**REPUBLIC OF KENYA**

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

**PETITION NO. 7 OF 2013**

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

**-BETWEEN-**

**MARY WAMBUI MUNENE...........................................APPELLANT**

**-AND-**

**1. PETER GICHUKI KING'ARA............................)**

**2. THE INDEPENDENT ELECTORAL AND )**

**BOUNDARIES COMMISSION.............................. )....RESPONDENTS**

**3. JAMES MBAI.................................................... )**

*(Being an Appeal from the Judgement, Decree and/or Order of the Court of Appeal of Kenya at Nyeri, in Civil Appeal No. 31 of 2013(AlnashirVisram, M.Koome&Otieno-Odek, JJA) dated the 13th day of February 2014)*

## JUDGEMENT

## I. INTRODUCTION

**[1]** This is an appeal against the entire Judgement of the Court of Appeal sitting at Nyeri, dated 13th February, 2014 in Civil Appeal No. 31of 2013,which Judgement overruled the decision of the High Court sitting at Nyeri (Ngaah, J) in Election Petition No. 3of 2013. The upshot of that decisionwas the invalidation of the election of the Appellant as the duly elected member of the National Assembly for Othaya Constituency.

**[2]** The Appellant lodged her Petition of Appeal in this Court on 8th April, 2014. She proffered 12 grounds on which her petition is premised. These were as follows:

(i) The learned Judges of the Court of Appeal **exceeded the scope of their jurisdiction in Election Petitions** which, pursuant to the provision of **Articles 87 (1)** of the Constitution of Kenya, and **Section 85A** of the Elections Act (No 24 of 2011), subsists on matters of law only, when the learned Judges delved into fact and made various conclusions of fact;

(ii) the learned Judges of the Court of Appeal patently breached the petitioner's right enshrined in **Article 50(1)** of the Constitution as read together with **Article 25(c)** thereof, **to have a dispute that can be resolved by the application of law decided in a fair hearing;** they violated the cardinal principles of fairness and justice, namely that if there has been a proper appraisal of evidence by a trial Court, a Court of Appeal ought not to embark on a fresh appraisal of the same evidence merely for the purpose of arriving at a different conclusion;

(iii) the learned Judges of the Court of Appeal patently breached the petitioner's right enshrined in **Article 50(1)** of the Constitution as read with **Article 25 (c)thereof, to have a dispute that can be resolved by the application of law decided in a fair hearing** before a Court when they wrongly proceeded to delve into matters of

fact, to the detriment of the Appellant, and evaluate the evidence of the applicant's witness Jeremiah Ichaura the trial Court not only found to have been uncontroverted, but also disregarded the effect of the 1stRespondent's lawyers having agreed with the said evidence;

(iv) the learned Judges of the Court of Appeal grossly erred by deviating from principles of incidence of burden and standard of proof in election petitions, contrary to the binding and unambiguous holding of the Supreme Court in the case of **Raila Odinga & Others v. Independent Electoral and Boundaries Commission & Others, Petition No. 5 of 2013 (as consolidated with petitions No. 3 and 4 of 2013)** and in patent breach of the provisions of **Article 163(7)** of the Constitution;

(v) the learned Judges of the Court of Appeal erred when they failed to appreciate that pursuant to the provisions of **Article 87(1)** of the Constitution, the Electoral Code reflects not only the Constitution, but also the Election Act 2011 and the Rules and Regulations made thereunder, including Rule 33 (4) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 which provides that:

*"Scrutiny shall be confined to the polling stations in which the results are disputed*";

(vi) the learned Judges of the Court of Appeal exceeded the scope of their jurisdiction in Election Petitions pursuant to **Articles 164 (3) (b) and 81** of the Constitution of Kenya, as read together with **Section 85A, 82 and 83 of the Elections Act 2011** and as applied to the

provisions of **Rule 33 of the Election Petition Rules** in relation to standard of proof, electoral irregularities, malpractices and application for scrutiny and recount;

(vii) the learned Judges of the Court of Appeal manifested bias in the impugned Judgement, against the Appellant herein and denied the Appellant equal protection and benefit of the law, contrary to the provisions of Articles 27 (1) and 50 (1) of the Constitution, when they entirely relied on the 1st Respondents allegations of errors and irregularities (as contained in paragraphs 4.58 of his petition dated 8th April 2013), and totally disregarded the evidence of the Appellant's chief agent, Mr. Jeremiah Ichaura, a professional accountant, whose affidavit formed part of the Appellant's response to the petition (and more so exhibit "JI 2", an analysis by the said chief agent, of all the form 35 as compared to form 36 of Othaya Constituency), which specifically replied to the allegations as made in the said paragraph 4.58 of the petition of 8th April 2013;

(viii) the learned Judges of the Court of Appeal did not evaluate and consider all the relevant provisions of the Constitution, the Election Act and Regulations thereunder, when they applied the provisions of Article 81 (e) and 86 (a) of the Constitution, without taking into account Articles 88 (5) and 87 (1) of the Constitution, that underpins the Elections Act as the primary statute for the management of elections in Kenya;

(ix) whereas **Rule 33 (2) and (4)** of the Elections (Parliamentary and County Elections) Petition Rules, 2013 and the Elections Act expressly

provide that scrutiny can only be granted by a Court if the Court is satisfied that there is sufficient reasons to do so, and only in respect of a polling station where the results are disputed, and which provisions are Constitutionally underpinned in Article 87 (1) of the Constitution of Kenya, the learned Judges erred by purporting to extrapolate results from 92 polling stations, as raised in paragraph 4.58 of the petition of 8th April 2013;

(x) the learned Judges of the Court of Appeal erred by trivializing the victory of the Appellant and converting the margin of votes between the winner and the runner-up into percentages (4.5%) and using it to reach their determination, instead of using the arithmetical margin which was 2,067 votes - and thus in breach of the provision of Articles 180 (4) of the Constitution of Kenya, which provides that **"the candidate who receives the greatest number of votes shall be declared elected", not**that "the candidate who receives the greatest percentage of votes shall be declared elected";

(xi) the learned Judges of the Court of Appeal violated the provision of Articles 1, 2, 4, 10 and 38 of the Constitution of Kenya;

(xii) the learned Judges erred by allowing the 1stRespondent to derive benefit from proceedings that are null and void ab initio, since the petition filed by the 1stRespondent in the High Court was filed 6 days after the expiry of 28 days from the date of declaration of results as envisaged in Article 87(2) of the Constitution, and Section 77(1) of the Elections Act 2011.

**[3]** The Appellant seeks three reliefs from this Court:

1. *that the Judgement of the Court of Appeal given in Nyeri Civil Appeal No. 31 of 2013, on the 13th day of February 2014, together with all other consequential orders be and is hereby set aside;*
2. *that the 1stRespondent's petition being Election Petition No. 3 of 2013 in the High Court of Kenya at Nyeri, be declared as null and void and is hereby struck out, with costs to the Appellant;*
3. *the 1stRespondent be ordered to bear the costs of the Appellant in the election Court, the Court of appeal and the costs of the Appellant in this appeal.*

## II. BACKGROUND

**[4]** The Appellant and the 1stRespondent, together with seven others, contested for the seat of Member of the National Assembly for Othaya Constituency, in the General Elections held on 4th March, 2013. The 2ndRespondent, **Independent Electoral and Boundaries Commission (the Commission**), is the constitutionally mandated body responsible for conducting or supervising elections to any elective body in Kenya, including the National Assembly. The 3rdRespondent was a duly gazetted agent of the Commission, under Regulation 4(1) of the **Elections (General) Regulations, 2012 (the Regulations),** to conduct the elections in Othaya Constituency.

**[5]** After the counting and tallying of the results, the Appellantwas declared the duly elected member of the National Assembly for Othaya Constituency. The 1stRespondentemerged as the 1st runner-up. Aggrieved by this declaration of the Appellant as the winner, the 1stRespondentfiled a petition in the High Court at Nyeri, Election Petition No. 3 of 2014, on 8th April 2013, challenging this outcome.

**[6]** The 1stRespondent sought *inter alia*: an order for scrutiny and recount of the votes cast in the elections; a declaration that the Appellant was not duly elected and that he, the 1stRespondent, was the duly elected member of the National Assembly for Othaya Constituency; a finding that the Commission failed and/or neglected to inquire whether the Appellantwas eligible to contest as a candidate for the office of the National Assembly for Othaya Constituency; a declaration that the 2nd and 3rdRespondents jointly and severally abetted election offences in the course of the election; a declaration that the election of the National Assembly for Othaya Constituency was not free and fair, but was vitiated by illegalities; and finally, an order for fresh elections to the office of National Assembly Member for Othaya Constituency.

**[7]** The Appellant and 2nd and 3rdRespondents contended that the elections were conducted in accordance with the Constitution, the Elections Act, and the Regulations made thereunder. They averred that the elections met the

threshold set out in Articles 86 and 88(4) of the Constitution, and that the management of the electoral process was simple, accurate, verifiable, secure, accountable and transparent.

**[8]** The ElectionCourt (Ngaah J) heard the case and on 12th September, 2013 dismissed the petition with costs, and confirmed the Appellant as the duly elected member of National Assembly for Othaya Constituency on these terms:

(a) The 3rdRespondent (Appellant herein) was eligible to contest as a candidate for the election held on 4th March, 2013 for the position of Member of National Assembly.

(b) There is **neither reason nor basis for this Court to order scrutiny and recount** of the votes cast in the election of Member of the National Assembly for Othaya Constituency in the elections held on the 4th March, 2013.

(c) The **3rdRespondent was validly elected** as the Member of the National Assembly for Othaya Constituency in the elections held on 4th March, 2013.

(d) Peter Gichuki King'ara was not duly elected to the office of Member of the National Assembly for Othaya Constituency in the elections held on 4th March, 2013.

(e) There is **no proof that the Respondents jointly or severally committed election offences** in the course of the election of Member of National Assembly for Othaya Constituency.

(f) The elections of the Member of Parliament for Othaya Constituency were free and fair, and were conducted substantially in accordance with the law.

**[9]** Aggrieved by the foregoing orders of the Election Court, the 1stRespondent appealed to the Court of Appeal in Nyeri (Civil Appeal No. 31 of 2013). He cited 35 grounds in support of his appeal. The Court of Appeal summarised those grounds as a charge that the trial court erred by follows:

a) *failing to order a scrutiny and recount of the votes despite overwhelming evidence of admitted irregularities;*

b) *upholding the results favouring the Respondents despite glaring anomalies, irregularities born out of the evidence;*

c) *disregarding and countenancing irregular and illegal management of elections;*

d) *failing to find that there was over-voting despite clear evidence to the contrary;*

e) *misapprehending and misapplying the law of evidence in the analysis and in the findings regarding Form 35 and 36 which were tendered in evidence;*

f) *failing to consider the effect of admissions as to irregularities and discrepancies, especially by holding that the same did not affect the outcome of the election;*

g) *failing to make a finding that an enquiry as to the 3rd Respondent's eligibility to vie for elective office could only be made by the 1st Respondent in the context of Article 88(4) of the Constitution;*

h) *misapprehending the provisions of Article 99(b) of the Constitution as read with Section 22 of the Elections Act.*

i) *declining to find that the 3rd Respondent did not possess the Constitutional and legal education-qualifications required of a candidate for the office of Member of the National Assembly.*

j) *failing to find that, based on the evidence tendered, the Respondents had committed and/or abated the election offences pleaded in the petition.*

k) *imposing the costs of the petition upon the petitioner.*

**[10]** The Court of Appeal identified four broad issues emerging from the grounds of appeal as follows:

(i) *whether the 3rd Respondent was eligible to vie for the post of Member for National Assembly for Othaya Constituency during the 4th March, 2013, elections;*

(ii) *whether the evidence on record supported the Appellant's prayer for recount and scrutiny;*

(iii) *Whether the Appellant proved his case to the required standard that the elections for Member of the National Assembly for Othaya was not conducted in accordance with the principles laid down in the Constitution and the law, and whether the irregularities did affect the result of the election;*

(iv) *Whether the Judge was entitled to condemn the Appellant in costs and if so, to specify the total amount payable?*

**[11]** The Court of Appeal concluded that **due to many breaches of the law and regulations, the 4th March, 2013 elections for Member of National Assembly for Othaya Constituency were not administered in an efficient, accurate and accountable manner. Hence, the Court declared the election null and void, and held that the 3rdRespondent, Mary Wambui Munene, was not validly elected.** The Court of Appeal directed the 1stRespondent (IEBC), to issue a certificate to that effect, to be served upon the Speaker of the National Assembly forthwith, pursuant to Section 80(5) of the Elections Act.

**[12]** Aggrieved by this decision, the Appellant filed an appeal before this Court on 8th April, 2014 seeking to set aside the whole Judgement of the Court of Appeal. Together with her petition, she filed a Notice of Motion under certificate of urgency seeking conservatory Orders to stay the execution of the Court of Appeal decision pending the hearing and determination of this appeal.

**[13]** The matter was certified urgent on 8th April, 2014 by Ibrahim, SCJ. The application was heard *interpartes* on two days: first on 14th April, 2014 when

the Court heard submissions on preliminary objection raised by learned Counsel Mr. Mbobu for the 1st Respondent; and on 15th April, 2014 when the substantive application was canvassed. After hearing the submissions by the parties on all interlocutory matters, Rawal DCJ and Ibrahim SCJ granted conservatory orders as follows:

- ***(i)*** ***"The Notice of Preliminary Objection dated 11th April 2014 is hereby dismissed.***
- ***(ii)*** ***An order for stay of execution of the Judgement and decree of the Court of Appeal given on the 13th of February, 2014 in Nyeri Civil Appeal No. 31 of 2013 pending the hearing and determination of the Appeal is hereby granted.***
- ***(iii)*** ***An order staying the By-election scheduled for 29th April, 2014 do hereby issue.***
- ***(iv)*** ***That the Appeal herein be heard and determined on a priority basis on 28th April, 2014 considering the urgency and the Constitutional timelines stipulated in Article 101 of the Constitution as read with Section 86 of the Elections Act.***
- ***(v)*** ***The costs of this Application shall be in the Appeal."***

[**14]** Pursuant to Order (iv) the appeal was heard before the full bench on 28th April, 2014.

## III. SUBMISSIONS

### *a) The Appellant's Submissions*

**[15]** For the purpose of her submissions, the Appellant summarised the grounds of appeal as follows:

i. that the Court of Appeal exceeded its jurisdiction as donated by **Article 87(1)** of the Constitution and **Section 85A** of the Elections Act by interrogating and making findings on issues of fact, which findings contradicted the finding of fact by the trial Court thereby,leading the Court of Appeal to arrive at a wrong decision and to infringe the Appellant's right to a fair trial;

ii. that the Court of Appeal failed to follow the doctrine of *stare decisis,* departing from its own previous decision and reaching a wrong decision infringing on the Appellant's right to a fair trial;

iii. that the Court of Appeal deviated from well known principles on the incidence of burden of proof and standard of proof in election matters, and misapplied the said principles, thereby infringing the Appellant's rights to fair trial as enshrined in Articles 50(1) and 25 (c) of the Constitution;

**iv.** that the 1stRespondent herein derived a benefit from proceedings that are null and void, as the petition in the High Court was filed **6 days** after the expiry of the prescribed **28 days** from the date of declaration of results as provided by **Article 87(2)** of the Constitution.

**(b) Questioning the Court of Appeal's Jurisdiction.**

**[16]** Mr. Cecil Miller, learned counsel for the Appellant, urged that the law on the jurisdiction of the High Court and Court of Appeal is well settled, and the Court of Appeal should only consider issues of law. However, in this case, the Court of Appeal delved into issues of fact and, by so doing engaged in 'judicial craft', proceeding ultra *vires* in its determination.

**[17]** Counsel submitted that the Court of Appeal exceeded its jurisdiction as provided under Article 87(1) of the Constitution and Section 85 A of the Elections Act, 2011 by making findings on matters of fact, overturning findings of fact made by the trial Judge, and that this denied the Appellant her right to a fair trial. Counsel cited the case of ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and 2 others*****,** Supreme Court Civil Application. No 2 of 2011**(**The ***S.K.Macharia*** case**),** and was emphatic that a Court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law, and that a Court cannot expand its jurisdiction through judicial craft.

**[18]** In an earlier case, ***Timmamy Issa Abdalla v. Swaleh Salim Imu and 3 others*****,** Civil Appeal No. 36 of 2013 **(**The ***Timmamy***case**)** the Court of Appeal (at paragraph 50) had properly defined the scope of its jurisdiction:

> ***"...This caution is of greater significance in an Appeal such as the one before us where the Right of Appeal is limited to matters of law only, because the jurisdiction of this Court to draw its own conclusions can only apply to conclusions of law. We must be***

***careful to isolate conclusions of law from conclusions of fact and only interfere if two conditions are met, firstly, that the conclusions are conclusions of law, and secondly, that the conclusions of law arrived at cannot reasonably be drawn from the findings of the lower Court on the facts."***

**[19]** Counsel argued that based on the principle above, the Court of Appeal erred by making conclusions on matters of fact which were in contradiction to the findings of the trial Court. Counsel enumerated six findings by the Court of appeal perceived as issues of fact:

(i) the holding that the Appellant's agents failed to record their objections and complaints to the Presiding Officers regarding bribery;

(ii) failing to read out the full names of the Appellant and his competitor who shared the name "GICHUKI", when announcing the results as per Regulation 80(1);

(iii) the allegation of over-voting was not proved;

(iv) the Court accepting that there were errors in the posting of votes in Form 35 and 36 in ten polling stations, but holding that the errors were negligible;

(v) the Appellant failing to prove the 23 seals collected from a certain polling station did not belong to the 1st Respondent; and

(vi) the Appellant failing to prove the errors in Forms 35 and 36 affected the overall results.

**[20]** As regards these findings by the Court of Appeal, Counsel cited various paragraphs from the trial Court's Judgement which had addressed them. Counsel submitted that the findings by the Court of Appeal exceeded the jurisdictional limitations under Section 85A of the Elections Act, 2011 and that this compromised the Appellant's right to a fair hearing as enshrined in Article 25 (c) and 50 (1) of the Constitution.

***(c) The Court of Appeal's compliance with the Doctrine of Stare decisis.***

**[21]** Counsel submitted that the Court of Appeal failed to adhere to the doctrine of *stare decisis,* by departing from its own previous decisions, thereby infringing the Appellant's right to fair hearing as enshrined in the Constitution.

**[22]** Counsel cited the ***S.K.Macharia***case in urging that this Court had held that Courts should exercise jurisdiction only as conferred by the

Constitution, or any written law, and that a Court cannot arrogate to itself jurisdiction exceeding that which is conferred by law.

**[23]** Counsel referred to various cases to support his submissions. In the case of ***Independent Electoral And Boundaries Commission and another v. Stephen Mutinda Mule and Others***, Civil Application No. 219 of 2013, the Court of Appeal upheld its limit on jurisdiction to matters of law only:

> ***"Those points in an appeal of the kind before us being from an election Courts decision is further circumscribed by Section 85A of the Elections Act which limits appeals to the Court of Appeal to matters of law only. It is therefore quite strange and improper that each of the seventeen grounds without exception commences with a standard expression, 'the judge erred in fact and in law' or 'the learned judge erred in law and in fact'. Clearly the drafters of the Memorandum did not have the Legal Provision in active contemplation. Had they done so, they would have found that by invoking factual errors, they were inviting jurisdictional objections to their entire appeal."***

**[24]** In the ***Timmamy***casethe Court of Appeal (at Page 26, paragraph 50) also recognised its jurisdiction to be limited to matters of law only, when it stated:

*"...In addition to the above guidance, this appeal being a first appeal to this Court, it is important to keep in mind the principles to be followed in a first appeal as reflected in **Peter's v. Sunday** (1958) EA 424 and **Selle v. Associated Motor Boats Company Limited** (1968) EA 123, that although the Court has jurisdiction to reconsider the evidence, re-evaluate and draw its own conclusion, this jurisdiction must be exercised cautiously. This caution is of greater significance in an appeal such as the one before us where the right of appeal is limited to matters of law only, because the jurisdiction of this Court to draw its conclusions can only apply to conclusions of law. We must therefore be careful to isolate conclusions of law from conclusions of facts and only interfere if two conditions are met, firstly, that the conclusions are conclusions of law and secondly that the conclusions arrived at cannot reasonably be drawn from the findings of the lower Court of the facts."*

**[25]** Further, counsel cited ***Peter Gichuki King'ara v. Independent Electoral And Boundaries Commission and Others***, Civil Appeal No. 23 of 2013, which related to matters of scrutiny and recount in this same election, wherein the Court of Appeal at Nyeri observed at (paragraphs 25 and 35):

*"[25] The jurisdiction of the Court of Appeal for election purposes is fortified by* **Section 85A** *of the* **Elections Act** *which stipulates that*

***an appeal from the High Court in an Election Petition concerning membership of the National Assembly, Senate or the office of County governor shall lie to the Court of Appeal on matters of law only. The jurisdiction of this Court to hear Election Petitions is restricted and narrowed to the extent that appeals lie only on points of law.***

**...**

***"[35] The nature of jurisdiction of the Court of Appeal under*** **Section 85A** ***of the*** **Elections Act** ***is an*** **omnibus ex-ante jurisdiction** ***exercisable*** **a posteriori** ***after the High Court has issued judgment and decree in an Election Petition. The appellate omnibus jurisdiction is consequential and is to hear and determine all contested and amalgamated points of law in an Election Petition whether such points of law arose in an interlocutory matter or in the judgment or decree of the High Court. The jurisdiction of the Court of Appeal under*** **Sections 80(3) and 85A** ***of the*** **Elections Act** ***is sequential whereby the appellate Court is required to exercise its jurisdiction sequentially after judgment and decree of the High Court. It is an all-encompassing comprehensive blanket jurisdiction rather than piecemeal jurisdiction."***

**[26]** Counsel submitted that the Court of Appeal contradicted itself by departing from the above principles *(stare decisis),* by delving into matters of fact by observing (at paragraph 50):

***"Also an appellate Court will not ordinarily differ with the findings, on a question of fact, by the trial judge who had the advantage of hearing and seeing the witness. Our role as an appellate Court is to review the evidence and to determine whether the conclusions reached … are in accordance with the evidence and the law although we do (so) with caution as aforestated."***

**[27]** It was counsel's submission that as a result of this departure, the Court of Appeal was in breach of Article 163(7) of the Constitution, and as such, the Appellant was denied a fair hearing.

***(d) The Appellant's case regarding principles of burden of proof and standard of proof.***

**[28]** Counsel submitted that the Court of Appeal wrongly applied the principles of burden of proof and standard of proof in election petitions. He submitted that the burden of proof rests with the Petitioner, whereas the standard of proof is above a balance of probability and that the Respondent does not bear a corresponding burden to disprove the petitioner's allegation, and may choose to remain silent. He cited the case of ***Raila Odinga v. Independent Electoral Boundaries Commission & Others Supreme Court Election***Petition No. 5 of 2013, **(**The ***Raila Odinga***case**)** in which the Court held (at page 85):

***"But at the same time, a Petitioner should be under an obligation to discharge the initial burden of proof, before the Respondents are invited to discharge the evidential burden. The threshold of proof should in principle be above the balance of probability, though not as high as beyond reasonable doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question".***

**[29]** Counsel submitted that Section 83 of the Elections Act 2011, places a further burden on the petitioner to prove whether the allegations made, even if proved, affected the election results. According to the Appellant's counsel the Court of Appeal erred by wrongly applying the principles of burden of proof, and shifting the evidential burden to the 1st and 2ndRespondents when it held that:

***"Once the 2ndRespondent admitted the seals belong to the 1stRespondent, it was the duty of the 1st and 2ndRespondent to secure them; and demonstrate how some accountable election materials left the custody of those entrusted with them. To expect the Appellant to prove that the seals were not removed in a bid to tamper with the ballot boxes, when the Court declined to allow a recount and scrutiny and the production of the polling day diaries was a clear misdirection on the part of the Judge."***

**[30]**Counsel submitted that the trial Court rightly summarized the evidence of the 2ndRespondent in respect of seals, and correctly found that the discovery of the broken seals could not by itself be evidence of electoral malpractice or irregularity. He further referred the Court to the proceedings at the trial Court in which, according to him, the 2ndRespondent clearly discharged its burden of disproving that the seals were used for electoral malpractice.

**(e) The Question of Nullity in relation to the proceedings in the High Court having been filed out of time.**

**[31]** Counsel submitted that the proceedings in the High Court had been a nullity, as the petition was filed outside the time allowed by Article 87(2) of the Constitution. Article 87(2) of the Constitution provides:

> ***"Petitions concerning an election, other than a presidential election, shall be filed within twenty eight days after declaration of the election results by the Independent Electoral and Boundaries Commission."***

**[32]** Counsel relied upon the case of **Hassan Ali Joho & Another v. Suleiman Said Shahbal And Others,** Supreme Court Petition No 10 Of 2013 **(**The **Joho** Case**)** where the Court held (at paragraph 100):

> ***"After considering the relevant provisions of the law, as well as the submissions made before us, secondly after taking due account of the persuasive authorities from a number of jurisdictions, we have come to the conclusion that the ultimate election outcome, for the gubernatorial office which is in question here, is the one declared at the County level by the County Returning Officer who issues the presumptive winner with a Certificate in Form 38."***

**[33]** Counsel submitted that the Appellant herein was declared winner of the election and issued with the certificate in Form 38 on 5th March, 2013 and any petition challenging the Appellant's election ought to have been filed *by 2nd April, 2013*. However the petition was filed *on 8th April 2014* under the provisions of Section 76(1)(a) of the Elections Act 2011 which was declared to be inconsistent with Article 87(2) of the Constitution and to that extent a nullity.

Section 76(1)(a) of the Elections Act 2011 provides as follows:-

> ***"(1) A petition-***
>
> ***(a) to question the validity of an election shall be filed within Twenty Eight days after date of publication of the results of***

***the elections in the Gazette and served within fifteen days of presentation."***

**[34]** Counsel referred the Court to Article 2(4) of the Constitution which stipulates:

***"Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid."***

**[35]** On the basis of the foregoing principles, counsel submitted that the entire proceedings in the High Court and Court of Appeal were void and a nullity *ab initio*. Nothing can flow from those proceedings, and there was no need for an application to be filed in the High Court or Court of Appeal seeking an order to this effect. He relied upon the decision of ***Macfoy v. United Africa Co. Ltd***[1961] 3 All E.R.where the Court stated that:

***"If an act is void then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad, you cannot put something on nothing and expect it to stay there. It will collapse."***

**[36]** Counsel submitted that this argument was upheld by the Court of Appeal in ***Suleiman Said Shahbal v. Independent Electoral & Boundaries Commission & others,*** *Civil Appeal No. 42 of 2013*. The Court (at page 382) stated:

> ***"The edict of Article 2(4) above speaks for itself, the letter and spirit of the above provision leaves no doubt in our minds that a provision of the law that is inconsistent with the Constitution is not a mere irregularity, but a nullity."***

The Court went on to state (at page 385) that:

> ***"We do not believe that it would be promoting the purpose of the constitution or advancing its principle and values or contributing to good governance to ignore Article 2 (4) and hold, on the facts of this case, that a statute that is blatantly violative of the Constitution can form the foundation of valid legal claims. At a time when the Constitution of Kenya is still in its early years of interpretation, the idea that statutory enactments contrary to the Constitution can claim even fleeting validity should not be countenanced, let alone entertained."***

**[37]** Counsel submitted that the declaration that Section 76(1)(a) of the Elections Act, 2011 is invalid, has retrospective effect, therefore invalidating the proceedings filed before the date of the decision.

**[38]** Whether or not this issue was raised and canvassed before the High Court and the Court of Appeal, it was counsel's submission,was a question of no materiality.

**[39]** With these submissions, counsel concluded by urging the Court to hold that these proceedings were a nullity *ab initio,* and the *status quo* that prevailed before the filing of the petition in the High Court should be reverted to, namely,the declaration that the Appellant was duly elected as the Member of the National Assembly for Othaya Constituency.

### *f) 2nd and 3rdRespondent's Submissions*

**[40]** Mr.Munge, learned counsel for the 2nd and 3rdRespondents, supported the petition submitting that the elections held on 4th March, 2014 were the first under the new Constitution and the Elections Act, 2011; therefore, it was a moment for guiding jurisprudential directions to be issued on elections and election disputes. He submitted that, as decisions of the Court of Appeal are binding on the High Court and the Subordinate Courts, any errors of the Court of Appeal if allowed to stand, would have a negative effect on future election-dispute settlement.

**[41]** Counsel submitted that as the Court entertains the rights of the parties, it should also consider the rights of the voters in Othaya Constituency and, while balancing those rights, uphold the terms of Article 38(2) of the Constitution.

**[42]** Counsel associated himself with the Appellant's submission that the petition at the High Court was filed *out of time,* and this was an issue of law set under the Constitution. It was his further submission that there cannot be an estoppel against the provisions of the Constitution, or statute, as constitutional and statutory timelines are not to be waived, even by consent of the parties.

**[43]** Mr.Munge submitted that Article 87 of the Constitution donates power to Parliament to establish mechanisms for the timely settling of electoral disputes, and thus, time is a vital factor.

**[44]** Mr.Munge argued that the Court of Appeal did not uphold, nor protect the principles set out in Article 81,as is required of it under Article 159 of the Constitution. Article 164(1)(b) of the Constitutionprovides that the jurisdiction of the Court of Appeal is to be in the manner prescribed by an Act of Parliament.The Elections Act limits the Court's jurisdiction to matters of law only. This, he urged, meant that in accordance withSection 85A of the Elections Act, the Court of Appeal was to restrict itself to no more than

matters of law. He relied on the holding of Lord Denning in ***Bracegirdle v Oxley***(1947) 1 KB 349, that **determination of primary facts is always a question of fact**. Counsel urged the Court to adopt this holding and find that the Court of Appeal erred by making conclusions and determinations on primary evidence presented before the Election Court. He urged that Section 3 of the Supreme Court Act provides that one of the Court's objectives is to develop rich jurisprudence;hence the need for the Court to overturn the decision of the Court of Appeal, and establish jurisprudence on the latter's bounds in election disputes.

**[45]** Learned counsel sought to highlight the issue of the 92 polling stations in respect of which the Court of Appeal observedthere had been errors and,based on these findings, it declared the Appellant's election invalid. He submitted that it be appreciated that the High Court had the *opportunity to examine the documents, video clips on the happenings at the tallying centre and the demeanour of witnesses*, which opportunity it did exercise. However, the Court of Appeal did not have such an opportunity. Relying on the case of ***Attorney-General v. David Marakaru****[1960] E.A 484*, ( the ***Marakaru*** case)it was counsel's submission that when an appellate Court is faced with a situation where it is supposed to look at issues of fact, that Court should look at the facts presented at the trial Court, to see if there was an error in principle in reaching a particular conclusion, but not delve into and distinguish the factual issues. On that basis learned counsel urged the Court to apply the principlein the***Marakaru***case.

**[46]** Counsel submitted that the Court of Appeal haddiffered with the trialCourt on factual issues on which it had no jurisdiction. For instance,*while the Court of Appeal found that the errors affected the results of the elections, the High Court found that the errors did not affect the results*. It was his submission that the findings of the Court of Appeal on the issue of errors, which was a factual matter, was because *the Court did not apprehend Form 35 which was the primary document*.

**[47]** Learned counsel took the Court through the results of two polling stations, to demonstrate the errors on Form 35. He conceded that while the narrative part of Form 35 had certain mistakes, this did not affect the final results as, with the exception of 10 polling stations, the results of all the identified 92 polling stations were correctly entered in Form 36 from Form 35. This fact had also been acknowledged by the 1stRespondent during cross-examination by counsel for the Appellant, at the High Court. He further submitted that under Regulation 80 of the Election Rules, a party at the polling station not satisfied with the results announced, had a right to ask for a recount, which right the 1stRespondent, by his own admission, had not sought to exercise.

**[48]** Counsel submitted that Section 83 of the Elections Act made provision for instances where mistakes occurred, but which, do not affect the results; and the High Court extensively dealt with this proviso, and adopted this

Court's decision in the ***Raila Odinga*** case, in which mistakes were held not to affect the results. However, the Court of Appeal had labelled such as"many mistakes," and had then proceeded to nullify the election notwithstanding the fact that they did not affect the results. He urged that the mistakes identified did not affect the constitutionality of the election, because in accordance with Article 38, they did not affect the will of the people of Othaya; thus there was no justification in law for the Court of Appeal to nullify the elections.

**[49]** Counsel concluded by urgingthat there was *need for the Court to clarify when a vacancy occurs under Article 101 of the Constitution, as it is defined neither by the Constitution nor the Elections Act*. This was important,as there were constitutional timelines within which the 2ndRespondent had to conduct the by-election.Counsel cited**Black's Law Dictionary:** 'occurrence is when there is a vacancy' hence the question, does the vacancy occur immediately the Judgment is delivered, or upon declaration by the Speaker?

**[50]** He submitted that three different dates had been cited by the parties herein, on when the vacancy may have occurred:

(i) **13th February, 2014**: the date when the Court of Appeal delivered its judgement;

(ii) **6th March, 2014**: the date when the Court of Appeal issued the certificate of nullification under section 86(1) of the Elections Act (the said certificate was signed by the Deputy Registrar); and

(iii) **10th March, 2014**: the date when the Court of Appeal sitting in Nyeri amended the error in its Judgement, and issued a second certificate of nullification under Section 86(1) of the Elections Act - the said certificate was signed by the three Judges of Appeal from the Bench that heard the appeal. (On the same date the Speaker on National Assembly issued a notification of vacancy pursuant to Section 86 of the Elections Act).

### *g)* 1stRespondent's Submissions

**[51]** Mr. Marete, learned counsel for the 1stRespondent, contested the petition, submitting pointing out that the appeal in the Court of Appeal had not succeeded on all the grounds listed in the Memorandum of Appeal, but only as regards the application of the law on scrutiny and recount, and the award of costs.

**[52]** Heurged that the Court of Appeal did not deal with matters of fact,as what was before the Court, in principle,was the question of recount and scrutiny.It was his submission that the trial Court declined to grantan order for scrutiny and recount on several occasions, and notwithstanding that the 1stRespondent had given reasons why scrutiny and recount was necessary,the Rules providing for a party to seek an order for scrutiny and recount at any time.

**[53]** Counsel submitted that there were "numerous irregularities" in the election, one of which was over-voting at five polling stations. Using Kagundu Polling station as an example, he stated that, as per the principal register, there were more votes recorded as cast, than the number of registered voters, which situation required the cancellation of the results of that polling station in accordance with Regulation 83 of the Election Rules. It was his submission that at the High Court, the 2ndRespondent had not addressed itself, by way of evidence, on the issue of over-voting in the five polling stations, yet the Judge still found that no over-voting was proved, and so he denied a recount.

**[54]** Counsel argued that in keeping with the law on scrutiny and recount, the 1stRespondent pleaded and proved errors in 92 polling stations; and thus, in the light of the Court's decision in the ***Raila Odinga***case, the burden of proof had shifted to the 2ndRespondent. He asserted that out of a total of 112 polling stations in Othaya, the 1stRespondent pleaded that 92 showed the errors and the Appellant, through her chief agent Jeremiah Ichaura, showed that the errors affected polling stations. The point of departure between the 1stRespondent and Mr. Ichaura was only as to the effect of the irregularities on the election outcome.

**[55]** Counsel submitted that the trial Court found the evidence of Mr.Ichaurato be uncontroverted. However, it was his contention that according to the law of evidence and trial, to controvert a fact that has been deponed to by a witness, one does not have to cross-examine that witness. In

the alternative, onecoulddepone to a different set of facts. He furtherargued that Mr. Ichaurahad no capacity to give views as to the errors of the 2nd Respondent, and that this was the position taken by the 1st Respondent,and nowhere did he admit to the evidence of Mr. Ichaura as claimed by the Appellant.

**[56]** It was counsel's further submission that the law on elections was not changed by this Court's finding in the ***Raila Odinga***case. He contested the Appellant's submission that this Court should find that, in line with Section 83 of the Election Act, there would be no basis for overlooking errors in the electoral process. Heurged that Section 83 of the Act is not a panacea for endemic errors affecting the outcome of an election. On this point, he relied on the case of ***Mbowe v Eliufoo****[1967] E.A 240.*

**[57]** Counsel asked the Court to take note of the publication of the official results by the 2nd Respondent on their web-page, which results were now the fourth set released by them: the first being those released at the tallying centre with the omission ofKagumo Primary polling station; the second at Bomas of Kenya, with the inclusion of KagumoPrimary polling station; and the third was the pronouncements by the 2nd Respondent in the course of the petition. He submitted that the question as to why the results kept changing was never answered, yet it was the Court's duty, through recount and scrutiny, to investigate and ensure that there was a valid outcome.

**[58]** He submitted that the Court should have applied the materiality test as propounded in **Opitz v Wrzennewsky,** *2012 SCC 55, 2012 3 SCR 76*.He urged that it was not possible, after the finding on irregularities, for the High Court to hold that the process met the test of accuracy and verifiability under Article 86 of the Constitution when election was both a numerical issue and an issue about votes cast in a system of universal suffrage, and equality of the vote.

**[59]** Counsel urged that all parties had agreed that one of the issues for determination by the Court of Appeal, was the exercise of the discretion to grant an order of scrutiny and re-count. Hence, to examine whether discretion was judiciously applied, the Court of Appeal had to sift through the evidence and, having done so the Court found that it was not judiciously exercised. Based on this finding, Counsel urged the Court had no choice but to nullify the election, as it could not order a recount and scrutiny, since that would be delving into matters of fact.

**[60]** On the issue of costs, it was Counsel's submission that it was wrong for the High Court to penalise the 1stRespondent with unascertained costs, yet the 1stRespondenthad informed the Court of the irregularities, and proved there were errors and irregularities in the electoral process.

**[61]** It was his conclusion that the Court of Appeal did not delve into facts; all it did was to question whether the law as applied by the High Court Judge

on the two issues was correctly applied. He urged the Court to uphold the Court of Appeal decision.

**[62]** With regard to the issue of the Court of Appeal arrogating toitself jurisdiction not granted by law, counsel reiterated that for the Court to arrive at the point of law, it had to appraise the evidence, and the question this Court should ask is whether a final decision was made on a point of law or fact. It was his contention that the Appellant had not demonstrated that the ultimate decision of the Court rested on a point of fact.

**[63]** On the issue of nullity of the petition, Counsel conceded that *Section 76(1)(a) of the Elections Act was declared unconstitutional in the **Joho Matter***. However, this should be considered in its proper perspective in line with Article 47 (right to a fair administrative action) as read with Article 87 (empowering Parliament to enact mechanisms for the timely settling of electoral disputes). It was his submission that in pursuance of Article 87 of the Constitution, Parliament enacted the Elections Act 2011, and provided guidance inthe conduct of electoral disputes. Hence, the 1st Respondenthad filed the petition *on the strength of a law enacted by Parliament*. He posed the question, where did justice lie where a certain Section of *the law had been followed, as it stood then, and the Court found it unconstitutional?* He further submitted that the issue of nullity of the initial petition was not raised by any

of the parties at the Court of Appeal, and thus it could not be raised now in this Court because if indeed it was such a vital issue it would have been the first point to be raised as a jurisdiction point.

**[64]** On the argument that the Court of Appeal did not follow *stare decisis*, Counsel submitted that the citation of the ***Raila Odinga*** case by the Appellant was only in relation to the question of the standard of proof that a petitioner before an Election Court must attain in order to be able to prove a claim. He disputed that the point arose in the context of the Court's consideration of the seals found in one of the polling stations.

**[65]** On the submissions by Counsel for the 2ndRespondent that Form 35 contained two parts, (the narrative part and the results part), and that the presiding officer could make mistakes on the narrative part, it was his submission that this was not the case, because Form 35 was one document and not two documents rolled up into one; therefore, if the document had a mistake in one part, that mistake of necessity, must also nullify the correct part of Form 35.

**[66]** As regardsthe issue as to when a vacancy occurs under Article 101 of the Constitution, it was Counsel's contention that Article 101 was clear, because once the Court of Appeal delivered its Judgement on 13th February, 2014 the

vacancy occurred, and the ninety days within which a by-election has to be conducted began running. He further submitted that the Judgement was a Judgement *in rem*, as opposed to a Judgement *in persona*, which binds the whole world. Therefore, with effect from the 13th day of February 2014 the Appellant ceased being the member of National Assembly for Othaya and the vacancy took effect.

## IV. ISSUES FOR DETERMINATION

**[67]** Flowing from the foregoing submissions, the following issues have crystallized before this Court for determination:

*i) whether these proceedings were a nullity ab initio, having been premised on a Petition filed out of time at the High Court;*

*ii) whether the Court of Appeal in arriving at its decision exceeded its jurisdiction by delving into issues of fact;*

*iii) whether the Court of Appeal misdirected itself when it made its finding on the issue of scrutiny and re-count;*

*iv) when did the vacancy for the Member of the National Assembly for Othaya occur?*

**[68]** The issue, whether these proceedings were a nullity *ab initio* is an issue that goes to the jurisdiction of this Court to entertain this matter.The question of jurisdiction is a pure question of law.This Court has on several occasions

adopted the dictum ofNyarangi J.A in the ***Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*[1989] KLR 1** that it has to be determined from the start, and that where the Court finds it has no jurisdiction, it should down tools. This is the approach this Court adopted when it considered the application for conservatory orders in this matter. We will, therefore consider this issue of nullity first, as it touches on the jurisdiction of this Court.

**[69]** At the main hearing of the appeal, the pertinent issue of whether the petition in the instant matter was filed out of the time allowed by **Article 87(2)** of the Constitution and on the basis of this Court's decision in the ***Joho*** case**,**therefore, entailed the question of nullity. Having considered the submissions, we are of the view that this issue touches on the jurisdiction of this Court and as such, should be considered and resolved in priority.

**[70]** Itwasthe Appellant's argument that the proceedings in the High Court were a nullity, as the petition was filed outside the time allowed by **Article 87(2)** of the Constitution.He cited this Court's decision inthe ***Joho*** case*,* arguingthat since the Court had clarified that *the date of declaration was when the County Returning Officer issued the presumptive winner with a certificate in Form 38*, then the date of declaration of the election results of the Othaya Member of the National Assembly was the date when the Constituency Returning Officer issued the presumptive winner (the Appellant herein) with a certificate in Form 38. As such, the Appellant was declared the

winner of the election and issued with the certificate in Form 38 *on 5th March, 2013*.

**[71]** Counsel specifically relied on paragraph 103 of the ***Joho*** case, in which this Court held that:

> ***"The Appeal is allowed, with the holding that Section 76(1)(a) of the Elections Act, 2011 is inconsistent with Article 87(2) of the Constitution of Kenya, 2010 and, to that extent, a nullity."***

Therefore, counsel argued that in consonance with **Article 87(2)** of the Constitution, any petition challenging the Appellant's election should have been filed *on or before 2nd April, 2013* as opposed to 8th April, 2014 which is the date when the petition in the High Court was filed in compliance with the invalidated **Section 76(1)(a)** of the Elections Act, No. 24 of 2011 (the Elections Act). As such, counsel argued that the petition had been filed 6 days out of time.

**[72]** Counsel relied on **Article 2(4)** of the Constitution and argued that the petition filed on 8th April 2013 was in contravention of **Article 87(2)** of the Constitution, and hence, was a nullity. It was submitted that the proceedings flowing from the petition were also a *nullity*. Counsel relied on the authority of ***Macfoy v United Africa Co. Ltd [1961] 3 All E.R.*** (the ***Macfoy*** case) in which Lord Denning held that:

***"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad, you cannot put something on nothing and expect it to stay there. It will collapse."***

**[73]** The 2nd and 3rdRespondents supported the submissions of the Appellant,as elaborately described hereinabove.

**[74]** In response, counsel for the 1stRespondent argued that the Appellant was raising the nullity question for the very first time. Counsel invoked the principle in the well-known case of ***Charles Rickards v Oppenheim (1950) All E.R 420,***to argue that since the Appellant had acquiesced in the process of litigation from the High Court to the Court of Appeal; she was barred from challenging the validity of the process at this stage. In any event, counsel argued, the Court's decision in ***Joho*** did not address the broader issue of retroactivity. Counsel contested the submission that a declaration of invalidity could apply retroactively. In support of this submission, counsel cited this Court's decision in the ***S.K. Macharia*** case and in particular, the Court's holding (at page 50):

> ***"Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately accrued before the commencement of the Constitution."***

Counsel urged the Court to uphold the rights which had accrued to the 1stRespondent, at the time of filing the petition, by dismissing the Appellant's case for nullity.

**[75]** The electoral history of Kenya is replete with cases of delay in finalizing matters, thereby denying the voters the opportunity to have their chosen representatives in the organs of democratic governance. It is clear that the sovereign power belongs to the people, and is exercised either directly or through their democratically elected representatives in the State Organs, which include Parliament and the Legislative Assemblies in County Governments. The voters' rights in this regard are quite clear, from the terms of the Constitution (Article 1).

**[76]** To give effect to the foregoing principle, **Article 87(1)** of the Constitution directed Parliament to establish mechanisms for the timely settlement of electoral disputes; hence the Elections Act. Further, **Article 87(2)** made the provision requiring that election petitions for elections other than Presidential elections, be filed within *28 days* after the declaration of the election results by the Commission.

**[77]** Unfortunately, Parliament had enacted a contradictory provision, in the form of **Section 76(1)(a**) of the Elections Act. In considering the effect of this provision, this Court in ***Joho***, declared **Section 76(1)(a)**of the Elections Act inconsistent with Article 87(2) of the Constitution.

**[78]** In line with the time-limits set by the Constitution, this Court, in***Raila Odinga & Others v Independent Electoral and Boundaries Commission & Others***, S.C. Petition No. 5 of 2013, and the ***Joho*** case,emphasized the need for adherence to the time-limits provided by the Constitution. In a Ruling dated 3rd April, 2013 expunging a new affidavit from the record before the Court, in the ***Raila Odinga*** case, the Court held (at page 9):

> ***"However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and Rules relating to the Constitution, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity. The Rules and time-lines established are made with special and unique considerations."***
>
> ***..."The background to the setting of the strict time-lines must be known to most Kenyans. There was a purpose to this and the intention of the People of Kenya and of Parliament must be respected."***

> ***...“The parties have a duty to ensure they comply with their respective time-lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.”***

**[79]** The Supreme Court has to give guidance on fundamental principles of the Constitution; and pursuant to this role, this Court in the ***Joho*** case adverted to the bearing of <u>time</u> in the scheme of constitutional processes (at paragraph 40)

> ***“The instant appeal involves a cardinal issue of law. The issue for determination in the High Court and the Court of Appeal was one of interpretation of the Constitution and an Act of Parliament: particularly on the issue as to when the <u>time-limit</u> envisaged under Article 87(2) of the Constitution is set in motion, and whether Section 76(1)(a) of the Elections Act is ultra vires the Constitution. This remains the issue before this Court.”***

In arriving at its conclusion, the Court adopted a broad interpretation, to safeguard the Constitution and its provisions regarding the settling of electoral disputes. The Court was clear in affirming that the terms of the Constitution are paramount in every instance of their application, thus holding (at paragraphs 48 and 51):

***"While the principle of timely disposal of election petitions affirmed by the Court of Appeal, must be steadfastly protected by any Court hearing election disputes, or applications arising from those disputes, the interests of justice and rule of law must be constantly held paramount."***

***..........***

***"In conclusion, the issue before the Court calls for a pragmatic approach in its adjudication, for the reason that Kenya as a nation has largely been shaped by the occurrences within the electoral system. There is a reason for this. Kenya today has undergone significant transformations along the paths of democracy and constitutionalism; and, necessarily, the majoritarian expression through electoral practice has had a major role, of which this Court takes cognizance. Thus the Constitution of Kenya, 2010 set out to streamline that electoral system. Part of that streamlining was the clear provisions on the settlement of electoral disputes, the timelines involved and various principles running across the entire span of the Constitution. In defending the Constitution and the aspirations of the Kenyan people, this Court must always be forward-looking, bearing in mind the consequences of legal uncertainty upon the enforcement of any provision of the Constitution."***

**[80]** Based on this Court's decision in ***Joho***, the Court of Appeal in ***Suleiman Said Shahbal v The Independent Electoral and Boundaries Commission and 3 others, Civil Appeal No. 42 of 2013***, dismissing the appeal, held that:

> ***"We do not believe that it would be promoting the purpose of the Constitution, or advancing its principle and values or contributing to good governance to ignore Article 2(4) and hold, on the facts of this case, that a statute that is blatantly violative of the Constitution can form the foundation of valid legal claims. At a time when the Constitution of Kenya is still in its early years of interpretation, the idea that statutory enactments contrary to the Constitution can claim even fleeting validity should not be countenanced, let alone entertained. Holding otherwise would be contributing to the erosion of the supremacy and preeminence of the Constitution in the hierarchy of legal norms."***

The Court of Appeal further held that:

> ***"We are alive to the fact that when Section 76(1) (a) of the Elections Act, 2011 was enacted, Article 87(2) of the Constitution was already in operation. Giving that statutory provision legal effect from the date of its enactment, would, in a sense be tantamount to holding that from the date it came into operation until it was declared unconstitutional on 4th February, 2014, that provision of the***

> ***statute overrode the clear provisions of Article 87(2) of the Constitution. We are not convinced."***

**[81]** We take judicial notice that the principle in the ***Joho case*** has been relied upon by the Court of Appeal in the case of ***Paul Posh Aborwa v Independent Electoral and Boundaries Commission and 2 Others, Civil Appeal No. 52 of 2013,*** in a judgement dated 2nd May 2013 in which the Court held:

> ***"The result of the foregoing is that we uphold the preliminary objection and determine that we have no jurisdiction to hear and determine the appeal emanating as it does from the proceedings that are a nullity by reason of having been instituted outside of the time limit set out under Article 87(2) of the Constitution of Kenya, 2010."***

**[82]** This Court has been keen to ensure predictability, certainty, uniformity and stability in the application of the law.This inclination was asserted in the case of ***Jasbir Singh Rai and 3 others v The Estate of Tarlochan Singh Rai and 4 Others, Petition No. 4 of 2012*** (the ***Rai*** case) in which the following passage appears (paragraph 42):

> ***"The immediate pragmatic purpose of such an orientation of the judicial process is to ensure predictability, certainty, uniformity and stability in the application of 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."***

**[83]** The Court's position in this case was that decisions of the Supreme Court are only arrived at after conscientious and due consideration. This approach is the basis upon which we evaluate the present scenario. As already noted, the ***Joho case*** declared Section 76(1)(a) of the Elections Act a nullity-a declaration that was clear as well as unqualified. Indeed, the Court of Appeal appreciated the sanctity of this declaration and dismissed the appeals before it-in accordance with comparative judicial practice around the world. In India, for instance, Justice B.P Sinha in***Bengal Immunity Co. Ltd v Bihar, (1955) 2 S.C.R 603, ('55') A. SC 661***observed:

> ***"Under the Constitution and even otherwise, this Court is naturally looked upon by the country as the custodian of law and the Constitution, and if this Court were to review its own previous decisions merely because another view is possible, the litigant-public may be encouraged to think that it is always worthwhile taking a chance with the highest Court in the land."***

**[84]** In ***Joho***, this Court had been silent on the effect of its declaration of invalidity of a statute and therefore unequivocal about the invalidity of any action emanating from Section 76(1)(a) of the Elections Act. However, in appropriate cases, this Court may exercise its jurisdiction to give its

constitutional interpretations retrospective or prospective effect. This derives from the broad mandate accorded this Court by Article 1, 10, 163, 159 and 259 of the Constitution, and Section 3 of the Supreme Court Act, 2011. Indeed, this Court has exercised this jurisdiction in ***Re Senate Advisory Opinion Reference No. 2 of 2013***.

**[85]** In the South African case of ***Sias Moise v. Transitional Local Council of Greater Germiston, Case CCT 54/00, Justice Kriegler*** *(for the majority)* ***held:***

> ***"If a statute enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution."***

> ***"Because the Order of the High Court declaring the section invalid as well as the confirmatory order of this Court were silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law the provision has been a nullity since that date."***

The withholding of prospective effect for the declaration of invalidity, was despite a specific provision in the South African Constitution [Section 172(1)] allowing the Court to make an order limiting the retrospective effect of a declaration of invalidity, or suspending the declaration of invalidity.

**[86]** In India, Mahajan J, in ***Keshavan Madhava Menon v. The State of Bombay [1951] INSC*** heldthat:

> ***"If a statute is void from its very birth then anything done under it, whether closed, completed, or inchoate, will be wholly illegal and relief in one shape or another has to be given to the person affected by such an unconstitutional law."***

This is also in line with the holding of Lord Denning in ***Macfoy's*** *case* **(supra)**, which has been cited widely and with approval.

**[87]** However, while we have pronounced ourselves on the issue of invalidity of Section 76(1)(a) of the Elections Act, in line with the Constitution, this Court is not precluded from considering the application of the principles of retroactivity or proactivity on a case-by-case basis. As such, in the instant matter, the issue of invalidity of Section 76(1)(a) of the Elections Act is bound to the issue of time. Time, as a principle, is comprehensively addressed through the attribute of accuracy, and emphasised by Article 87(1) of the Constitution, as well as other provisions of the law. Time, in principle and

applicability, is a vital element in the electoral process set by the Constitution. This Court's decision in ***Joho*** was guided by this consideration.

**[88]** For the purposes of this case, we apply the precedent in ***Joho,*** taking into account that the issue in question involves imperatives of timelines demanded by the Constitution in settling electoral disputes which involve accuracy, efficiency and exactitude, limiting any other considerations, in the exercise of our discretion.

**[89]** From the analysis above, and from a review of the principles in the ***Joho*** case as regards the settlement of electoral disputes, we are convinced that for the benefit of certainty and consistency, the declaration of invalidity must apply from the date of commencement of the Elections Act, i.e. 2nd December 2011.

**[90]** We are aware that several constitutional processes have been concluded, and others ensued as a result of the directions of the Courts while handling electoral disputes following the 2013 General Elections. It is our position that, in either of these scenarios, and as a matter of finality of Court processes, parties cannot reopen concluded causes of action. A relevant case in this regard is ***A v. The Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88***, (at paragraph 36) where Murray CJ, stated as follows:

> ***"Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the***

***point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position”***.

**[91]** We are of the view that the above principles are sound in law and applicable in this case. As a result, the apprehension that a declaration of nullity and its retrospective effect may trigger a frenzy to re-open concluded or determined election cases, should not arise or be contemplated.

## V. ORDERS

**[92]** As a result of our conclusion, it is not necessary to consider and determine the other issues presented to us in the Petition of Appeal. We will make the following Orders:

***1. The Petition of Appeal dated 8th April, 2014 is hereby allowed.***

2. ***The Judgement, consequential Orders and the proceedings before the Court of Appeal in Nyeri Civil Appeal No. 31 of 2013 are hereby declared null.***

3. ***All the costs in the proceedings before the High Court, the Court of Appeal and this Court, be borne by each party respectively.***

4. ***For the avoidance of doubt, the declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of the seat for the Othaya Member of the National Assembly is hereby restored.***

**DATED** and **DELIVERED** at **NAIROBI** this 5th day of **May** 2014

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|---|---|
| ............................................... | ............................................... |
| **WILLY MUTUNGA** | **K.H. RAWAL** |
| **CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT** | **DEPUTY CHIEF JUSTICE/ DEPUTY PRESIDENT OF THE SUPREME COURT** |
| ...................................... | ........................................ |
| **P.K. TUNOI** | **M.K. IBRAHIM** |
| **JUSTICE OF THE SUPREME COURT** | **JUSTICE OF THE SUPREME COURT** |
| ............................................ | ...................................... |
| **J.B. OJWANG** | **S. C. WANJALA** |
| **JUSTICE OF THE SUPREME COURT COURT** | **JUSTICE OF THE SUPREME** |

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

**I certify that this is a true copy of the original**

**REGISTRAR**
**SUPREME COURT OF KENYA**