REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga, CJ & P, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. 35 OF 2018

LENNY MAXWELL KIVUTI.....PETITIONER

–VERSUS–

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

EMBU COUNTY RETURNING OFFICER .....2ND RESPONDENT

MARTIN NYAGA WAMBORA.....3RD RESPONDENT

DAVID KARIUKI.....4TH RESPONDENT

(Being an appeal from the Judgment and Decree of the Court of Appeal of Kenya sitting at Nyeri (W. Ouko, D. K. Musinga and F. Sichale, JJA) delivered on 17th August, 2018 in Election Petition No. 6 of 2018)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] What is before the Court is a Petition of Appeal dated 7th September, 2018 filed on 12th September, 2018. The appeal is challenging the decision of the Court of Appeal, dated 17th August, 2018, which decision upheld the appeal by the 3rd

respondent herein, hence setting aside the High Court Judgment dated 22nd February, 2018 that had annulled the Gubernatorial elections for Embu County in the 8th August, 2017 elections.

B. LITIGATION BACKGROUND

(a) At the High Court

[2] Following the declaration of the 3rdrespondent as the Governor elect for Embu County having garnered 97,760 votes against the petitioner's 96, 775 votes, the petitioner instituted Embu HC Election Petition No. 1 of 2017, ***Lenny Maxwell Kivuti v. the Independent Electoral & Boundaries Commission & 3 Others*** disputing the said declaration.

[3] The petitioner's case before the High Court was that although the process of casting of ballots in respect of that election was smooth and peaceful, the counting and tallying process was characterized by grave irregularities; that the results were inflated and swapped in favour of the appellant; that Forms 37A were tampered with, at the tallying stations to reflect fictitious figures; that some Forms 37A were not signed by agents; that his agents were barred from participating in the counting and tallying of ballots at the polling stations; and that the counting of the votes was undertaken in a manner that contravened Article 81 of the Constitution, Section 38A of the Elections Act and Regulation 69(2) of the Election (General) Regulations 2012.

[4] The petitioner's prayers were for a re-tally of the votes cast in Gategi Primary School and New Site polling stations within Mbeere South Constituency, scrutiny and recount of all the votes cast in all polling stations in Manyatta and Runyenjes Constituencies, nullification of the results declared, a declaration that he was the

validly elected Governor of Embu County, costs and any other relief that the Court could be pleased to grant.

[5] In response to the petition, the 1st to 4th respondents denied all the allegations by the petitioner and asserted instead, that the gubernatorial election was conducted in accordance with the Constitution and the law; that it was free, fair and transparent; and that the 3rd respondent and the 4th respondent were validly declared the Governor and Deputy Governor, respectively.

[6] At the close of the oral hearing, the petitioner successfully moved the Court on 28th December, 2017 for Orders of partial scrutiny and recount of ballots in several specified polling stations in Mbeere South, Manyatta and Runyenjes Constituencies. He subsequently successfully applied for review of the said Order, vide a Motion dated 19th January, 2018 to include more polling stations in Manyatta Constituency for a recount of votes. In the result, the Deputy Registrar was further directed to carry out a partial scrutiny of Forms 37A for all polling stations in Mbeere South, Mbeere North, Manyatta and Runyenjes Constituencies. The scrutiny and recount was concluded and a report by the Deputy Registrar, Embu High Court, dated 7th February 2018 duly filed in Court.

[7] The High Court concluded that from the material generated by the scrutiny report, there were irregularities and incidences of non-compliance with the law on elections. The Court therefore set the question for determination as whether those irregularities or non-compliance with the law were of such a degree as to invalidate the election.

[8] In a Judgment dated 22nd February, 2018, *Musyoka J* nullified the election of the 3rd respondent. The learned Judge first addressed the issue of unpleaded matters and found that election disputes are *sui generis* and subject to their own unique procedures and as such an Election Court could look at unpleaded materials that emerge from scrutiny or recount and make a determination on the same.

[9] To answer the question, whether the election before him was conducted substantially in accordance with the Constitution and the relevant electoral law, the Judge came to the conclusion that the irregularities, errors and non-compliance with the law during the collating, counting and tallying of votes fundamentally undermined the electoral process and as such, the result was not accountable, verifiable or accurate.

(b) At the Court of Appeal

[10] Dissatisfied with the Election Court's decision, the 3rd respondent (the appellant before the Court of Appeal) instituted Nyeri Election Appeal No. 6 of 2018, ***Martin Nyaga Wambora v. The Independent Electoral and Boundaries Commission & 2 Others***, challenging the Election Court's decision on 23 grounds summarized as follows; That the learned Judge erred in holding that *Muchemi J* had jurisdiction to issue substantive Orders of 28th August, 2018 for preservation of electoral materials and of 31st August, 2018 for provision of security and representation of the 3rd and 4th respondents in the exercise despite not being a gazetted as an a Judge for purposes of that election petition; in issuing Orders for scrutiny without any legal basis; in determining the petition on the basis of unpleaded matters arising from scrutiny and recount and allowing the petitioner to expand the scope of his petition through oral submissions; in failing to refer to the Deputy Registrar's Report but instead using the 'handwritten copies of forms allegedly used by the Deputy Registrar during the scrutiny exercise; in misapplying Regulation 81 of the Elections (General) Regulations 2012 in the context of scrutiny and recount; in disregarding empirical evidence before it; in departing from its Orders of 18th January, 2018; in maintaining the petition despite the unlawful interference of the election materials in the execution of the Orders by *Muchemi J* in the absence of the 3rdrespondent or his agents; in annulling the elections on grounds of

irregularities and non-compliance with the law; and for breaching Articles 180 (4), 38, 81, and 86 of the Constitution.

[11] The 1st and 2nd respondent filed a cross appeal on 27th March, 2018 on grounds similar to those in the 3rd respondent's appeal. They urged the Appellate Court to set aside the Judgment and Decree of the High Court dated 22nd February, 2018, and instead dismiss the petition with costs.

[12] The 4th respondent on the other hand agreed with the 1st, 2nd and 3rdrespondents.

[13] The petitioner herein (the 1st respondent before the Appellate Court) denied interfering with the electoral material and urged that the Orders issued by *Muchemi, J* were carried out under the supervision and with the participation of IEBC; that he had laid sufficient basis for scrutiny and recount and that the Learned Judge properly exercised his discretion in granting the same; that all the irregularities and illegalities which were unearthed during the scrutiny exercise and detailed in the Deputy Registrar's report were exhaustively pleaded in the petition; that the irregularities and non-compliance fundamentally affected the results. He urged the Appellate Court to accept the school that postulates the argument that an election Court cannot turn a blind eye on serious electoral malpractices or irregularities exposed by scrutiny or recount.

[14] In its Judgment dated 17th August, 2018, the Appellate Court allowed the appeal and set aside the Judgment by the election Court. The justification for setting aside the said Judgment was premised on four principles elucidated by the Court as; first, by the provisions of Section 85A of the Elections Act, the Appellate Court has jurisdiction to hear appeals from an election Court on "matters of law" only; second, the nullification test laid down by Section 83 of the Elections Act, makes a rebuttable presumption that the results declared by the electoral body are correct unless the contrary is shown and further that Section 83 is the legal threshold, the fulcrum upon which the decision to nullify an

election rests. That this threshold must be measured against the general electoral principles laid down in Articles 81 and 86 of the Constitution; third, a party alleging that there was non-compliance with the Constitution and the law or that that the non-compliance affected the result of the election bears the burden to prove the claim in terms of Sections 107, 108 and 109of the Evidence Act; and finally, a party is bound by its pleadings and cannot be allowed to raise a different or fresh case without due amendment.

[15] The Appellate Court concluded that the trial Judge, had judicially exercised his discretionary powers in the two rulings of 18th and 24th January, 2018 on scrutiny and recount. That from the exercise of re-tally, scrutiny and recount contained in the Deputy Registrar's Report, it was clear that the 3rdrespondent had more votes than the petitioner. In addition, the Court found that both the petitioner and the learned trial Judge were satisfied with the report by the Deputy Registrar, save for the argument by the petitioner, that totals in the Deputy Registrar's report were inaccurate, which allegation, even if correct could not have altered the results in the petitioner's favour.

[16] The Appellate Court held that the learned trial Judge had erred in law by determining matters not pleaded or argued before him. The Appellate Court faulted the learned Judge's rummage reliance on handwritten notes, in disregard of the report by the Deputy Registrar filed as per its Ruling of 13th February, 2018. Further, the Court held that the petitioner had not discharged the legal burden of proof to the required standard. The Court found that the grounds, upon which the Learned Judge had based the invalidation of the 3rd respondent's election, did not meet the established legal standards to warrant such drastic action.

(c) At the Supreme Court

(i) Appeal

[17] Aggrieved by the Appellate Court's decision, the petitioner filed this appeal seeking the following reliefs: -

(a) That the appeal herein be allowed as prayed.

(b) That the entire Judgment/Orders of the Court of Appeal sitting at Nyeri Election Petition Appeal No.6 of 2018, be set aside, and the Judgment and Decree of the Election Court at Embu, Election Petition No.1 of 2017 delivered on 22nd February, 2018 be reaffirmed;

(c) That the costs of this appeal, and before the Superior Courts be provided for; and

(d) Any other or further relief that this Court may deem fit to grant.

[18] The appeal is premised on 12 grounds summarized thus: that the Court of Appeal violated the petitioner's rights to fair hearing under Article 163 (7), 50(1) and 25(c) of the Constitution by misapplying the decision of this Court in ***Gatirau Peter Munya v. Dickson Kithinji & 2 Others*** [2014] eKLR, by misinterpreting its jurisdiction under Section 85A of the Elections Act, by misinterpreting and misapplying the provisions of Section 82 of the Elections Act and by holding that the petitioner had not discharged the burden of proof; that the Court of Appeal rendered a contradictory interpretation and application of Articles 81 and 86 of the Constitution; misinterpreted the provisions of Section 83 of the Elections Act; violated the petitioner's rights under Articles 38, 81, 86 and 87 by failing to consider material evidence relied on by the election Court; misinterpreted and misapplied the provisions of Articles 38, 81, 86, 87 and 180 of the Constitution by failing to consider the Registrar's Report; exceeded the scope of its jurisdiction in election petition pursuant to Article 87(1) of the Constitution

and *Section 85A* of the Elections Act; and violated the rights of the petitioner under Articles 27, 47 and 50of the Constitution by setting aside the election Court decision.

[19] The petitioner has itemized 24 issues for determination summarized as follows: -

(i) Whether the Court of Appeal violated the petitioner's rights to fair hearing under Article 167(3), 50 and 25 (c) of the Constitution;

(ii) Whether the Court of Appeal rendered a contradictory interpretation and application of Article 81 and 86 of the Constitution;

(iii) Whether the Court of Appeal misinterpreted and misapplied the provisions of Section 82 of the Elections Act;

(iv) Whether the Court of Appeal misinterpreted and misapplied the provisions of Section 83 of the Elections Act;

(v) Whether the Court of Appeal exceeded the scope of its jurisdiction pursuant to Section 85A of the Elections Act;

(vi) Whether the Court of Appeal misinterpreted and misapplied the provisions of Articles 38, 81, 86, 87 and 180 of the Constitution; and

(vii) Whether the Court of Appeal violated the petitioner's rights under Articles 38,27, 47, 81, 87

[20] In response to the petition, the 3rd respondent moved the Court vide a Notice of Motion dated 17th September, 2018 for Orders to strike out the appeal for lack of jurisdiction under Article 163 (4) (a) of the Constitution, Sections 15 (1) (2) and Section 17 of the Supreme Court Act. The main basis for the application was that this appeal does not involve the interpretation or application of the Constitution. The 1st and 2nd respondents have also filed their Grounds of

Objection dated 26th September, 2018 objecting to the Grounds of Appeal and challenging the jurisdiction of this Court on grounds similar to the 3rd respondent's Motion.

(ii) The Parties' Cases

[21] The petitioner filed his submissions dated 9th October, 2018 in opposition to the motion, and submissions dated 1st October, 2018 and further submissions dated 9th November in support of the appeal, the 1st and 2nd respondents filed their joint submissions dated 5th October, 2018, the 3rd respondent filed his submissions in support of the motion dated 1st October, 2018 and submissions on the appeal dated 12th October, 2018 and the 4th respondent filed his submissions dated 15th October, 2018 agreeing in *toto* and adopting the submissions by the 3rd respondent.

(iii) Application to Strike out for Lack of Jurisdiction

[22] The petitioner contends that the appeal is properly anchored on Article 163(4)(a) of the Constitution and involves the interpretation and application of the Constitution in particular Articles 81(a)(d)(e), 86 and 38 of the Constitution. He argues that the appeal before this Court involves the determination of whether the election for governor Embu County was conducted substantially in accordance with the principles laid down in the Constitution. He cites the case of ***Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others,*** SC Pet. No. 10 of 2013 in support thereof**.** He maintains that in interpreting the provisions of the Elections Act, the Election Court and the Court of Appeal could not disengage from the Constitution, as the electoral law is founded on Article 81 and 86 of the Constitution. He also cites the case of ***Gatirau Peter Munya v.***

Dickson Mwenda Kithinji & 2 Others, Application No. 5 of 2014 in support of this argument on jurisdiction.

[23] The 1st and 2nd respondents, contend that the appeal does not meet the threshold established under Article 163(4)(a) of the Constitution as it does not involve the interpretation of any Article of the Constitution. It is also submitted that the appeal before the Court of Appeal was purely founded on the provisions of the Elections Act and Elections Rules and that the petitioner has failed to cite a single excerpt from the decision of the Appellate Court, on the interpretation or application of the Constitution. Counsel for the respondents thus invites the Court to down its tools for lack of jurisdiction. He relies *inter alia* on this Court's decision in ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Limited & 3 Others*** [2017] eKLR ***(Lawrence Nduttu Case)*** to support this submission**.**

[24] The 3rd respondent agrees with the 1st and 2nd respondents and argues that the grounds before the Appellate Court were premised on the Election Act and the Regulations thereunder but not the Constitution. It is further submitted that the appeal before the Courts below and this Court does not raise any constitutional issues. He cited various decisions of this Court to support this contention. Furthermore, he insists that the Judgment of the Appellate Court only interrogated the errors committed by the election Court but did not apply or interpret any provisions of the Constitution.

[25] He argues that not every Judgment by the Court of Appeal is appealable to this Court. He cites the decision of ***Samuel Kamau Macharia & Another v. KCB & 2 Others,*** SC. Civil. Appl. No. 2 of 2011 and ***Lawrence Nduttu Case*** in that regard.

(iv) Jurisdiction of the Court of Appeal

[26] The petitioner submits that the Appellate Court lacks jurisdiction to delve into matters of facts more so in election petition under Section 85A of the Elections Act. That the Court fundamentally erred in law in adjudicating on the veracity and the admissibility of the '*Handwritten Forms*' for in so doing it invited itself to review the evidence presented before it . He relied on various decisions of both the Court of Appeal and this Court including ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** Petition No. 2B of 2014 [2014] eKLR ***(Munya 2 Case)*** to support this argument.

[27] The 1st and 2nd respondents disagree with the submission by the petitioner and instead contend that as per the Appellate Court Judgment, there are no conclusions made in respect of matters of fact. It was further submitted that even if the Appellate Court was to delve into the report by the Deputy Registrar, this would not amount to acting in excess of its jurisdiction as the same was part of its record. Counsel argued that the law does not act in a vacuum and that a Judge can only calibrate the truth of a statement upon inquiry into the records provided. Reliance was placed on the decision in ***Munya 2 Case*** (Petition No. 2B of 2014) to explain this principle.

[28] The 3rd respondent whose submissions the 4th respondent has adopted in *toto* submits that the Appellate Court in its Judgment only explored the Deputy Registrar's report which formed part of the proceedings. That the Court of Appeal therefore did not err in determining the correct Report that ought to have been relied on by the election Court in view of the conflicting handwritten notes.

(v) Right to Fair Hearing

[29] The petitioner in his submission alleges that there was a violation by the Appellate Court of his right to fair hearing pursuant to Articles 50, 25(c) and 163(7) of the Constitution. It is submitted that this right was violated by virtue of the Court of Appeal's failure to consider material facts relied on by the election Court. He relied on the persuasive decision of ***Ruiz Torija v. Spain*** Application No 18390/91 to apply the principle expounded by the European Court of Human Rights that where a Court fails to consider the submissions or evidence adduced by a party, that failure amounts to violation of the right to fair hearing.

[30] The 1st and 2nd respondents submit that the Court of Appeal was right in upholding the scope of pleadings that had been exceeded by the petitioner and the election Court. That the handwritten notes referred to by the petitioner were introduced through his submissions and could not legally form the basis of annulling an entire election.

[31] The 3rd respondent submits that each and every party was granted an equal opportunity to present their respective cases and the petitioner is wrong in his assertion that his right to fair hearing was infringed under the Constitution. He relies on the Court of Appeal decision in ***Judicial Service Commission v. Gladys Boss Shollei*** [2014] eKLR. It is further argued that the petitioner has failed to state with precision the basis upon which his alleged right to fair hearing was violated.

(vi) Increase of the Scope of Pleadings

[32] The petitioner submits that the Appellate Court erred in finding that the trial Court was wrong in nullifying the elections on unpleaded matters. That all the matters relating to irregularities and illegalities were exhaustively pleaded in the petition in paragraphs 95, 96, 98, 100-104, 108, 109, 110, 111, 114-127. That scrutiny was conducted only to give the trial Court a clear picture as to whether the election was conducted in accordance with the Constitution. It is submitted

that the Appellate Court should not have turned a blind eye to issues that arose after scrutiny and recount exercise merely because the issues were not pleaded. The case of ***Peter Maranga & Another v. Joel Omagwa Onyancha*** Kisii Pet No 7 of 2013,was cited in support of this argument.

[33] To the contrary, the 1st and 2nd respondents submit that it is trite law that a party is bound by its pleadings and that the Appellate Court was right in disregarding unpleaded issues in its Judgment. The 3rd respondent agrees with the other two respondents and submits that the election Court had no jurisdiction to consider issues that had not been pleaded. He relies on the decision in ***Jones v. National Coal Board*** [1972] 2 QB 55 and this Court's decision in ***Zachariah Okoth Obado v. Edward Akong'o Oyugi & 2 Others*** [2014] eKLR.

[34] It is further submitted that the petitioner cannot therefore depart from the parameters laid down in his case, as to do so, would deny the respondents an opportunity to reply.

(vii) Scrutiny and Recount

[35] The petitioner submits that a scrutiny report is binding on a trial Court as held in ***Moses Masika Wetangula v. Musikari Kombo & 2 Others*** Civil Appeal No. 43 of 2013 and ***James Omingo Magara v. Manson Onyongo Nyamweya & 2 Others*** Civil Appeal No. 8 of 2010 [2010] eKLR. He submits further that from the scrutiny report, it was apparent that the election could not be ascertained, and as such, the same could not have been free and fair.

[36] The 1st and 2nd respondent submit that contrary to the petitioner's assertions, the Court of Appeal duly considered the Scrutiny Report by the Deputy Registrar at page 33 of its Judgment. It was submitted that the respondents only took issue with the trial Court's decision to rely on the

handwritten report in disregard of the Deputy Registrar's Report duly filed in Court. The respondents appreciate the place of scrutiny in election disputes but fault the trial Court's reliance on material that was not part of the official Report.

(viii) Applicability of Section 83 of the Elections Act

[37] The petitioner submits that this Court expounded on the meaning of *Section 83* of the Elections Act in Presidential Petition No. 1 of 2017 ***Raila Amollo Odinga v. IEBC (Raila 2017)*** at paragraph 208 to mean that the election must be conducted substantially in accordance with the principles of the Constitution and the Elections Act. He submitted further that having pointed out the irregularities and illegalities that emerged from the scrutiny report, there were clear breaches of Articles 81 and 86 of the Constitution which require the elections to be accurate, verifiable, accountable, and transparent, it was impossible to ascertain the election result for the gubernatorial elections for Embu. He urged the Court to apply a purposive approach to the interpretation of Section 83 of the Elections Act as per the decision in ***Raila 2017*** to declare that the gubernatorial Election in Embu County was not conducted in compliance with the Constitutional principles under Articles 81, 86 and the Electoral Laws.

[38] The 1st and 2nd respondents submit that the election was conducted substantially in compliance with the Constitution and electoral laws. To support this contention, it was submitted that the petitioner before the election Court admitted that the voting exercise was conducted without a hitch and further that the Deputy Registrar's finding after the Scrutiny exercise conducted in the presence of all the representatives, confirmed the win by the 3rd respondent.

[39] The 3rd respondent submits that the threshold for nullifying an election set under Section 83 of the Election Act requires the non-compliance to substantially affect the result of the election. He submitted further, that to determine the effect

in an election, the quantitative test is the most relevant where numbers and figures are in question while the qualitative test becomes relevant where the quality of the entire election is in question. Reliance was placed on the decision in ***Munya 2.*** According to Counsel, the election was conducted in accordance with the Constitution and the law more so as the quantitative test of the election was applied and confirmed.

[40] It is submitted that the Appellate Court Judgment was therefore legally sound, having concluded that the election was substantially conducted in accordance with the Constitution and the Electoral law. The Court was satisfied that the irregularities and other acts of non-compliance were not of such a nature as to have affected the results in tandem with the holding of this Court in. ***Munya 2*** and Lord Denning's pronouncement in ***Morgan v. Simpson*** [1974] 3 ALL ER 722.

C. ANALYSIS

[41] Having carefully considered the pleadings of the parties, the attendant interlocutory motions, the list of authorities provided by counsel for the parties, and the robust oral and written submissions of counsel, we have come to the conclusion, that there are only two issues, whose determination would be dispositive of this appeal. Towards this end, the issues for determination are:

(i) Whether this Court has jurisdiction to determine the Petition of Appeal;

(ii) Whether the Court of Appeal acted in excess of jurisdiction in determining the appeal before it.

(i) On Jurisdiction

[42] The gist of the respondents' Preliminary Objection, is that this Court lacks the jurisdiction to entertain the Petition of Appeal, as the same does not meet the threshold of an appeal envisaged in Article 163 (4) (a) of the Constitution. Counsel for the 3rd respondent, Mr Ahmednassir, was categorical that the Memorandum of Appeal at the Appellate Court, the issues for determination as formulated by that Court, and the ensuing Judgment there-from, did not involve any interpretation or application of the Constitution so as to justify a further appeal to this Court. The elaborate written and oral submissions by Counsel, including those in support, are set out in detail in the foregoing paragraphs.

[43] On the other hand, in opposition to the Preliminary Objection, the petitioner maintains that this Court has the requisite jurisdiction to determine his Appeal as the same falls squarely within the ambit of Article 163 (4) (a) of the Constitution. Both counsel for the petitioner, Mr. Ngatia and Professor Ojienda argue that the Appeal involves the interpretation and application of Articles 25 (c), 38, 47, 50, 81, 86, 87, 88, and 180 of the Constitution. It is their argument that the election of Governor of Embu County was so badly conducted that it failed to meet the constitutional and legal requirements of a free and fair election and that the irregularities affected the results. Professor Ojienda maintains that the Memorandum of Appeal at the Appellate Court was anchored on constitutional grounds to wit, grounds 19 and 20. Again, the elaborate written and oral submissions by counsel are set out in the foregoing paragraphs.

[44] The operative provision of the Constitution is Article 163(4) (a) of the Constitution, which provides, that an appeal lies from the Court of Appeal to the Supreme Court "*as of right in any case involving the interpretation or application of the Constitution*". This Court has already determined the import, scope, and limits of its appellate jurisdiction under Article 163 (4) (a) of the

Constitution in ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and 2 Others,*** [2012] eKLR; ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another*** [2012] eKLR; ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*** [2012] eKLR; ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** [2014] eKLR; ***Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndung'u Waititu & 4 Others*** [2014] eKLR; ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*** [2013] eKLR among others.

[45] The jurisprudence of the Supreme Court's appellate jurisdiction is (or ought to be) well settled given the Court's repeated authoritative pronouncements in this regard. However, the question as to whether an appeal lies to the Court under Article 163 (4) (a) of the Constitution still claims prominence at the Court's docket of Preliminaries. Nowhere is this more pronounced than in appeals from decisions of the Court of Appeal in election petitions. From the authorities cited above, there ought to be no longer any lingering doubt about certain jurisdictional truisms such as:

1. That not all appeals lie from the Court of Appeal to the Supreme Court.

2. That for an appeal to lie to the Supreme Court from the Court of Appeal, it must be preferred under either Article 163 (4) (a) or 163 (4) (b) of the Constitution.
3. That there is no automatic right of appeal from the Court of Appeal to the Supreme Court; and therefore an intending appellant must still satisfy the Court that an appeal indeed meets the threshold of either of the two limbs as already illuminated in the decisions of the Court.

4. That for an appeal to lie to the Supreme Court under Article 163 (4) (a), the said appeal must, have originated from the Court of Appeal, where the

issues of contestation revolved around the interpretation and application of the Constitution. Consequently, the appellant must be challenging the interpretation or application of the Constitution that the Appellate Court used to dispose of the matter at that forum.

5. That general references to provisions of the Constitution by a superior court in the course of its judgment do not, without more, bring the resultant appeal therefrom, within the ambit of Article 163 (4) (a), unless it can be demonstrated that, the said court, in arriving at the conclusions it did, had taken a trajectory of constitutional interpretation or application.

6. That at issue in an appeal under Article 163 (4) (a), must be, a cogent question of constitutional controversy, resulting from the manner in which the Court of Appeal interpreted, or applied the Constitution.

7. That a Memorandum of Appeal, wherein constitutional issues, that were not at play at the Appellate Court, are being raised for the first time, does not suffice to clothe the Supreme Court with jurisdiction under Article 163 (4) (a).

[46] These principles are self-evident from the precedents cited, and should suffice, as a guide, to litigants who seek to invoke the Supreme Court's appellate jurisdiction. It should also be quite clear, that the principles, are applicable in equal measure, to electoral disputes that may have escalated to the Court of Appeal, as was stated by this Court in ***Evans Odhiambo Kidero v. Ferdinand Waititu.*** It would however appear from the submissions of Counsel for the Petitioner herein, that this Court may have established, some kind of exception, regarding election petitions, in so far as the scope of Article 163 (4) (a) is concerned.

[47] In ***Fredrick Otieno Outa v. Jared Odoyo Okello & 4 Others*** SC Petition No. 10 of 2014; [2014] eKLR, this Court observed:

> *"In adopting this view, we would observe that the Elections Act, 2011 enacts in substantive form the constitutional principle of securing for the Kenyan people a representative democracy, in which the mandate of leadership is attained through popular elective politics, based on the ideals of free and fair election. The realization of this goal is partly attainable through universal franchise, expressed in a voting exercise guided by appropriate legislation, that is derived from the premises and values embodied in Articles 38, 81 and 86 of the Constitution.* ***Thus it is for certain that electoral contestations will involve constitutional interpretation or application".***

[48] In ***Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndung'u Waititu & 4 Others;*** this Court held: [Para. 144]

> "*It follows that Article 163 (4) (a) of the Constitution confers upon the Supreme Court a role of constitutional interpretation and application, which cannot be performed through a bare apportionment of judicial tasks,...Where disputes arise with regard to the interpretation and application of such principles and norms in election petitions, this Court, being Kenya's apex Court, cannot gaze helplessly when moved by a litigant."*

[49] In ***Gatirau Peter Munya v. Dickson Kithinji & 2 Others;*** Civil Application No.5 of 2014 commonly referred to as ***(Munya 1),*** this Court made the following observation in response to an argument by Counsel for the 1st respondent therein:

> *"We hasten to add that the* ***Elections Act, and the Regulations thereunder, are normative derivatives of the principles***

embodied in Article 81 and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution." *[Emphasis added].*

[50] These pronouncements by the Supreme Court are not only jurisprudentially sound, but conceptually logical, as they aptly capture the architecture of the 2010 Constitution. However, the ***Munya, Outa*** and ***Kidero decisions*** should not be taken to mean, that somehow, they give a *Carte Blanche* for admitting appeals, from the Court of Appeal to the Supreme Court in election petitions. Indeed in its Ruling in ***Munya 1*** this Court, in agreement with counsel for the 1st respondent therein, reaffirmed its holding in earlier decisions regarding its jurisdiction and firmly stated that "*not every election petition decision is appealable to the Supreme Court under Article 163 (4) (a) of the Constitution."* The Court was alive to the fact that, what it had to decide, was whether the appeal before it, had arisen from a decision of the Appellate Court, in which issues of interpretation and application of the Constitution were at play. The Court had to determine, whether the applicant was faulting the interpretation or application of the Constitution in reaching the decision to set aside the Judgment of the High Court.

[51] The ***Munya Case*** was the first one, in which both the High Court and Court of Appeal had to grapple with the meaning, scope, and applicability of Articles 81 and 86 of the Constitution as they tested the integrity of that particular election. What meaning for example had to be assigned to the Constitutional edict in Article 81 that an election had to be "accurate?" The Supreme Court bench concluded, that the issue of the applicability of Articles 81 and 86 of the Constitution, in so far as determining the accuracy and verifiability of that particular election was alive, throughout the proceedings in the two Superior Courts. As the parties had taken opposite views on how the two courts

had navigated this fundamental question, the Supreme Court decided, that it had to weigh in under Article 163 (4) (a) of the Constitution.

[52] It was long after this conclusion that the Court responded to Mr. Muthomi, counsel for the first respondent in the ***Munya Case***. Counsel had argued that what was being impugned by the applicant in that case, was the Appellate Court's interpretation of Section 87 of the Election Act, and this, had nothing to do with the interpretation or application of the Constitution. (See para. 75). At paragraph 77 of that Ruling, the learned Judges of the Supreme Court (*Ojwang & Wanjala*), rendered themselves thus:

> *"While we agree with Mr. Muthomi, regarding his contention that Section 87 of the Elections Act cannot be equated to a constitutional provision, we must hasten to add that* ***the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution."***

[53] It is this pronouncement that is increasingly being taken out of context, to justify the perception that all appeals from decisions of the Court of Appeal in election petitions lie to the Supreme Court!

[54] This then brings us to the submissions by counsel for the parties on the issue of jurisdiction. It is Mr. Ahmednassir's argument that the Petition of Appeal does not meet the threshold for admission in Article 163 (4) (a) of the Constitution. Counsel submits that there was not a single issue revolving around the interpretation and application of the Constitution at the Appellate Court. According to counsel, constitutional issues are being raised for the first time in the Memorandum of Appeal to this Court. Even the body of the Judgment of the Court of Appeal does not reveal that there was any cogent question of constitutional controversy that the Court addressed and which can support a

further appeal to this Court. Neither can it be said, that in arriving at its decision, the Court of Appeal took a trajectory of constitutional interpretation or application. This view is supported by Mr. Kibicho, Counsel for the 1st and 2nd respondents.

[55] Professor Ojienda on the other hand takes the view that the Petition of Appeal is properly before this Court as it is grounded on grievances as to how the Court of Appeal interpreted and applied the provisions of the Constitution. Specifically, Counsel submits that the Learned Judges of Appeal erred in law and fact, as they interpreted and applied Articles 81 (a), (d), (e), 86 and 38 of the Constitution, when they held that the massive irregularities that were observed during the scrutiny and recount exercise amounted to mere administrative errors and were not sufficient to vitiate an election. Counsel further argues that the Memorandum of Appeal filed by the 3rd respondent herein at the Court of Appeal itself raised constitutional grievances to the extent that it faulted the trial Court for diminishing the spirit of Article 38 of the Constitution. Professor Ojienda submits that what the petitioner is seeking, is for the Supreme Court to interpret the provisions of Articles 25 (c), 50 (1), 81 (e), 86, 87(1), 94 (1) and 163 (7) of the Constitution of Kenya. In support of this pursuit, Counsel cites the case of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji*** which in his view held that: "*The Elections Act, and the Regulations thereunder, are normative derivatives of the Principles embodied in Articles 81 and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution.*"

[56] Applying the principles that have been established by this Court to determine whether or not an appeal lies to this Court, we find that on the whole, the Petition of Appeal before us, does not meet the threshold to be admitted under Article 163(4) (a) of the Constitution, save in one instance to which we shall turn later. Our examination of the proceedings at the trial Court and Court

of Appeal has not established that the determination of the petition turned on the interpretation and application of the Constitution. In this regard, we agree with Mr. Ahmednassir, Counsel for the 3rd respondent, to the effect that what the petitioner is doing is to introduce constitutional questions in his Memorandum of Appeal, that none of the two Superior Courts dealt with in arriving at their decisions. We are being invited to interpret provisions of the Constitution in a vacuum, a task for which this Court could hardly have been established. There must be a real controversy relating to how the Appellate Court interpreted and applied the Constitution to trigger the Supreme Court's jurisdiction under Article 163 (4) (a).

[57] Professor Ojienda particularly zeroed in on the Court of Appeal's Judgment at page 22, to make the case that indeed, the Appellate Court had generated a controversy worthy of this Court's attention by the way the former had interpreted and/or applied the Constitution. The Court of Appeal stated:

> "*Section 83 is the legal threshold; the fulcrum upon which the decision to nullify an election rests. That threshold must be measured against the general electoral principles laid down in Articles 81 and 86 of the Constitution, that, inter alia, elections must be free and fair, conducted by secret ballot; free from violence, intimidation, improper influence or corruption, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner; that whatever voting method is used, the system must be simple, accurate, verifiable, secure, accountable and transparent; that the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; that the from polling stations are openly and accurately collated and promptly announced by the returning officer; and that there be in place appropriate structures and mechanisms to eliminate electoral malpractice, including the safekeeping of election materials.*"

[58] We are at pains to understand how the statement by the Court of Appeal as quoted above, can be the basis for invoking the jurisdiction of this Court under Article 163 (4) (a) of the Constitution. What interpretative exercise, can the Appellate Court be said to have been engaged in by stating what it did? Wasn't the Court simply reciting what can be called the "Constitutional Creed for Free and Fair Elections"? Wasn't the Court simply reproducing verbatim the provisions of Articles 81 and 86 of the Constitution?; Wasn't the Court doing what this Court said a Court of law must do in ***Munya 1?***

[59] We hereby re-emphasize that the oft-quoted pronouncement by this Court in ***Munya 1*** was neither a "holding" nor was it meant to be a *Carte Blanche* for invoking this Court's jurisdiction under Article 163 (4) (a) of the Constitution in electoral disputes.

[60] Be that as it may, we note that the most strenuously contested issue in this petition right from the High Court through the Court of Appeal and now the Supreme Court was how the trial Judge "applied the test of verifiability" by his deployment of the Recount/Scrutiny Report. In our view, this particular controversy goes to the essence of how a Court of law should apply the verifiability test under Article 86 of the Constitution. This is an issue of application of the Constitution, and it is in this respect alone, that we hereby assume jurisdiction so that we may address with finality some of the questions that have arisen regarding the Recount and Scrutiny Report. These questions are as follows?

1. Under what circumstances may an election Court make an Order for a recount and/ or scrutiny?
2. When may an Election Court issue an Order for a recount or scrutiny *suo motu?*

3. Can an election Court draw conclusions and make adverse findings arising from the results of a scrutiny even if those findings are not based on the petitioner's pleadings?
4. What weight ought an election Court place on the submissions of the parties on the contents of a recount/scrutiny report?
5. What is the scope of a recount/scrutiny report?

(ii) When to Make an Order for Scrutiny or Recount

[61] This issue has been addressed variously in the Superior Courts. In ***Gatirau Peter Munya v. Dickson Mwenda Kithinji*** [2014] eKLR, this Court extensively reviewed the law (both statutory and case law) relating to scrutiny and recount. The Court proceeded to lay down a number of guiding principles at paragraph 153 of its Judgment. We reiterate that these principles remain valid and should ideally inform the Superior Courts when faced with the question. Let us restate that an order for scrutiny or re-count may be made following a request by any of the parties, at any stage, after the filing of a petition, before the determination of the petition. However, the party applying for an Order of scrutiny, must establish a basis for such a request by way of pleadings, affidavits, or evidence adduced during the trial. The trial Court, in issuing an Order for scrutiny or recount should ideally confine itself to the specifics of the application.

(iii) Issuing an Order Suo Motu

[62] A trial Court may issue an Order for scrutiny or recount *suo motu,* if it considers that such an Order, may aid it in arriving at a just and fair determination of the petition. However, this discretion must be exercised sparingly, and should be informed by the pleadings or evidence. The trial Court

should record the reasons for such an Order, always bearing in mind that, at the end of the day, the case belongs to the petitioner.

(iv) Findings not Based on Pleadings

[63] A scrutiny or recount exercise, is to be triggered by an application by any of the parties to the dispute. If made *suo motu*, it should still be informed by the pleadings and evidence adduced during the hearing. The scrutiny or recount exercise is not meant to be a fishing expedition to aid the petitioner. It is intended to aid the Court in verifying and establishing the validity of the vote. It follows that the trial Court ought to confine itself to the claims that necessitated the scrutiny or recount in the first place. Were the Court to have the liberty of making conclusions from the scrutiny report, that are not based on the pleadings, this would open a pandora's box whereby courts of law, would be turned into automatic sounding boards for election losers. It is worthy repeating the age-old maxim that parties are bound by their pleadings. The slightly different approach that this Court took in ***Abdirahman Ibrahim Mohamud v. Mohamed Ahmed Kolosh & 2 Others*** Petition No. 26 of 2018; can be explained by the fact that in that case, an application for scrutiny and recount had been made in relation to specific polling stations. During the scrutiny exercise, a number of serious irregularities (though not pleaded) were unearthed in those very same polling stations. Although the irregularities were not part of the pleadings, the election Court could not close its eyes to their effect on the election. An application for scrutiny had been made in respect of particular polling stations, and since the irregularities in question, were unearthed in those same polling stations, the petitioner could not be said to have been engaged in a fishing exercise.

(v) Submissions on the Scrutiny Report

[64] Parties are entitled to make submissions on the content of the scrutiny or recount report. The submissions are intended to solidify or controvert the claims on which the scrutiny or recount exercise was based. The submissions are not meant to introduce new evidence that goes beyond the scope of the petition. The trial Court should consider those submissions just as any others made during the hearing.

(vi) The Scope of a Scrutiny or Recount Report

[65] A scrutiny or recount report is that which is prepared by the Registrar, signed by all the parties, and formally tabled before Court. The report should confine itself to the claims on which the Order for scrutiny was based, or the specific directions given by the trial Court, when issuing the Order for scrutiny *suo motu***.** Any document that is not so prepared and signed ought not to be considered as part of the Scrutiny Report. The Scrutiny Report forms part of the proceedings of the Court.

(vii) The Hand Written Notes

[66] We now turn to the question as to whether the Court of Appeal rightly faulted the trial Judge for relying on what came to be known as the "hand-written notes of the Deputy Registrar". It is to be noted that the trial Judge nullified the election of the 3rd respondent herein almost solely, on the basis of the contents of the said hand-written notes. In our view, based on the law, purpose and process of scrutiny, we have no hesitation in agreeing with the Court of Appeal in faulting the Learned trial Judge's reliance on the Deputy Registrar's hand written notes. Clearly these notes were not part of what was formally tabled before the Court. The contents of the hand written notes clearly introduced matters that could not have been responded to by the respondents as they were not part of the

pleadings. It is also obvious that the hand written notes were not part of the Scrutiny and Recount Report properly so understood.

(viii) Whether the Court of Appeal Acted in Excess of its Jurisdiction

[67] It is the petitioner's case that the Court of Appeal acted in excess of its jurisdiction by delving into matters of fact contrary to provisions of Section 85A of the Elections Act. Counsel for the petitioner submits that it was a fundamental error of law for the Court of Appeal to adjudicate on the veracity and admissibility of the "hand-written notes" and evaluate their effect which clearly invited them to review the evidence presented before the trial court. This Court has already addressed the question as to the meaning of "matters of law" as opposed to matters of fact in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji.***

[68] It is our perception, that what was before the Court of Appeal, was not necessarily the veracity of the contents of the handwritten notes by the Deputy Registrar, but whether, the said notes could be considered as forming part of the Scrutiny Report. Such a question in our view, was clearly not one of fact but of law. Secondly, the Court of Appeal had to interrogate the contents of the handwritten notes to determine their admissibility. As parties are bound by their pleadings, it was quite in order for the Appellate Court to determine whether, the contents of the hand written notes, derived from the pleadings. Such an inquiry was not meant to question the Learned Judge's findings of fact, but to determine whether the evidence on which he relied was admissible or not. This question, was a matter of law and properly within the Appellate Court's jurisdiction. We therefore find that the Court of Appeal did not act in excess of its jurisdiction.

(ix) Verifiability under Article 86 of the Constitution

[69] The petitioner contends that the election result could not be ascertained, as the results declared, were different from those revealed by the Scrutiny and Recount Report. This variance in the totals, according to the petitioner, means that the election was not verifiable. He urges the Court to adopt a purposive interpretation of Section 83 of the Elections Act. It is important to recall that this Section states:

> "***No election shall be declared void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written law or that non-compliance did not affect the result of the election."***

[70] In ***Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission & 2 Others;*** Presidential Election Petition No. 1 of 2017 [2017] eKLR, this Court held that in interpreting this Section, a disjunctive test had to be applied with the effect that a party must demonstrate that the *election was either not conducted in compliance with the Constitution and the electoral law* ***or,*** *that the non-compliance affected the results of the election."* We see no reason to depart from this test in the matter before us. While we are not in a position to actually determine which of the total figures actually represents the final tally in the Embu Gubernatorial Election, (a matter of fact dealt with by the Election Court), we note that all the three different figures indicated a victory for the 3rd respondent. The issue would have been different, in terms of verifiability, had the post-declaration totals indicated a victory for the petitioner. As it is, the variance in the totals (all signaling the 3rd respondent as the winner), cannot suffice to vitiate the election. Can it be argued for example,

that given these different totals, which nonetheless hand victory to the same person, it is not possible to tell who won the election? We don't think so.

(x) Reliance on Hand-Written Notes

[71] Regarding the reliance on hand-written notes by the trial Judge to nullify the election, based solely on the contents of those notes, we agree with the Court of Appeal's finding that the Learned Judge had erred in that regard. The Scrutiny Report prepared and tabled in court by the Deputy Registrar plus the evidence tendered at the trial, ought to have provided the basis for any conclusions arrived at by the Judge. To base the nullification of an election on a document, that is alien to the parties, or at least some of the parties to the dispute, is to deny the latter, a fair hearing. The hand-written notes were not part of the typed Scrutiny Report that was tabled and submitted upon in Court before judgment. The notes were referred to by the trial Judge, after the parties had closed their submissions. The parties had clearly lost the opportunity to make an impression on the Court regarding this document upon which, the decision to nullify the election would depend.

[72] Taking all the conclusions and findings we have arrived at, we see no basis upon which to interfere with the Appellate Court's decision. It follows that this appeal must be dismissed.

D. COSTS

[73] It is a settled principle of law that costs follow the event. This Court adheres to this principle in a majority of cases. However, the Court may and does exercise discretion to apportion costs if circumstances of a particular case so require. In this particular case, on the basis of our decision, it is not in doubt that the 3rd Respondent herein, can no longer be condemned in costs at the High Court. Such

costs are to be borne by the Petitioner on the basis of the Capping as required by law. The situation changes at the appellate level, considering the fact that all the three key parties have contributed to the further development of electoral jurisprudence, and none ought to be faulted for this noble pursuit.

E. ORDERS

(i) The Petition of Appeal dated 7th September, 2018 is hereby dismissed.

(ii) The Judgment of the Court of Appeal dated 17th August, 2018 is hereby upheld.

(iii) For the avoidance of doubt, the declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of the Governor for Embu County is hereby upheld.

(iv) At the High Court, costs shall be borne as follows: the Petitioner herein shall bear his own costs and those of the 3rd Respondent herein. The 1st Respondent [IEBC] shall bear its own costs. At the Court of Appeal and the Supreme Court, Each Party shall bear its own costs.

DATED and **DELIVERED** at **NAIROBI** this **30th Day** of **January, 2019.**

.....	.....
D.K. MARAGA **CHIEF JUSTICE & PRESIDENT** **OF THE SUPREME COURT**	**M. K. IBRAHIM** **JUSTICE OF THE SUPREME**

.....	.....
J. B. OJWANG	**S. C. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
NJOKI NDUNGU	**I. LENAOLA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a
true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA