

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram: Mutunga, CJ & P; Rawal, DCJ & VP; Tunoi, Ibrahim, Ojwang,  
Wanjala, Njoki, SCJJ)*

**PETITION NO. 11 OF 2014**

**–BETWEEN–**

**MABLE MURULI.....APPELLANT**

**–AND–**

**HON. WYCLIFFE AMBETSA OPARANYA.....1<sup>ST</sup> RESPONDENT**

**PHILIP MUSEVE KUTIMA.....2<sup>ND</sup> RESPONDENT**

**NICHOLAS SUMBA.....3<sup>RD</sup> RESPONDENT**

**INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....4<sup>th</sup> RESPONDENT**

*(Being an appeal from the Judgment of the Court of Appeal sitting  
at Kisumu (Azangalala, Mohammed and Ole Kantai JJA) dated 14<sup>th</sup>  
March, 2014 in Civil Appeal No.41 of 2013)*

**RULING**

**A. INTRODUCTION**

**[1]** This is an application for review, by the appellant, of this Court’s decision in *Hassan Ali Joho and Another v. Suleiman Said Shahbal and Two Others*, Sup. Ct. Petition No. 10 of 2013. The review application emanates from

a preliminary objection filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The respondents object to the appellant's appeal, on the ground that the High Court petition which the appeal originates from, was filed outside the stipulated constitutional timelines, and that consequently, this Court lacks jurisdiction to entertain it. They support this contention with this Court's prior decisions, notably, the **Joho** case. The appellant, on the contrary, is of the view that the **Joho** decision was incorrect. So, the appellant asks for a full Bench of this Court to depart from, or overrule that decision.

## **B. BACKGROUND**

### **(a) Proceedings in the High Court**

[2] The appellant intended to vie for the position of Governor of Kakamega County. She presented her nomination papers to the returning officer for that County, but these were rejected. She appealed to the Independent Electoral and Boundaries Commission (IEBC) Tribunal, but her appeal was dismissed. She filed a petition, **Mable Muruli v. Independent Electoral & Boundaries Commission & Another**, Nairobi High Court Petition No. 93 of 2013, seeking: *a declaration that she was a degree- holder within the meaning of Section 22 (2) of the Election Act, 2012, entitled to vie for the position of County Governor; a mandatory injunction compelling the Commission to accept her nomination papers and issue her with a clearance certificate to contest for the seat in question; a mandatory injunction compelling the Commission to include her*

*name in the list of candidates and ballot papers, as an independent candidate for the gubernatorial seat.*

[3] In a Ruling delivered on 13<sup>th</sup> February, 2013, *Ogola J* ordered that the appellant, who was qualified for candidature, be included on the ballot paper. However, the 4<sup>th</sup> respondent failed to take action upon the Court's directive. The appellant instituted contempt proceedings; and the 4<sup>th</sup> respondent for its part, filed a Notice of Motion asking the Court to review its Ruling dated 13<sup>th</sup> February, 2013, on the ground that the Court had issued Orders without full facts. Before the two applications could be heard, both parties entered into a consent Judgment, on 20<sup>th</sup> February, 2013, to this effect: *the petition be marked as settled; right of the appellant under Section 75 of the Elections Act reserved; appellant be paid costs; application for leave to cite officers of the IEBC for contempt of Court, be marked as spent; application by the IEBC for review of the said Judgment, also be marked as spent.*

[4] The appellant, however, did not participate in the elections as a candidate. The elections were completed, and the results for the Kakamega gubernatorial seat declared on 6<sup>th</sup> March, 2013. The appellant, who was dissatisfied with the election outcome, lodged an Election Petition, ***Mable Muruli v. Hon. Wycliffe Ambetsa Oparanya & 3 Others***, Pet. No.5 of 2013 at the High Court in Kakamega, on 8th April, 2013.

[5] She sought a declaration that: *her fundamental rights and freedoms, as enshrined in the Constitution, were violated and compromised by the 3rd and 4th respondents; the election of 1<sup>st</sup> and 2<sup>nd</sup> respondents as a Governor and Deputy Governor be declared null and void, and fresh elections be ordered and held in Kakamega County; a determination be made to the effect that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not validly elected, due to failure on the part of the 3<sup>rd</sup> and 4<sup>th</sup> respondents to hold free, fair and credible nominations on 31<sup>st</sup> January, 2013; the 3rd and 4th respondents be condemned to pay costs of this petition, and other incidental costs.*

[6] *Chitembwe J*, on 13<sup>th</sup> September, 2013 dismissed the petition, and found that the appellant had not provided sufficient evidence to warrant the nullification of the election. He determined that the election was free and fair.

***(b) Proceedings in the Court of Appeal***

[7] Dissatisfied with the High Court's decision, the appellant sought redress in the Court of Appeal, which considered 11 separate grounds urged by the appellant:

- (i) that the trial Court failed to appreciate the legal import of the appellant's constitutional rights to participate as a candidate in the said election;
- (ii) that such failure by the trial Judge led to the disenfranchisement of the electorate;

- (iii) that the learned Judge failed to understand the legal import of the consent Order recorded in ***Mable Muruli v. Independent Electoral & Boundaries Commission & Another*** Nairobi High Court Petition No. 93 of 2013;
- (iv) that the learned Judge erred in holding that all issues pertaining to the nomination of the appellant as a candidate for the said seat, had been settled in Petition No. 93 of 2013;
- (v) that the learned Judge misapplied and misunderstood the concept of *res judicata* and *estoppel*;
- (vi) that the learned Judge erred in not holding that the electoral offence of bribery had been committed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and in applying a higher standard of proof than the law requires;
- (vii) that the learned Judge did not properly analyze the evidence and submissions presented by the appellant;
- (viii) that the learned Judge had been biased in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and did not accord the appellant equality before the law;
- (ix) that dismissal of the appellant's petition was contrary to law ;
- (x) that the learned Judge had contradicted himself in analysis of the evidence on record;
- (xi) that such contradictions led to the Judge misdirecting himself in law, in finding that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had been validly elected to office.

[8] The Appellate Court, in its decision of 14<sup>th</sup> March, 2014, observed that the appellant had voluntarily settled the petition, with Judgement being pronounced in her favour in the High Court. Thus, in the perception of that Court, this was a typical case of the appellant craving for a second bite at the cherry. The Appellate Court determined that the doctrines of *estoppel* and *res judicata* should apply in this case; the appellant should not claim that there had been a contravention of her constitutional rights. The Appellate Court found the appellant's complaints regarding bribery to be groundless; and it held the appeal to be devoid of merit, mulcting the appellant in costs.

**(c) Proceedings in the Supreme Court**

[9] Aggrieved by the said Judgment, the appellant, on 22<sup>nd</sup> April, 2014 filed a petition of appeal, founded upon Article 163 (4) (a) of the Constitution, Section 15 of the Supreme Court Act, and Rules 9 and 33 of the Supreme Court Rules. Her grounds were formulated as follows:

- (a) the Court of Appeal exceeded its jurisdiction under Articles 87 (1) and 164(3) of the Constitution, by contravening the provision of Section 85 A of the Elections Act, which limits its competence in respect of election petitions to matters of law only;

- (b) the Court of Appeal erred in failing to appreciate the import of the appellant's constitutional right to participate as a candidate in terms of Article 38 of the Constitution;
- (c) the Court of Appeal erred and misdirected itself in law and in fact, in failing to appreciate that the infringement of the appellant's right aforesaid would result in the disenfranchisement of the electorate, and this was a breach of the fundamental rights of the electorate, to free expression, in the terms of Article 38 of the Constitution;
- (d) the Court of Appeal erred in law in misinterpreting the content, meaning and legal import of the consent Order recorded in ***Mable Muruli v. Independent Electoral & Boundaries Commission & another*** Nairobi High Court Petition No. 93 of 2013;
- (e) the Court of Appeal erred in law by failing to make a finding on the issue whether the entire subject of nomination of the appellant as a candidate, and all issues adjudicated in ***Mable Muruli v. Independent Electoral & Boundaries Commission & Another*** Nairobi High Court Petition No. 93 of 2013, were *res judicata*;
- (f) the Appellate Judges disregarded the grounds of appeal raised by the appellant, contrary to Article 25 (c) of the Constitution;
- (g) the Court of Appeal erred in penalising the appellant in costs, for matters that were solely within the control of the 3<sup>rd</sup> and 4<sup>th</sup> respondents, as the managers and supervisors of the elections ;

(h)the Court of Appeal contravened Article 163(7) of the Constitution, by ignoring precedent set by the Supreme Court.

**[10]** The reliefs sought are that the Judgement and Orders of the Court of Appeal in Civil Appeal 41 of 2013 be set aside, and that:

- (i) *a declaration be made that the petitioner's fundamental rights and freedoms, as enshrined in Article 38 of the Constitution, were violated;*
- (ii) *a declaration be made that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not validly, impartially and fairly elected as Governor and Deputy Governor for Kakamega County, on account of failure by the 3<sup>rd</sup> and 4<sup>th</sup> respondents to hold free, fair and credible nominations on 31<sup>st</sup> January, 2013 and 1<sup>st</sup> February, 2013, and elections on 4<sup>th</sup> March, 2013;*
- (iii) *the election of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as the Governor and Deputy Governor for Kakamega County be declared null, and a certificate to that effect issued;*
- (iv) *fresh gubernatorial elections be ordered and held in Kakamega County, to accord the petitioner and the entire electorate of Kakamega County, an opportunity to participate in free, fair and transparent elections as envisaged in the Constitution and the electoral laws;*

- (v) *the costs of this petition be awarded to the petitioner;*
- (vi) *such other relief or Orders as may be deemed fit and just to grant , be granted.*

**[11]** The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a notice of preliminary objection, dated 9<sup>th</sup> May, 2014. They objected to the proceedings on grounds that: *the appeal is grounded on a High Court petition filed outside the time permitted by Article 87 (2) of the Constitution: the declaration of results for the Kakamega gubernatorial office was made on the 6<sup>th</sup> March, 2013 ; any election petition based on this declaration ought to have been filed on or before 3<sup>rd</sup> April, 2013; the High Court petition from which this appeal originates was filed on 8<sup>th</sup> April 2013, a time outside the constitutionally- permitted period; that for these several reasons, this Court lacks jurisdiction to entertain this appeal.*

***(d) Seeking a Review of earlier Decisions of the Supreme Court***

**[12]** The matter came up for hearing on 28<sup>th</sup> October, 2014 before a five- Judge Bench of this Court. Counsel for the appellant called upon the Court to review its past decisions, and this was the basis of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' preliminary objection. He also asked for a seven- Judge Bench to hear the matter. The Court directed that the appellant formulate specific issues, and serve the same upon other parties, so they may respond as necessary.

**C. THE PARTIES' RESPECTIVE CASES**

***(i) The Appellant***

[13] The appellant formulated two issues for the Court's determination:

*(i) can the Court, in certain circumstances, depart from, or overrule/overturn its earlier decisions on an issue? (ii) what is the meaning of 'declaration of elections results', as used in Article 87(2) of the Constitution.*

[14] Counsel submitted that a Bench of this Court, in the **Joho** Case, had declared Section 76(1) of the Elections Act to be a nullity, as it was inconsistent with Article 87 (2) of the Constitution; and that this Court, in **Mary Wambui Munene v. Peter Gichuki King'ara and 2 Others** Sup. Ct. Petition No. 7 of 2014, adopted that finding, without any evaluation or examining the facts, and without attempting an independent interpretation of the Constitution or the applicable statutory provision, holding that it was bound by that decision. The appellant's counsel urged that this Court can, in appropriate circumstances, depart from, overrule or overturn its earlier decisions. He relied on Article 163(7) of the Constitution, and Rule 19(3) and (4) of the Supreme Court Rules 2011. He submitted that a review presents an opportunity for a Court to depart from its earlier decisions. In this regard, he invoked the Ugandan decision, **The Uganda Law Society v. the Attorney-General of the Republic of Uganda**, Petition No. 18 of 2005, and the Indian Supreme Court case, **The Bengal Immunity Company Limited v. The state of Bihar and Others** [1954] INSC 120. Learned counsel for the appellant, Mr. Mwenesi and Mr Owala, urged

that the Constitution allowed this Court to depart from a previous decision if convinced of its error.

[15] Urging that the relevant precedents of this Court should be departed from, counsel relied on A.P. Blaustein's article entitled "Overruling Opinions in the Supreme Court", in *Michigan Law Review*, Vol. 57 No. 2, December 1958. The author justifies such departure from precedent (at page 168) in certain specific instances:

*(i) where the Supreme Court has to choose between conflicting precedents;*

*(ii) where the Supreme Court has to follow a State Court's interpretation of a State Constitution or statute—and that interpretation is contrary to the Supreme Court's prior decision; (iii) where the Supreme Court's prior interpretation is impracticable, resulting in hardship or inconvenience; (iv) where there has been obvious error in the prior supreme Court decisions; and (v) where an express overruling is merely declaratory of a prior virtual overruling.*

[16] Counsel urged that the **Joho** case, which is the subject of objection, fell squarely under conditions (i), (iv) and (v) in the foregoing scheme. He submitted that there had been conflicting decisions in **Mary Wambui Munene v. Peter Gichuki King'ara and 2 Others**, Sup. Ct. Petition No. 7 of 2014; **Peter Munya**; and **Lemanken Aramat v. Harun Meitamei Lempaka & Two Others**, Sup Ct. Petition No.5 of 2014; [2014] eKLR; and that there was obvious error in the prior Supreme Court interpretation of Article 87(2), in **Joho**, in view

of the holdings in the **Wambui**, **Munya** and **Aramat**. Counsel submitted that, the overruling of **Joho** would be merely declaratory of a “prior virtual overruling”.

[17] Counsel relied on a work by C.P. Banks, entitled *Reversals of Precedent and Judicial Policy-making: How Judicial Conceptions of stare decisis in the United States Supreme Court influence Social Change*, as a basis for criteria to guide the Court in deciding whether or not to depart from its earlier decisions. The following passage in that work is relevant (page 3):

***“Judges should give more or less weight to several factors, including: First whether the Court is deciding a constitutional or statutory case; second whether the underlying decision is inconsistent with justice or social welfare; and third, whether the precedent has produced a substantial reliance that prevents the court from overruling it ...; the fourth factor is whether the underlying court spoke with one voice in pronouncing the rule of law; that is the force of the precedent depends upon whether the Court making the precedent is unanimous or divided. The last key variable of the traditional paradigm is the age of the precedent, where the weight afforded the principle is contingent upon whether it has emerged as an authoritative rule over time.”***

[18] Counsel urged that the **Joho** precedent, as it was made on 4<sup>th</sup> February, 2014, remains a recent decision, that has not been the subject of much reliance; and thus, a departure from it is by no means impractical.

[19] Counsel submitted that the **Joho** precedent, though unanimously arrived at, was made *per incuriam*. He contended that the decision detracts from considerations of justice, in that it locks out litigants with legitimate electoral disputes, curtailing their constitutional rights under Article 48.

[20] Mr. Mwenesi submitted that ‘declaration’, as depicted in **Joho**, was erroneous and that the “declaration of election results” as envisaged in Article 87 (1) of the Constitution, is the final stage of the electoral process, and ought to coincide with the principles and standards set out in Articles 81, 259 and 263 of the Constitution. He urged that the Constitution be read as an integral whole.

[21] Counsel submitted that the Supreme Court, in **Joho**, had overlooked the fact that the term “Gazette”, in Section 76 of the Elections Act, was defined in the Constitution; and that Regulation 87 (4) (b) has to be read with Regulation 87(4) (a), which refers to the IEBC ‘declaring’ results by notice in the *Gazette*. He cited **Black’s Law dictionary** (9<sup>th</sup> edn) as defining a declaration, as a “*formal statement, a proclamation or announcement especially one embodied in an instrument.*” He contended that the signed Form 38 by the Returning Officer was not the “declaration” envisaged under Article 87 (2) of the Constitution. He urged that if the *Gazette Notice* is the instrument used to declare Presidential election results, it would also be the instrument used by the IEBC to declare other results for the purposes of Article 87(2) of the Constitution. He submitted that Article 87

of the Constitution contemplated a declaration by the IEBC— the body corporate— and not that by an employee, a servant or an agent. He urged that a returning officer is an employee, or officer of the Commission, and not a member of the IEBC: and that logically, a returning officer could not make the requisite declaration under Article 87(2) of the Constitution.

[22] Counsel submitted that this Court, in *Aramat, Wambui*, and *Peter Munya* recognised that the publication of election results by IEBC in the *Gazette*, is indeed a declaration of the same. He urged that the proper meaning of ‘declaration of election results’, if the Constitution is holistically interpreted, is a formal statement, a proclamation, or an announcement by the IEBC. He urged that the holding in *Joho*, declaring section 76(1) of the Elections Act null, as it was inconsistent with the Constitution, was erroneous. He urged the Court to overturn the *Joho* precedent.

**(ii) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

[23] Learned counsel Mr. Nyaundi for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, did not dispute the submission that this Court has the power to depart from its previous decisions; and he acknowledged the terms of article 163 (7) of the Constitution.

[24] Counsel, however, remarked as point of contention, the circumstances that would compel a Court to depart from its precedent. Counsel relied on principles expressed by this Court in *Jasbir Singh Rai and Three Others v. The*

***Estate of Tarlochan Singh Rai and Four Others***, Sup. Ct. Petition No. 4 of 2012, urging that the power of the Court to review its past decisions was limited, and located within the concept of horizontal *stare decisis*; and that this principle required the Court to promote certainty, consistency and uniformity in its decisions.

[25] Counsel submitted that sustenance of precedent was a normal judicial commitment, for attaining uniformity, consistency and certainty (Rupert Cross and J. W. Harris, ***Precedent in English Law***, 4<sup>th</sup> ed. (Oxford : Carendon Press, 1991) p.3. ) Counsel urged that a party could only invite the Court to depart from its decision if that decision was lacking in merit, and should not be sustained as a reference-point for future litigation. Counsel submitted that the appellant's case ought to entail more than the claim that applying the ***Joho Case*** would occasion loss of her appeal.

[26] Learned counsel submitted that Courts only depart from a precedent when it is clearly erroneous. Relying on Lord Wright's article on 'Precedents', in ***Cambridge Law Journal*** (1943) vo. 8, pp.118-145, counsel urged that the power to depart from precedent is limited, and must be used sparingly, always with an inclination towards *certainty in law*. He also cited decisions from comparative jurisprudence: ***Brodie v. Singleton Sire Council*** (2001) 206 CLR 512; ***Horton v. Sadler*** [2006] UKHL 27; ***Rees v. Darlington***

*Memorial Hospital NHS Trust* [2003] UKHL 52; and *Food Corp. of India v. Antclizo Shipping Company* (1988) 1 WLR 603, (1988) 2 ALL ER 513.

[27] Counsel contested the appellant's assertion that the *Joho* decision was *per incuriam*. He urged that a decision reached *per incuriam*, is one arrived at through carelessness or mistake, such as could be avoided. He cited the English decision in *Morelle v. Wakeling* [1955] 2 QB 3379, which held that *per incuriam* decisions are those given in ignorance, or in forgetfulness of some inconsistent statutory provision, or some authority binding the Court concerned. Counsel urged that, in a *per incuriam* decision, the position is that, had the Court reviewed the facts, it could have reached a different outcome. Counsel submitted that the *Joho* decision was well-reasoned, thorough, comprehensive, and represented a judicious application of the law to the facts, apart from bearing a meticulous consideration of the multiple facets of the question before the Court.

[28] Learned counsel submitted that the matter before the Court was an electoral question affecting a political office, a subject bearing considerable political, social and economic ramifications. He urged that there was no reason to seek a departure from the Court's previous decision.

[29] Counsel submitted that the appellant had not demonstrated any error in the *Joho Case*, or any baneful effect it might have on the public. He urged further, that the appellant had shown no inconsistency in the Supreme Court precedents, with respect to the matters in issue; or any error in the Supreme

Court decisions; nor demonstrated that the Court's Ruling was merely declaratory of some prior, "virtual overruling". Counsel submitted that the appellant had not made a case for departure from the precedent set in the ***Joho Case***. He urged the Court to disallow review, by following its precedent in the ***Rai Case***.

[30] Counsel contested the appellant's submission that there was a distinction between the IEBC, as a corporate entity, and the County Returning Officer. He submitted that Article 88 of the Constitution established the IEBC; Article 88(2) made a distinction between the IEBC and its members; and Article 88(5) allowed the IEBC to exercise its powers in accordance with the Constitution and other national legislation. He urged that part of the national legislation encapsulated the *Elections (General) Regulations, 2012*, whereby a key function of the Returning Officer is making 'declaration', under Regulations 3 and 4. He urged that the meaning of the word 'declaration' in Article 87(2) of the Constitution, was the same as that in Rule 4(c) of the Election regulations. He submitted that while a 'declaration' is a 'formal statement, a proclamation or announcement especially one embodied in an instrument,' the act of the County Returning Officer provided under Regulation 4 (c), must be seen at the final act prescribed under Article 87 (2) of the Constitution.

***(iii) The 3<sup>rd</sup> and 4<sup>th</sup> Respondents***

[31] Learned counsel Mr. Kilonzo, submitted that the appellant's submissions were not the proper occasion for a review of the **Joho** decision, in view of Rule 20(4) of the Supreme Court Rules, 2012. He urged that this Rule contemplates 'an application' for review, whereas the appellant's counsel had filed submissions instead. He relied on this Court's decision in the **Rai Case**, submitting that, to exercise its review jurisdiction, the Court must be properly moved. He relied on the Court of Appeal's decision in **Equity Bank Limited v. West Link Mbo Limited** [2013] eKLR, which held that the issues that Court was being asked to determine, were not brought in appropriate proceedings, and any conclusion upon them would, therefore, be *obiter*. Counsel urged this Court to hold that the manner in which it had been moved does not constitute appropriate proceedings, upon which to exercise its power of review.

[32] Counsel contested the appellant's contention that this Court's finding on the constitutionality of Section 76 of the Elections Act was at variance with the Court's findings in other cases: **Wambui; Munya; Aramat**. He submitted that the appellant had made an omnibus application for review, in which she gave no particulars, nor suggested a course of interpretation which would sustain the judicial principles of predictability, certainty, uniformity and stability in the application of the law. Counsel submitted that all the several decisions are consistent, as regards timelines in electoral-dispute proceedings. He urged that the decisions, though incremental in elements of electoral-dispute jurisprudence

(especially as regard timelines), are separate and distinct precedents, forming the basis for different legal principles.

[33] Counsel submitted that it was not the case—contrary to the appellant’s stand—that this Court in *Aramat ,Wambui, Munya*, signalled that the publication of the election results by IEBC in the Gazette is what amounts to a declaration of the same. He urged that a *Gazette* notice does not declare the election results as contemplated in Article 87 (2) of the Constitution. Counsel submitted that the *Gazette* notice is merely meant to inform the public; and the declaration of the election result by the IEBC as perceived in both *Wambui* and *Munya*, refers to the declaration by the respective Returning Officers, in accordance to Article 87 (2) of the Constitution.

[34] Counsel submitted that to depart from its previous decisions, in this instance, would occasion a major public disruption, as it would mean that all persons elected for the various positions would cease to be duly elected. Consequently, the Court would have to determine who the proper office- holders should be; and this would reopen settled issues, and occasion fresh litigation— which would go against the recognized principle that there must be an end to litigation.

[35] Learned counsel submitted that the Returning Officer is the IEBC, for the purpose of Article 87 (2) of the Constitution. He urged that the term ‘returning officer’ is a term of art, historically evolved from the common law position into

formal legislative instruments. The term had a distinct meaning: the person who returns the result of the ballot. The term is thus defined, in *Osborne’s Concise law Dictionary*, 6<sup>th</sup> ed. (1976) [page 293]: “A person responsible for the conduct of an election”. Counsel submitted that it is inapposite to perceive Returning Officers as mere employees; for such a perception would mean that only “commissioners” could conduct elections. He urged that such an interpretation would occasion absurdity, quite apart from being contrary to the public interest. He submitted that the IEBC can only discharge its functions and mandates through *persons*, be they *employees* or *Commissioners*. He urged this Court to eschew interpretations of the law such as would lead to absurd or illogical results, and, in this context, to decline to review the decisions in *Joho, Wambui, Munya* and *Aramat*.

[36] In response, learned counsel for the appellant submitted that there would, indeed, be political consequences to his client’s prayers before this Court. He however, invited the Court to the intrepid course, of making what may appear as a political decision. He submitted that the IEBC was to be distinguished from its employees, and that Regulation 87(4) flowed from Section 76 (1) of the Elections Act, which remained in the statute book, notwithstanding the Supreme Court’s decision to annul it.

#### **D. ISSUES FOR DETERMINATION**

[37] From the documentation filed, and from the written and oral submissions tendered by the parties, it is clear to us that the following issues fall for determination:

- (i) *whether a basis exists for the Supreme Court to consider departing from earlier decisions?*
- (ii) *what is the meaning of ‘declaration of election results,’ as used in Article 87 (2) of the Constitution?*
- (iii) *whether the Returning Officer during the conduct of national elections, is a mere employee, or the valid representative of IEBC?*

## **E. ANALYSIS**

### ***(i) Is there a Basis for the Supreme Court to consider departing from its earlier Decisions?***

[38] It is to be noted that the appellant’s counsel only sought a review of the various decisions of this Court (**Joho** and its progeny) after the 1<sup>st</sup> and 2<sup>nd</sup> respondents raised a preliminary objection anchored on the said decisions. The appellant’s counsel on 4<sup>th</sup> November, 2014 filed a document titled ‘Petitioner’s submission on the preliminary objection’, in which he sets out his case for review. We have accommodated the submission by virtue of Rule 20(4) of the Supreme Court Rules, which thus provides:

***“The Court may, in circumstances it considers exceptional, on application by any party or on its own motion, review any of its decisions”.***

**[39]** It was a duty incumbent upon the appellant, to comply with Rule 20 (4) of the Supreme Court Rules, 2012: a party desirous of moving the Court to exercise its powers of review, should do so by way of an application, rather than just incidentally, through submissions. Such an issue had come up before this Court in ***In the Matter of the National Gender and Equality Commission***, Reference no. 1 of 2013, the Court thus observing (paragraphs 27,28, 29):

*“ Though not forming part of the issues for determination, a matter arose in the course of filing the pleadings that caught our attention. Upon the institution of the reference, the interested party (IEBC) filed a notice of preliminary objection. Upon being served with the notice, the applicant proceeded to file what it termed as ‘ a notice of preliminary objection to the notice of preliminary objection’ Ordinarily, a party files grounds of opposition in response to a preliminary objection However, counsel for the applicant argued that he was justified in filing a parallel notice of preliminary objection; because the preliminary objection as filed by the IEBC was ‘ bad in law’, as it did not seek to raise **a pure point of law.***

*“It is our position that parties should not endeavour, in their pursuit of creativity, to introduce ‘new pleadings’ unknown to the law. The rules of procedure are a handmaid to the course of justice and should be followed with fidelity.*

*“The Court decided, however, to exercise its discretion on the basis of article 159 of the Constitution, and to consider the essence of both sets of preliminary objection in a holistic framework.”*

[40] We are mindful of Article 159 of the Constitution, which bears the principle that the exercise of judicial authority is to ensure that justice shall be done to all, irrespective of status; and that justice shall be administered without undue regard to procedural technicalities. In more general terms, that Article reposes in the Courts the obligation to protect and promote the purposes and principles of the Constitution. In this instance we are inclined to exercise our discretion as called for, and in the interests of justice, to overlook the procedural constraint. This, however, is not to compromise the important role of prescribed process, in the fulfilment of goals of justice, and of fair hearing.

**(ii) *The Question of departing from the Supreme court’s earlier decisions***

[41] The appellant contends that the **Joho Case** has resulted in conflicting decisions. He relies on the scholarly writings of A.P. Blaustein, based on the United States of America's Supreme Court experience. In that experience, a precedent of the supreme Court can be departed from in certain recognized situations, as follows:

(a) *where the Supreme Court must choose between conflicting precedents;*

(b) *where there has been obvious error in the prior supreme Court decision; and*

(c) *where an express overruling is merely declaratory of a prior "virtual overruling".*

[42] Counsel contends that the **Joho Case** falls within situations (a) (b) and (c) above. By his submission, the **Wambui, Munya, and Aramat decisions** are in mutual conflict, and are the manifestation of error in the interpretation of Article 87(2) of the Constitution. However, this bold assertion, in our perception, is not supported with any detailed account.

[43] As regards the **Joho** precedent, counsel submitted that it is only a recent decision, upon which no substantial reliance has been placed. He contended that **Joho** was arrived at *per incuriam*, and that it is inconsistent with principles of justice, in so far as it locks out litigants with legitimate electoral disputes.

[44] It is not in contention that this Court *can* depart from its previous decisions. Indeed, the Constitution anticipates that the Court may in a proper

case, depart from its decisions. Article 163(7) provides that: “*all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.*” What is in contention is whether circumstances have now arisen that necessitate this Court departing from its precedent. The Court has discussed the significance of the doctrine of precedent, and considered the issue of departure therefrom, in the **Rai Case**. On that occasion the Court thus observed (at paragraphs 41, 42, 43, 44, 46, 50, 51, 52):

*“Whether or not the apex Court will adhere to its precedent, or depart therefrom, is dependent on that Court’s perception of the claims of justice and equity, or of the fundamental constitutional or related principles coming to bear upon the issues raised.*

*“The immediate pragmatic purpose of such an orientation of the judicial process, is to ensure predictability, certainty, uniformity and stability in the application of the law. Such institutionalization of the play of the law gives scope for regularity in the governance of commercial and contractual transactions in particular, though the same scheme marks also other spheres of social and economic relations.*

***“In principle, therefore, it follows that this Court, an apex Court, can indeed depart from its previous decision, for***

**good cause, and after taking into account legal considerations of significant weight.**

*“ Such a latitude for departure from precedent exists not only in principle, and from well-recorded common law experience, but also by virtue of the express provision of the Constitution.....*

*“There are other grounds of substance which show that the Supreme Court of Kenya may depart from its previous decisions of precedent-value. In this regard, the purpose and intent flows from two complementary Articles. Article 159 which declares that the judicial authority is derived from the people, further states that: ‘the purposes and principles of this Constitution shall be protected and promoted’; and Article 259 (1) thus stipulates:*

***‘This Constitution shall be interpreted in a manner that...permits the development of the law.’***

*The inference is to be drawn that the Supreme Court, if it is to ‘develop the law’, has to have the liberty to depart from previous decisions such as may stand as a constraint to the growth of the law...*

*“For the special role of precedent in the certainty and predictability of the law as it plays out in daily transactions, any departure is to be guided by rules well recognized. It is a general rule that the*

Court is not bound to follow its previous decision where such decision was an **obiter dictum**(side-remark), or was given **per incuriam** (through inattention to vital, applicable instruments or authority). A statement **obiter dictum** is one made on an issue that did not strictly and ordinarily, call for a decision: and so it was not vital to the outcome set out in the final decision of the case. And a decision **per incuriam** is mistaken, as it is not founded on the valid and governing pillars of law.

“Comparative judicial experience shows that the decision of a superior Court is not to be perceived as having been arrived at *per incuriam*, merely because it is thought to be contrary to some broad principle, or to be out of step with some broad trend in the judicial process; **the test of per incuriam is a strict one – the relevant decision having not taken into account some specific applicable instrument, rule or authority.**

“ Subject to that broad principle, certain directions may, on this occasion, be laid down:

- (i) where there are conflicting past decisions of the Court, it **may** opt to sustain and to apply one of them;
- (ii) the Court **may** disregard a previous decision if it is shown that such decision was given **per incuriam**;

*(iii) a previous decision will not be disregarded merely because some, or all of the members of the Bench that decided it might now arrive at a different conclusion;*

*(iv) the Court will not depart from its earlier decision on grounds of mere doubts as to its correctness.”*

[45] Counsel for the appellant, as we have observed, has not clearly shown any situations of conflict, error, or public-interest infractions in the **Joho, Wambui, Munya 2B** and **Aramat** cases. If anything, the decisions in **Wambui, Munya 2B** and **Aramat** are fundamentally consistent with the findings in **Joho**.

[46] We are, with respect, not persuaded by learned counsel’s argument that **Joho** has yet to generate a substantial level of reliance such as makes a definitive case for sustenance. It is relevant in this regard that in **Rai**, we thus observed (paragraph 77):

*“If it may be thought that any error was entailed in the Court’s perception of jurisdiction, such an apprehension by itself, would not justify the reversal of the Macharia Ruling, a decision which, as we must take judicial notice, will have established itself as a mark of certainty and predictability in the law, and on the basis of which numbers of people will have figured out their rights and*

***expectations. In these circumstances, in our view, public policy will not stand on the side of reversal of precedent”.***

[47] On the foregoing principle, we take judicial notice that ***Joho*** has been endorsed in numbers of election petitions, that have come before this Court. Examples are: ***Wambui, Munya 2B, Aramat, Lisamula***; and the Appellate Court case, ***Posh Aborwa***. In all these decisions, this Court and the Appellate Court have laid out a set of guiding principles. Besides, it is by no means insignificant that, recognizable political rights have vested in the parties, with consequent public-interest expectations on the part of the electorate.

[48]The value of precedent in judicial decision-making is a recurring theme in our decisions such as: ***Wanjohi v. Kariuki & Others*** Petition No. 2A of 2014 (paragraphs 79, 82, 83 and 86); ***Outa v. Okello & 3 Others***, Sup. Ct. Petition 10 of 2014 (paragraph 57); and ***Obado v. Oyugi & 2 Others***, Sup Ct. Petition No 4 of 2014, (paragraph 122). In ***Kidero & 5 Others v. Waititu and Others***, Sup. Ct. Petition No. 18 of 2014(Consolidated with Petition No. 20 of 2014) *Njoki Ndungu, SCJ* in her concurring opinion, made the following apposite remarks (para.236):

***“The principle of stare decisis in Kenya unlike other jurisdictions is a constitutional requirement aimed at enhancing certainty and predictability in the legal system. The Articles of establishment and jurisdiction***

*reveal the Court’s vital essence and the decisions of this Court protect settled anticipations by ensuring that the Constitution is upheld and enforced and that the aspirations of the Kenyan people embodied in a system of constitutional governance are legitimized. The constitutional contours of Article 163(7) oblige this Court to settle complex issues of constitutional and legal controversy and to give jurisprudential guidance to the lower Courts. In the exercise of our mandate, we determine the constitutional legality of statutes and other political acts to produce judicially-settled principles that consolidate the rule of law and the operation of government, and the political disposition, particularly in the settlement of electoral disputes. As a Court entrusted with the final onus of settling constitutional controversies, one of our principal duties is the enforcement of constitutional norms.”*

[49] We thus find a basis for arriving at the conclusion that no valid cause has been shown, for this Court to exercise its power of review of its past decisions.

**(iii) “Declaration of Election Results”: What’s the meaning?**

[50] The concept of “declaration of election results” was considered and perceived by this Court, in the **Joho** case, as bearing the following signification (paragraphs 72, 77):

*“‘Declaration’ takes place at every stage of tallying. For example, the first declaration takes place at the polling station; the second declaration at the Constituency tallying centre; and the third declaration at the County returning centre. Thus the declaration of election results is the aggregate of the requirements set out in the various forms, involving a plurality of officers. The finality of the set of stages of declaration is depicted in the issuance of the certificate in Form 38 to the winner of the election. This marks the end of the electoral process by affirming and declaring the election results which could not be altered or disturbed by any authority.....*

*“Bearing in mind the nature of election petitions, the declared election results, enumerated in the Forms provided, are quantitative, and involve a numerical composition. It would be safe to assume, therefore, that where a candidate was challenging the declared results of an election, a quantitative break down would be a key component in the cause. It must also be ascertainable who the winner, and the loser(s) in an election, are. **The certificate in***

***Form 38 declares the winner of the election and terminates the mandate of the returning officer, who acts on behalf of the Commission, shifting the jurisdiction in respect of the electoral process to challenge the results of the election to the election Court. We hold that the certificate in Form 38 comprises the declaration of election results. This declaration sets in motion the time-frame within which to lodge an election petition, and it is hereby so held. Consequently, the provision of Section 76 (1) (a) of the Elections Act is inconsistent with the provisions of Article 87 (2) of the Constitution, as elaborated hereinbefore, and is hereby declared unconstitutional to that extent [emphasis supplied]***

***(v) “Returning Officer” is a Mere employee? Or a Representative of IEBC?***

**[51]** What exactly is the identity of the IEBC ? Article 88 (1) of the Constitution establishes the IEBC, and Article 88(4) thus outlines the responsibilities of the IEBC:

***“The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and***

***any other elections as prescribed by an Act of Parliament and, in particular, for—***

***(a) the continuous registration of citizens as voters;***

***(b) the regular revision of the voters' roll;***

***(c) the delimitation of constituencies and wards;***

***(d) the regulation of the process by which parties nominate candidates for elections;***

***(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;***

***(f) the registration of candidates for election;***

***(g) voter education;***

***(h) the facilitation of the observation, monitoring and evaluation of elections;***

***(i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;***

***(j) the development of a code of conduct for candidates and parties contesting elections; and***

***(k) the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.***

***“(5) The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation.”***

[52] *The Elections (General) Regulations, 2012* in Regulation 3, provides for the appointment of the Returning Officer by the Commission (IEBC). Under Regulation 3(a), the Returning Officer is responsible for conducting elections at the constituency level. The Constitution, in Article 88(4) provides that: *“The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution and any other elections as prescribed by a Act of Parliament”* In ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others***, Civil Application no. 5 of 2014, this Court thus determined (paragraph 77):

*“While we agree with Mr. Muthomi, regarding his contention that section 87 of the Elections Act cannot be equated to 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]** The Election (General) Regulations, 2012 are to be read in conformity with the Constitution. The effect is that, the Returning Officer is the IEBC, when conducting the relevant duties under the Constitution, the Elections Act, and the Regulations thereunder.

**[54]** No less relevant is the Independent Electoral and Boundaries Commission Act, 2011. This Act, in Section 4, sets out the functions of the IEBC which are for the most part, replicated in Article 884(4) of the Constitution. It thus provides for the composition of the Commission (Section 5):

***“The Commission shall consist of a chairperson and eight other members appointed in accordance with Article 250(4) of the Constitution and the provisions of this Act.”***

**[55]** The IEBC Act also provides for a Secretary to the Commission (Section 10), who is appointed pursuant to Article 250 (12) of the Constitution. The Secretary is the chief executive officer of the Commission; head of the secretariat; accounting officer of the Commission; custodian of all Commission records; bearer of responsibility for executing decisions of the Commission; officer in charge of assignment of duties and supervision of all employees of the

Commission; facilitator, co-ordinator and executor of Commission's mandate; guarantor of staff compliance with public ethics and values; executor of such other duties as may be assigned by law and by the Commission. Without a doubt, the Secretary is a vital component of the IEBC – indeed, a central part of the IEBC, regardless of not bearing the designation “Commissioner”. Section 11 of the Act makes provisions regarding employees of the Commission, who conduct their functions at headquarters, and at the numerous regional offices of IEBC.

**[56]** From the foregoing details regarding IEBC's operations, it is clear to us that the appellant's perception of its identity is inappositely limited. We take judicial notice that it would be impractical to expect the Commissioners *qua* “Commissioners”, to conduct all the functions entrusted to the Commission under Article 88 (4) of the Constitution. The secretary, hence, can hardly do without employees entrusted with specified duties. Had it been the case that all such tasks devolved only to “Commissioners”, the consequence would be that all actions routinely taken by the IEBC staff, such as continuous registration of voters, regular revision of voters' roll, and registration of candidates, would be a nullity in law. There is need to avoid such construction of the Constitution as would be contrary to the public interest . The requisite approach in interpreting Article 88 (1) of the Constitution, is one that vindicates the constitutional purposes and objectives, and that fosters good governance, in accordance with the terms of article 259. Good governance in this instance entails ensuring that the constitutional functions of the Commission do not come to a standstill, as is

destined to happen if the discharge of such functions were left entirely to the nine Commissioners.

[57] In short, as we perceive it, the IEBC comprises the Commissioners, as well as its employees who have been duly authorised. Consequently, and in accordance with the *Joho* precedent, the Returning Officer, an employee of the IEBC, properly acts on its behalf.

#### F. DETERMINATION

[58] Consequently, it is clear to us that the review application is for disallowing. As a consequence, and in view of the fact that the application departs from normal form, and comes *via* submissions to a preliminary objection, we would allow the said preliminary objection.

#### G. ORDERS

[59] This leads us to make appropriate Orders as follows:

- (a) ***The review application and the petitioner's submissions to the Preliminary Objection are disallowed.***
- (b) ***The Preliminary Objection dated 9<sup>th</sup> May, 2014 is allowed.***
- (c) ***As a consequence of Order No (b) above, and for the avoidance of doubt, this Court lacks jurisdiction to entertain the appeal, as it was grounded on a High Court Petition filed contrary to the terms of Article 87(2) of the Constitution.***
- (d) ***The appellant shall bear the costs of this suit.***

**DATED and DELIVERED at NAIROBI this 21<sup>st</sup> Day of April 2016.**

.....  
**W. M. MUTUNGA**  
**CHIEF JUSTICE & PRESIDENT**  
**OF THE SUPREME COURT**

.....  
**K.H. RAWAL**  
**DEPUTY CHIEF JUSTICE &**  
**VICE-PRESIDENT**  
**OF THE SUPREME COURT**

.....  
**P. K. TUNOI**  
**JUSTICE OF THE SUPREME COURT**

.....  
**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**J.B. OJWANG**  
**JUSTICE OF THE SUPREME COURT**

.....  
**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**S. N. NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

I certify that this is a  
true copy of the original

**REGISTRAR, SUPREME COURT**