REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga, CJ & P, Mwilu, DCJ & VP; Ibrahim, Ojwang, Wanjala, Njoki & Lenaola SCJJ)

PETITION 7 OF 2018

Consolidated with PETITION 9 OF 2018

–BETWEEN–

HON.MOHAMED ABDI MAHAMUD..... PETITIONER

–AND–

AHMED ABDULLAHI MOHAMAD.....1ST RESPONDENT

AHMED MUHUMED ABDI.....2ND RESPONDENT

GICHOHI GATUMA PATRICK.....3RD RESPONDENT

INDEPENDENT ELECTORAL

BOUNDARIES COMMISSION.....4TH RESPONDENT

(Appeal from the judgment and decree of the Court of Appeal at Nairobi (Waki, Kiage & Makhandia JJ.A) in Election Petition Appeal No.2 of 2018, dated 20th April, 2018)

RULING

A. INTRODUCTION

[1] The Notice of Motion before the Court is dated 28th May 2018 and anchored on Articles 24, 48, 50, and 159 (2) (d) of the Constitution, sections 20 and 21 of the

Supreme Court Act, Rules 3 and 18 of the Supreme Court Rules, 2012 and all other enabling provisions of the law. It is supported by an affidavit sworn by the Appellant on even date.

[2] The Application seeks the following Orders:

1. *That this Honourable Court be pleased to take additional evidence identified in the Appellant's supporting affidavit or to direct that additional evidence be taken by the trial Court or by the Registrar in such manner and subject to such conditions as this Honourable Court deems appropriate to achieve the ends of justice.*
2. *That the costs of this Application be provided for.*
3. *That such other and/or further relief be granted as this Honourable Court might deem fit and just to grant in the unique circumstances of this matter.*

[3] The motion is supported by nine grounds summarized as follows:

(a) *The further evidence adduced will assist this Court as the Court of last resort to reach a just determination on the issue of the Appellant's academic qualification.*

(b) *The appeal on the question of the Appellant's education is founded inter alia on the fact that he had two degrees presented at both superior courts even though his intention is to demonstrate at the hearing of the petition that parliament had waived this requirement in respect of the 2017 gubernatorial elections.*

(c) *The legitimacy of his degrees was nevertheless erroneously impeached by the Appellate Court.*

(d) *The law empowers this Honourable Court with wide powers to delve deep in all disputes and ascertain the real issues before it and administer substantive justice.*

(e) *The delay in filing the additional evidence was as a result of a pre-trial conference conducted by the trial judge on 9th October 2017 wherein the parties entered into a consent admitting all documents on record, including the Appellant's degree without the requirement for strict proof.*

(f) *It is in the interests of justice to allow further evidence be adduced before this Honourable Court for the purposes of a just and fair determination of this matter.*

(g) *The Respondents stand to suffer no prejudice if the orders sought in the motion are granted.*

(h) *The Appellant on the other hand stands to suffer permanent prejudice extending beyond the political sphere if his education/academic bonafides are impeached without considering the fresh evidence sought to be adduced.*

(i) *This Court has discretion and jurisdiction to grant the Orders sought in the interests of justice and affirmation of the Appellant's right under Articles 28, 38 (3) (6), 43 (1) (f) and 81 of the Constitution of Kenya.*

B. BACKGROUND

High Court

[4] On 8th August, 2017, gubernatorial elections were conducted for Wajir County. Following the counting and tallying of votes, the 3rd Respondent declared the Appellant as having garnered the highest number of votes (49,079). As such, he was declared the duly elected Governor of Wajir County.

[5] The 1st and 2nd Respondents, also gubernatorial candidates in Wajir County, were dissatisfied with the declaration of results and filed a petition on 6th September, 2017 challenging the results.

[6] To settle this dispute, the learned Judge adopted the issues for determination that had been agreed on by the parties, namely;

> ***a) whether the Gubernatorial Election for Wajir County held on 8th August, 2017 was in accordance with the Constitution and electoral laws.***
>
> ***(b) whether there were any electoral malpractice and/or offences during the Wajir County Gubernatorial Election held on 8thAugust, 2017 which affected the outcome of the Gubernatorial Election.***
>
> ***(c) whether the 1st Respondent was lawfully qualified to vie for the Wajir Gubernatorial Election on the 8th August, 2017.***
>
> ***(d) whether the 1st Respondent was validly elected as Governor for Wajir County in the Election held on 8th August, 2017.***
>
> ***(e) who should bear the costs of the Petition and what should be the instructions fee on the Petition.***

[7] On 12th January 2018, Mabeya J rendered his decision. He allowed the petition and declared that:

> ***(a) the 1st Respondent was not validly cleared to vie for the seat of Governor for Wajir County as he did not possess the educational qualifications;***
>
> ***(b) the 1st Respondent was not validly elected to the position of Governor and his election was null and void;***
>
> ***(c) the 3rd Respondent was to hold a fresh election in conformity with the Constitution and the Elections Act, 2011.***

(d) the Respondents to jointly and severally, pay costs to the petitioners for taxation by the Deputy Registrar provided however that the instructions fee was capped at Kshs. 2 million.

Court of Appeal

[8] Aggrieved by this decision, the Appellant preferred an appeal to the Appellate Court. The Returning Officer and the IEBC also filed a cross appeal. The Appellate Court determined the appeal on two issues. Firstly, *whether the Appellant met the constitutional and statutory qualifications to vie for the position of governor* and secondly *whether the High Court had jurisdiction to enquire into the issue which related back to the Appellant's nomination to vie.*

[9] On the second issue, the Appellate Court determined that the learned Judge, committed no error holding that he had jurisdiction to enquire into a question as to the qualification of a candidate which goes to his eligibility to vie in cases such as was before the learned Judge where the matter had not been dealt with finality by any other body constitutionally or statutorily mandated to do so.

[10] On the first issue, it upheld that trial judge's finding that the Appellant lacked the requisite academic qualifications to vie for the gubernatorial seat. As a consequence, the Appellate Court remarked that examination of the other grounds of appeal would be superfluous. Consequently, the Court of Appeal found the appeal to be devoid of merit and dismissed it with costs to the 1st and 2nd Respondents. The cross appeal was also dismissed with no Orders as to costs.

[11] That decision triggered the instant motion before us which is supported by the 3rd and 4th Respondent and opposed by the 1st and 2nd Respondent.

C. SUBMISSIONS

Appellant

[12] The Appellant relies on his written submissions dated 20th June 2018 and 6th July 2018. He submits that he is seeking to ensure that his rights to education, correction or deletion of untrue or misleading information, political participation and dignity under Articles 28, 35, 38(3)(c), 43 (1)(f) and 57(a), (b) and (c) of the Constitution of Kenya are protected and not taken away in a manner that does not accord to fair trial and access to justice as conferred by Articles 48 and 50 of the Constitution.

[13] It is the Appellant's case that there exists a High Court Order in which strict proof had been waived by consent in respect of his two degrees from Kampala University, their respective academic transcripts and an accreditation letter issued by the Commission for Higher Education (CHE) confirming the legitimacy of the two degrees.

[14] The Appellant submits that the additional evidence does not present a new issue for adjudication and will not ambush or prejudice the Respondents' rights to a fair trial in any way.

[15] The Appellant contends that this Court has jurisdiction to entertain this Application by virtue of Rules 18, 3(5) of the Supreme Court Rules 2012, sections 20 and 21 (3) of the Supreme Court Act 2011, Article 159 (2) (d) of the Constitution as read with Rule 3(4) of the Supreme Court Rules, Articles 19 (2), 20 (3), 22(3)(d) and 259 of the Constitution of Kenya.

[16] He relies on this Court's decisions in ***Evans Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others*** [2014] eKLR (***Kidero***), ***George Mike Wanjohi v Stephen Kariuki & 2 Others*** [2014] (***Wanjohi***) ***Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others***, SC Petition No. 6 of 2017 ***(Outa)*** and the Ugandan Supreme Court decision in ***Attorney General v Paul Kawanga Ssemwogerere & Another*** [2004] UGSC 3 to contend that this Court has jurisdiction to entertain further evidence.

[17] He submits that this matter can be distinguished from that of ***Chris Munga N Bichage v Richard Nyagaka Tong'i & 2 others*** [2015] eKLR (***Bichage***) because in the ***Bichage*** matter, the Applicant sought to introduce a document which was already on record and the prejudice to him was minimal.

[18] It is urged that this Court should not elevate *process* over *substantive justice.* In this regard, he urges the Court to be persuaded by the Article ***"Technicalities in Procedure Civil and Criminal", John Davision Lawson, 1910, Journal of Criminal Law and Criminology (Volume 1 Article 4),*** the appellate decision in ***King Woolen Mills Limited & 2 Others*** [2016] eKLR, the Indian Supreme Court decision in ***Akhilesh SinghAkhileshwar.vs Lal Babu Singh*** Civil Appeal Nos. 2108 of 2018 and the United States Supreme Court decision in ***Hormel v Helvering***, 312 U.S. 552 (1941).

[19] The Appellant submits that this Court has inherent jurisdiction to do justice and determine the real dispute in this appeal. To buttress this assertion, he relies on this Court's decisions in ***Deynes Muriithi & 4 others v Law Society of Kenya & another*** [2016] eKLR (***Deynes***), ***Raila Amolo Odinga & anor v IEBC & 2 Others*** [2017] eKLR ***(Raila 2017).***

[20] It is the Appellant's case that his matter demonstrates *sufficient reason* to grant the Orders sought in the motion. He urges the Court to be persuaded by the Court of Appeal's decision ***Savings & Loan Kenya Ltd v Onyancha Bwomote*** [2014] eKLR which provides guidance on aspects of '*sufficient cause.*'

[21] The Applicant submits that section 85A of the Election Act to the extent that it attempts to limit electoral appeals to 'matters of law only', offends fundamental notions of justice and fairness and contravenes the provisions of Articles 19(3) (b) and (c), 20 (3) and (4) 24,25,48, 50 and 259 of the Constitution.

[22] In addition, it is urged that Section 85A attempts to fetter the jurisdiction conferred to this Court by the Constitution to audit the Electoral process for integrity, fidelity and compliance with the constitutional requirements because the audit necessitates an examination of facts.

[23] The Appellant submits that '*matters of law only*' encompass constitutional matters as well since the Constitution is the Supreme law. He urges that such an interpretation by this Court, would bolster the jurisdiction of both the Appellate Court and Supreme Court.

3rd and 4th Respondents

[24] The 3rd and 4th Respondents' submissions in response to the motion are dated 5th July 2018. They submit that this Court is clothed with jurisdiction and powers to grant the Orders sought by virtue of section 20 of the Supreme Court Act, Rules 18 (2) and (3) of the Supreme Court Rules which are anchored on Article 163 (8) of the Constitution; and Article 159 (2) (d) of the Constitution as read with Rule 3(5) of the Supreme Court Rules 2012.

[25] It is submitted that this Court as the ultimate custodian and guarantor of the rights of citizens is vested with the sacred duty to do justice between the parties without being unduly curtailed by rigid Application of procedural formalities. In this regard, they cite the Supreme Court of India decision ***Ashok Kumar Gupta v State of U.P*** Petition (c) No. 511 of 1995, the Singapore Court of Appeal in ***Public Prosecutor v Mohd Ariffan bin Mohd Hassan*** [2018] SGCA 10 and the South African Court of Appeal in ***Mkhize v Department of Correctional Services*** [2015] ZASCA 7.

[26] They contend that the evidence sought to be adduced is not in relation to a fresh case or argument but is crucial for the determination of the core issues already in controversy before the Court. They urge the Court to make an Order for

the consideration of the totality of evidence so as to achieve substantive justice. They contend that no prejudice will be suffered by any party if such Order is made.

[27] The 3rd and 4th Respondents urge this Court to consider the *principle of proportionality* so as to balance the interests of the parties. They submit that this will aid in achieving the overriding goal which is to arrive at a just decision.

[28] They rely on the decisions from the Constitutional Court of South Africa in ***De Lange v Smuts*** No. 1998 (3) SA 785, ***Sadrudin Saffiff v Tarlochan Singh S/O Jwalla Singh***, Supreme Court of India decision in ***Union of India v Ibrahim Uddin & another***, (2012) 8 SCC 148 and the United States Federal Circuit Appeals Court in ***Schwartz v Million Air***, Inc-341 F.3d 1220, 1223-26 (11th Cir. 2003) to urge this Court to allow this Application in the *interests of justice.*

1st and 2nd Respondents

[29] The 1st and 2nd Respondents rely on the replying affidavit deponed by the 1st Respondent on 4th June 2018, their written submissions dated 5th June 2018 and 26th June 2018. They submit that this Court should not allow additional evidence in exercise of its appellate jurisdiction. They buttress this assertion with this Court's decisions in ***Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others*** [2013] eKLR (***Raila 2013***), ***Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others*** [2014] eKLR ***(Obado)*** and ***Bichage.***

[30] The 1st and 2nd Respondents urge that the admission of new evidence will have the effect of re-opening pleading timelines and affecting constitutional timelines and will be a scorn to the jurisprudence set by this Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others,*** Sup. Petition 2B of 2014 [2014] eKLR ***(Munya)*** and ***Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*** [2014] eKLR **(*Aramat*).**

[31] They submit that they will be prejudiced by the admission of new evidence as they prosecuted their election petition at the trial Court timeously, defended their appellate and present appeal timeously even as the Appellant resorts to delay tactics. They urge that compelling them to go through another fact-finding trial will be manifestly unjust.

[32] They contend that the Appellant seeks to adduce additional evidence that was available at the time of the trial yet he chose not to avail it. They urge that the contention that the parties had consented to waive strict-proof is self-defeatist as the Appellant's replying affidavit pre-dates the consent he refers to.

[33] They submit that this Court has no jurisdiction to entertain this matter. They submit that Rule 3(5) of the Supreme Court Rules safeguards this Court's *inherent powers* which are distinct from *inherent jurisdiction*. They rely on this Court's decision in Board of Governors, ***Moi High School Kabarak & another v Malcolm Bell*** [2013] eKLR which outlined the difference.

[34] The Appellant's submission that section 85A of the Elections Act is unconstitutional is urged to be untenable. The 1st and 2nd Respondent submit that this Court has already dismissed this unconstitutionality argument in its decisions in both ***Outa*** and ***Munya.***

[35] The 1st and 2nd Respondent submit that the Appellant cannot move this Court to take evidence in contravention of section 85A of the Elections Act. It is urged that although this Court has discretion to take additional evidence, this discretion cannot be exercised in appellate proceedings where section 85A of the Elections Act is operative. They rely on the ***Bichage*** decision and a Nigerian Supreme Court decision; ***Oke vs Mimiko*** (2014) NWLR to reinforce this contention.

D. ISSUES FOR DETERMINATION

[36] From the pleadings and submissions of the parties, the following issues crystallize for determination:

> *(i) Whether this Court has jurisdiction to grant leave to the Appellant to adduce additional evidence contained in his supporting affidavit;*
>
> *(ii) If (i) is answered in the affirmative, under what circumstances would this Court allow additional evidence?.*
>
> *(iii) Whether leave to admit additional evidence should be granted in this matter?*

E. ANALYSIS

[37] Before we delve into the issue of additional evidence, we must state at this point that we agree with the 1st and 2nd Respondent that the Appellant's submission that section 85A of the Elections Act is unconstitutional is untenable. We have affirmed its Constitutionality in ***Munya*** in paragraphs 64 and 65:

> ***"By limiting the scope of appeals to the Court of Appeal to matters of law only, Section 85A restricts the number, length and cost of petitions and, by so doing, meets the constitutional command in Article 87, for timely resolution of electoral disputes.***
>
> ***Section 85A of the Elections Act is, therefore, neither a legislative accident nor a routine legal prescription. It is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. The Section is directed at litigants who may be dissatisfied with the judgment of the High Court in an election petition. To those litigants, it says: 'Limit your appeals to the Court of Appeal to matters of law only'."***

[38] We also re-affirmed this position in ***Outa***:

> ***"[69] Counsel urged that Section 85A of the Elections Act is unconstitutional, as it limits the jurisdiction of the Court of Appeal to determine questions of law only in appeals on electoral disputes from the High Court. With respect, we do not agree."***

[39] We see no need to depart from these decisions and categorically state again that section 85A of the Elections Act demonstrates the legislature's intention to limit the scope of appeals to the Court of Appeal as *'matters of law only'*.

(i) Whether this Court has jurisdiction to grant leave to the Appellant to adduce additional evidence contained in his supporting affidavit?

[40] The Appellant cites Article 163 (8) of the Constitution as the basis of his Application for additional evidence. It is his contention that the Supreme Court Rules, 2012 are to be viewed in this constitutional context. It is on this basis that he urges that Rule 18 confers jurisdiction upon this Court *in any proceedings* and for *sufficient reason* to call for additional evidence. He also contends that this Rule makes provision for a party to invoke the jurisdiction of the Court by seeking to adduce additional evidence.

[41] The 1st and 2nd Respondents on the other hand will have none of it. To them, the Appellant is playing Russian roulette. They caution us against allowing additional evidence whilst exercising our appellate jurisdiction. They contend that admitting new evidence will contravene section 85A of the Elections Act. They also urge that allowing additional evidence runs afoul of the principles of *'timelines and timeliness'* in election petitions set by this Court and will, in addition, be prejudicial to them.

The law: Constitution, Statutory provisions and Rules

[42] To effectively adjudicate this motion, we must revert to the relevant provisions of the law. Article 163 (4) of the Constitution, provides the '*threshold constitutional basis*' for this Court's appellate jurisdiction. It provides:

> ***"Appeals shall lie from the Court of Appeal to the Supreme Court –***
>
> ***(a) as of right in any case involving the interpretation or Application of this Constitution; and***
>
> ***(b) in any other case in which the Supreme Court or the Court of Appeal, certifies that a matter of general public importance is involved..."***

[43] Article 163 (8) of the Constitution provides that ***"the Supreme Court shall make rules for the exercise of its jurisdiction."*** The Supreme Court Rules, 2012 are enacted pursuant to this Constitutional edict.

[44] The scope and objectives of these rules are set out in Rule 3 as follows:

> ***(1) These Rules apply to proceedings under the Court's jurisdiction and includes petitions, references and Applications.***
> ***(2) The overriding objective of these Rules is to ensure that the Court is accessible, fair and efficient.***
> ***(3) The Court may use appropriate technology in its proceedings and operations.***
> ***(4) The Court shall interpret and apply these Rules without undue regard to technicalities and procedure.***
> ***(5) Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders or give directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court.***

[45] In addition, Rule 18, Supreme Court Rules 2012 (Rule 18) provides:

> ***18. Evidence before the Court***

(1) The Court may in any proceedings, call for additional evidence.

(2) A party seeking adduce to additional evidence under this rule shall make a formal Application before the Court.

(3) On any appeal from a decision of the Court of appeal, or any other court or tribunal acting in the exercise of its original jurisdiction, the Court shall have power—

(a) to call for or receive any record on any matter connected with the proceedings before it;

(b) to re-appraise the evidence and to draw inferences of fact; and

(c) in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by the Registrar.

(4) Where additional evidence is taken by the Court, it may be oral or by affidavit, and the Court may allow cross-examination of any witness.

(5) Where additional evidence is taken by the trial court, the trial court shall certify such evidence to the Court, with a statement of its opinion on the credibility of the witness giving the additional evidence.

(6) Where evidence is taken by the Registrar, the Registrar shall give statements of opinion on the credibility of the witness.

(7) The parties to an appeal shall be entitled to be present when such additional evidence is taken.

[46] Also relevant is **Section 21 (3) of the Supreme Court Act** which provides:

The Supreme Court may make any order necessary for determining the real question in issue in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its

finding on any question which the Supreme Court thinks fit to determine before final judgment in the appeal.

[47] The provisions of **Article 259 of the Constitution** which oblige Courts to *promote 'the spirit, purport, values and principles of the Constitution, advance the rule of law, human rights and fundamental freedoms in the Bill of Rights, permit the development of the law and contribute to good governance* in construing the Constitution. The duty to adopt an interpretation that conforms to Article 259 is mandatory. Thus, in construing the Supreme Court Rules which are enacted pursuant to Constitutional provision, we will be so guided.

Case Law

[48] This Court, has made pronouncements on the import of Rule 18 as pointed out by the parties. In the ***Wanjohi*** case, this Court had the opportunity to address the Application of Rule 8(1) and (2) in relation to the filing of additional pleadings. It was remarked at paragraph 51:

> ***"We note that the Supreme Court Rules, 2012 do not envisage a situation in which a Respondent may lodge a supplementary record of appeal. However, Rule 8(1) and (2) makes provision for any party, with leave of Court or with the consent of the other party, filing further pleadings or affidavits. Such an Application for leave may be made informally. Rule 11 also provides that a Respondent may file grounds of objection, an affidavit, or both. We note that no prejudice was occasioned by the additional material placed before the Court." (emphasis ours)***

[49] The 1st and 2nd Respondents are however resolute that although this Court has jurisdiction to take additional evidence, we cannot exercise it in appellate proceedings where Section 85A of the Elections Act is operative. They rely on our decision in Bichage. In ***Bichage*** this Court had to determine whether to exercise

its jurisdiction and allow the admission of a supplementary affidavit that had been filed out of time.

[50] The supplementary affidavit sought to re-introduce a document that was already on record. On this the Court stated:

> ***"35A. Since in the instant matter Form 38 is indeed part of the record, the Applicant is in no way prejudiced; and an affidavit for the admission of such a document lacks a proper basis."***

[51] The Court distinguished this matter from the ***Wanjohi*** decision as follows:

> ***"[48] The emerging principle logically entails the position that the Supreme Court, sitting on second appeal, is essentially restricted to matters of law only. On that basis, what is the implication of Rules 8(1) and 18(1) and (2) of the Supreme Court Rules, in relation to the Court's discretion as regards the admission of further affidavits or pleadings? In Wanjohi the Court observed that a reading of Rule 8(1) and (2) suggested that it could admit the supplementary record. However, that case is distinguishable from the instant one: because all the parties had consented to the supplementary record of appeal being filed."***

[52] Likewise, we are inclined to distinguish the instant matter from the ***Bichage*** matter. In the instant matter, the Appellant seeks to adduce additional evidence which in his view, will enable this Court to reach a just determination on the issue of his academic credentials.

[53] Not only does he intend to produce both degree certificates and a letter of recognition of the same by the CHE that were laid out in both the High Court and the Appellate Court, he also seeks to adduce other documents to counter the 1st and 2nd Respondent's allegations that his academic qualifications are invalid.

[54] We are alive to the fact that without the requisite academic credentials, he would not have been entitled to vie for governor pursuant to the provisions of Section 22 (2) of the Elections Act. Indeed, this is why the Appellate Court nullified his win.

[55] The Appellant is emphatic that should the Court entertain his Application particularly pursuant to section 21 (3) of the Supreme Court Act and Rule 18, he will be vindicated. Now *Rule 18 (3)* (c) as outlined above, does allow this Court, ***on any appeal*** from a decision of the Court of Appeal or any other Court or Tribunal acting in exercise of its original jurisdiction to *in its discretion, for sufficient reason, take additional evidence* or direct additional evidence be taken by the trial Court or by the Registrar.

[56] In our view, this provision is not a legislative accident given the mandate of the Supreme Court. The provision is intended to serve a purpose. As we expressed ourselves in ***Aramat*** at paragraph 89 when we explained the functions of the Supreme Court:

> ***"[89] Such are new functions, that were not in contemplation at the time of the decision of the "Lillian S" case. The Supreme Court is, besides, not in the more constrained position in which the Court of Appeal had been, at the time of "Lillian S". The Supreme Court is expressly empowered [Article 163(8)] to "make rules for the exercise of its jurisdiction"; and besides [Article 163(9)], a Parliamentary enactment "may make further provision for the operation of the Supreme Court"; and indeed, the Supreme Court Act, 2011 (Act No. 7 of 2011) has been enacted which upholds this Court's standing as the formal custodian of the interpretive process for Constitution, the national grundnorm. This is the context in which we will express our understanding, that in the case before us, it is not possible to detract from the Supreme Court's authority to hear and determine all the relevant questions. (emphasis ours)***

[102] The Supreme Court's jurisdiction in relation to electoral disputes is, in our opinion, broader than that of the other superior Courts. We note in this regard that while the Court of Appeal's jurisdiction is based on Section 85A of the Elections Act, with its prescribed timelines, that of the Supreme Court is broader and is founded on the generic empowerment of Article 163 of the Constitution, which confers an unlimited competence for the interpretation and Application of the Constitution; and this, read alongside the Supreme Court Act, 2011 (Act No. 7 of 2011) illuminates the greater charge that is reposed in the Supreme Court, for determining questions of constitutional character.

[57] With these pronouncements in mind, we must exercise our best judgment in the matter before us bearing that we have the responsibility to resolve questions coming up before us, in particular, where these have a direct bearing on the interpretation and Application of the Constitution. In so doing, we must not betray the Constitution.

[58] Section 21 (3) of the Supreme Court Act empowers us to make *any order* necessary for determining the real question in issue in an appeal. The import of *section 21 of the Supreme Court Act* was considered in ***Kidero*** in the concurring judgment of ***Njoki Ndungu SCJ***. At paragraph 366 she delivered herself thus:

"[367] The Supreme Court Rules, 2012 stipulate in Rule 3, that:

(5) Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or give such directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

[368] The upshot of this is that this Court may make the same kind of orders that the High Court is empowered to make under Articles 22 and 165, when the matter comes to the Supreme Court on appeal, as the Court would find fit. As alluded to earlier on these remedies include declarations of rights, injunctions, conservatory orders, declaration of invalidity of any law, orders for compensation, orders for judicial review or any other appropriate relief where rights and fundamental freedoms have been denied, violated or are threatened.

[369] Taking all these legal provisions into consideration, it is manifest that this Court may make any order that the High Court has jurisdiction to make in the enforcement of rights and fundamental freedoms. This Court also has the latitude to make any order that would be necessary for determining the real question in issue in this appeal and to ensure that the principles of the Constitution are promoted - including an order for a witness to be cross-examined. I am alive to the fact that this is not a remedy that this Court would hastily grant but in light of the violation of constitutional rights that occurred it is the most appropriate remedy under the circumstances."

[59] The emerging picture therefore is that this Court does have the jurisdiction to entertain an Application for additional evidence though this remedy should not be granted hastily.

[60] Also illuminating is our ***Deynes*** decision where we stated:

[61] This Court has the inherent jurisdiction to forestall an instance of injustice. Justice, in this context, requires that all parties are heard freely and fairly, before a matter is concluded. ...

[63] The basic principle regarding jurisdiction, is clear. And so, where there is such a palpable injustice as in the instant case, this Court has jurisdiction, not as to the merits,

but for the purpose of correcting the injustice occasioned by a contravention of the Constitution.

[61] These sentiments are shared in ***Ojwang SCJ's concurring opinion,*** in ***Anami Silverse Lisamula v. The Independent Electoral and Boundaries Commission and Two Others***, Sup. Ct. Petition No. 9 of 2014 [2014] eKLR ***(Lisamula)*** at Paragraph 151:

> ***"It is my task to demonstrate, in this concurring opinion, that this Supreme Court is not to sidestep meritorious occasions for a decision, by invoking obsolescent concepts: for the Supreme Court is the fundamental plank of the constitutional order, bearing the mandate to 'develop the law to the extent that it does not give effect to a right or fundamental freedom', and to 'adopt the interpretation that most favours the enforcement of a right or fundamental freedom" [the Constitution of Kenya, 2010, Article 20(3)].***

[62] We must stress that it behooves this Court to do justice to every dispute before it. Articles 10,20, 25, 159 and 259 of the Constitution obligates us to apply the law in a manner that ensures that justice is achieved.

[63] This Court's decision in ***Outa*** also sheds some light on how we should deal with the motion before us. In this case, one of the issues for determination was whether the Court of Appeal erred in finding the Appellant to have committed the Election Offence of Bribery. The Court remarked:

> ***"[98] As a Court sitting to hear a second appeal, we have an obligation not to tamper with the trial Judge's findings of fact. However, as that matter of evidence touches on bribery – a phenomenon not always marked by tell-tale structural outlines – it is proper that we re-evaluate the relevant evidence, as a task falling under the notion of "matter of law." In the Munya case, we considered the interplay between fact and law, in election cases, and in particular the***

elements of the phrase, "matters of law." The Court, in that case, thus held (paragraph 80):

"From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase 'matters of law' as follows:

(a) the technical element: involving the interpretation of a constitutional or statutory provision;
(b) the practical element: involving the Application of the Constitution and the law to a set of facts or evidence on record;
(c) the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."

We will apply the third element, to examine how the evidence adduced at the trial Court was applied by both the trial Court and the Court of Appeal, and whether this Court will be inclined to uphold, or set aside the findings made by the Court of Appeal regarding the offence of bribery."

[64] Thus, in the instant matter, we are also able to evaluate the evidence on record at both superior Courts to determine whether the findings made were sustainable. From the foregoing analysis therefore, it is apparent that this court has jurisdiction to grant leave in this Application.

(ii) Under what circumstances would this Court allow additional evidence?

65] Having established that this Court has jurisdiction to grant leave for an Application to admit additional evidence, it should be clarified that it is not every instance that such a request would be granted.

Comparative jurisprudence on additional evidence: a lesson

[66] Appellate Courts in parts of the Commonwealth and beyond have grappled with the issue as to when to allow additional evidence. We will consider some of these decisions in a bid to attain useful insight for Application to the instant matter.

The position in England

[67] In ***Ladd Vs Marshall*** (1954) 3 All ER 745, Mrs. Marshall former wife of Mr. Marshall gave false testimony in favour of Mr. Marshall which led to a determination in his favor. When she divorced him, Mr. Ladd applied for leave on appeal, to adduce further evidence by Mrs. Marshall who now sought to tell the truth. Though this appeal was dismissed, the Justices stated the following:

Lord Denning:

> ***"It is very rare that Application is made to this Court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions mast be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."***

Lord Justice Hodson remarked:

> ***I would only make a brief reference to the well-known case of Brown v Dean (1910 Appeal Cases at page 375; where the house of Lords affirmed a decision of the Court of Appeal and gave guidance on this topic. The passage which is often***

discussed and may be said perhaps to have been modified in part is the portion of the speech of Lord Loreburn where he says: "When a litigant has obtained a judgment in a court of justice, whether it be a county court or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive".

Lord Justice Parker: I agree. I would only add one word on the Application for leave to call further evidence. The further evidence which it is desired to call in this case is the evidence of one of the Plaintiff's witnesses, Mrs. Marshall, who, it is said, will now say that what she said at the trial was a lie and that she is now prepared to tell the truth. The circumstances in which the Court on such an Application will grant leave to adduce that further evidence must be very, very rare, for the very good reason that such evidence on the face of it does not comply with the test as laid down by Lord Loreburn in Brown v. Dean, in 1910 Appeal Cases, page 373, where he said that new evidence must at least be "such as is presumably to be believed". It may be that if it could be shown that the witness told a lie originally because he or she had been bribed or because he or she had been coerced, nevertheless it could be said in those circumstances that her evidence was such as is presumably to be believed.

The Ugandan position

[68] In ***Attorney General v Paul Kawanga Ssemwogerere & another,*** Constitutional Appeal No. 2 of 2004 [2004] UGSC 3 the Supreme Court of Uganda determined a matter in which the Applicant sought the leave of the Court under the relevant rules of the Court to adduce additional evidence. The Ugandan

Supreme Court, had in a previous matter before it, annulled the Constitution (Amendment) Act 2000.

[69] The Applicant's contention was that, had the Court received the additional evidence, which he wished to be admitted now, the Court's decision and declarations (annulment) would have been different. The Applicant contended that the reason why the evidence was not produced was because of the incompetence of counsel who represented the Applicant in both the Constitutional Court and the Supreme Court. Although the Court ended up disallowing the Application, it laid down parameters under which additional evidence may be allowed. The Court delivered itself thus:

> ***"There are no authorities on what principles or conditions this Court may allow an Application such as the present, but our opinion is that authorities or decided cases which are relevant to this Court's discretion to admit additional evidence on appeals to it do provide useful guidance for that purpose and are of persuasive value. We have in mind: Ladd Vs Marshall (1954) 3 All ER 745 at 148 Skone Vs Skone (1971), 2 All ER 582 at 586; Langdale Vs Danby (1982) 3 ALL ER. 129 at 137; Sadrudin Shariff Vs Tarlochan Singh (1961) EA.72, Elgood Vs Regina (1968) EA 274; American Express International Vs Atulkimar S. Patel, Application No.8B, of 1986 (SCU) (unreported); Karmali Vs Lakhani (1958), EA.567 and Corbett (1953), 2 ALL ER, 69. A summary of these authorities is that an appellate court may exercise its discretion to admit additional evidence only in exceptional circumstances, which include:***
>
> ***(i) Discovery of new and important matters of evidence which, after the exercise of due diligence, was not within the knowledge of, or could not have been produced at the time of the suit or petition by, the party seeking to adduce the additional evidence;***
>
> ***(ii) It must be evidence relevant to the issues;***

(iii) It must be evidence which is credible in the sense that it is capable of belief;

(iv) The evidence must be such that, if given, it would probably have influence on the result of the case, although it need not be decisive;

(v) The affidavit in support of an Application to admit additional evidence should have attached to it, proof of the evidence sought to be given;

(vi) The Application to admit additional evidence must be brought without undue delay.

These have remained the stand taken by the courts, for obvious reasons that there would be no end to litigation unless a court can expect a party to put its full case before the court. We must stress that for the same reason, courts should be even more stringent to allow a party to adduce additional evidence to re-open a case, which has already been completed on appeal."

[70] Further, in the Supreme Court of Uganda's decision in ***Attorney General & Another v Afric Cooperative Society Ltd*** Misc. Applic. No. 6 of 2012 [2014], the Applicants sought orders to file further evidence to elucidate evidence already on record and additional evidence to show that the Respondent was under receivership and therefore had no legal capacity to sue or be sued or bring an Application for judicial review. The Court held:

"In the peculiar circumstances of this case, it is clear that the evidence being sought to be admitted is intended to elucidate evidence already on record: that is to say, a summary of the report is already on record. The full report could only help give a fuller picture of matters already in the summary. We do not think that this would prejudice the Respondent."

The position in Belize

[71] In the Supreme Court of Belize Action no. 30 of 1992, ***Glovers Reef Limited & Long Caye Associates Limited V Gilbert Lomont & Marsha Lomont*** (5th January, 1996), one of issues that the Court had to determine was whether compelling new material evidence that came to the Applicant's attention after the judgement, which cast doubts on the proprietary title of the plaintiffs to the said land was admissible. *George D. Meerabux, P.J* remarked:

> ***"The law is quite clear that:-when a litigant has obtained a judgement in a court of Justice... he is by law entitled not to be deprived of that judgement without very solid grounds" (Brown v. Dean [1910] A.C. 373, p. 374, per Lord Loreburn L.C. who adds that the maxim interest reipulicae ut finis sit litium is applicable) if it is sought to deprive him of his judgement by further evidence, there are conditions which must be satisfied before it can be received:" first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, thought it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be uncontrovertible" (Ladd v. Marshall [1954] 1 W.I.R. 1489: [1954] 3 All E.R. 745, C.A., per Lord Denning L.J. p. 1491, approved in Skone v. Skone [1971] 1 W.L.R. 812; [1971] 2 All E.R. 582, H.L: Roe v. Robert McGregor and Sons Ltd. [1968] 1 W.L.R. 925; [1968] 2 All E.R. 636, C.A.)."***
>
> ***"As regards the second condition, the view of Lord Loreburn L. C. in Brown v. Dean above, was that, in order to be received, the new evidence "must at least be such as is presumably to be believed, and if believed would be conclusive." Lords Atkinson and Mersey apparently agreed; but the last six words go further than Lord Shaw was prepared to go in his speech: it was sufficient, he thought, if the new matter was "so gravely material and so***

clearly relevant as to entitle the court to say that material and relevant fact should have been before the jury in giving its decision- (p. 376). Neither of these statements have been generally acted upon in subsequent cases; the former has been generally treated as going too far; the latter as not going far enough. Hanworth M.R. in R. v. Copestake [1927] 1 K.B. 468. p. 474, thought "the evidence must be of such a character that not merely is it relevant but of such importance that it would have affected the judgement of the tribunal if it had been before them at the original hearing of the case." Scrutton L.J., p. 477, thought "it must be of such weight as if believed, would probably have an important influence on the result" (and see per Birkett L.J. in Corbett v. Corbett [1953] P. 205, P.215). The Privy Council in Hip Foong Hong v. Neotia and Co [1918] A.C. 888, P. 894, thought that the evidence must be "of such a character that it would, so far as can be foreseen, I have formed a determining factor in the result" (words adopted by Lord Maugham in Rowell v. Pratt [1937] A.C. 101, p. 116, by Evershed. M.R. in Corbett v. Corbett, above page 215 and again by the Privy Council; in Andrew v. Andrew [1953] 1 W.L.R. (1454).

The question in a nutshell is whether the "new compelling evidence" is "of such a character that it would so far as can be foreseen have formed a determining factor in the result."

[72] The Court dismissed the Application as it found that the three conditions for the reception of the new evidence had not been satisfied.

Singapore

[73] In ***Public Prosecutor V Mohd Ariffan bin Mohd Hassan*** [2018] SGCA 10 the subject of the judgment was the Application filed by the Prosecution to admit further evidence on appeal. The appeal was against the trial judge's acquittal of the Respondent on several charges involving allegations of serious sexual offences. One of the issues for determination was on the proper approach to

be taken in determining whether further evidence should be admitted in a criminal appeal on an Application made by the Prosecution. The Court opined:

> ***"53 In short, where the Application to admit further evidence is made by the Prosecution, the interest in ensuring the correct substantive outcome is to be balanced against the need for finality in litigation, the relevance and importance of which depends once again on the procedural background of the Application (such as, for instance, the fact that the Application is made following a plea of guilt by the accused person who would therefore be entitled to expect that facts concerning the nature of his misconduct would not be reopened). In every case, however, the court will ultimately be guided by the need to do justice and it therefore remains within its discretion to allow the further evidence if this is necessary to avoid substantial injustice."***

[74] The Court in addition to admitting evidence it deemed relevant, also permitted the parties to supplement the record with substitute versions of documents that had been submitted at trial.

Indian position

[75] In ***Union of India v Ibrahim Uddin and another*** (2012) 8 SCC 148 the Supreme Court has stated of additional evidence:

> ***"Stage of Consideration:***
>
> ***38. An Application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the Applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to***

pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court."

The United States of America

[76] In as far back as 1941, the United States Supreme Court in ***Hormel v Helvering***, 312 U.S. 552 (1941) sought to reformulate the rule against introducing new matters in appellate Courts. The Court stated:

> ***"Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. And the basic reasons which support this general principle applicable to trial courts make it equally desirable that parties should have an opportunity to offer evidence on the general issues involved in the less formal proceedings before administrative agencies entrusted with the responsibility of fact finding.***
>
> ***Recognition of this general principle has caused this Court to say on a number of occasions that the reviewing court should pass by, without decision, questions which were not urged before the Board of***

Tax Appeals. ***But those cases do not announce an inflexible practice, as indeed they could not without doing violence to the statutes which give to Circuit Courts of Appeals reviewing decisions of the Board of Tax Appeals the power to modify, reverse or remand decisions not in accordance with law 'as justice may require.'***

There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.

.....These decisions and others like them, while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice".

[77] In ***Schwartz v Million Air, Inc*** 341 F.3d 1220, 1223-26 (11th Cir.2003) the U.S. Court of Appeals for the Eleventh Circuit determined a tort action involving an airplane crash in Ecuador. It was later discovered, however, that some of the many plaintiffs had falsified their medical records and that they had, in fact, not been injured in the crash. The defendant moved to dismiss the claims and to award fees and costs, and the district court granted the motion.

[78] On appeal, the remaining victims and their attorneys moved to supplement the record to include exhibits from the case files of their former clients. The court decided to permit the evidence. It noted:

> ***"We rarely supplement the record to include material that was not before the district court, but we have the equitable***

power to do so if it is in the interests of justice. We decide on a case-by-case basis whether an appellate record should be supplemented. Even when the added material will not conclusively resolve an issue on appeal, we may allow supplementation in the aid of making an informed decision."

[79] Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the ***governing principles on allowing additional evidence*** in appellate courts in Kenya as follows:

(a) *the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;*

(b) *it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;*

(c) *it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;*

(d) *Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;*

(e) *the evidence must be credible in the sense that it is capable of belief;*

(f) *the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;*

(g) *whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;*

(h) *where the additional evidence discloses a strong prima facie case of willful deception of the Court;*

(i) *The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.*

(j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

(k) *The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.*

[80]We must stress here that this Court even with the Application of the above-stated principles will *only* allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.

(iii) Whether leave to admit additional evidence should be granted in this case?

[81] We are now tasked with applying the principles we have set out in paragraph 79 of this Ruling to the specific circumstances of this case; which is to determine whether this instant case meets the established criteria. We note from the record that during a pre-trial conference dated 9th October 2017 conducted by the trial judge at the High Court, the parties entered into a consent that the documents on record were not objected to and would not require strict proof. It is the Appellant's case that he and his legal advisors understood this to mean a waiver of the requirement for cross-examination of the said documents.

[82] The trial judge aptly noted that gubernatorial electoral disputes are tried by way of Affidavit evidence. He outlined *Rule 12 of the Elections (Parliamentary and County elections) Petition Rules, 2017* which in relevant parts provides

> ***"(12) An Affidavit shall form part of the record of the hearing and may be deemed to be the deponent's evidence for the purposes of an examination-in-chief.***
>
> ***(13) Every deponent shall, subject to the election court's direction, be examined in chief and cross-examined:***
>
> ***Provided that the parties may, by consent, accept not to cross-examine the deponent but shall have the deponent's evidence admitted as presented in the affidavits." (Emphasis supplied)***

[83] Despite the consent of the pre-trial conference, we find it curious that both the learned trial judge and Appellate Court did not allude at all to the fact that documents on record were admitted and needed not be strictly proved. To the contrary, the learned trial judge remarked that the Appellant had not shown that the alleged degrees were genuinely issued and/or conferred on him and made an adverse finding against him.

[84] The Appellant's claim is that he was operating under the mistaken assumption that the requirement for cross-examination had been waived due to the pre-trial consent. In the circumstances, we deem this explanation sufficient especially because what was at stake was his election for a gubernatorial seat. It is reasonable to infer that he would have been willing to defend it at all costs at the trial Court.

[85] This notwithstanding, we do fault the Appellant and his legal advisors for equating *'strict proof'* to *'cross-examine'* and failing to show up for the mandatory *'exam in chief'* and *'cross-examination'*. This failure in effect meant that he could not *produce* the *relevant* evidence which would have probably had an *important influence* on his case.

[86] We are also minded that the *interests of justice* dictate that this Court ensures that all parties to a dispute are accorded a fair hearing so as to resolve the dispute judiciously. This is particularly so because what is at stake is the Appellant's right to a fair election as well as the right of the voters to non-interference with their already cast votes, the *will of the people*, so to speak. It is on this breath that we must consider whether the Appellant's right to a fair hearing and trial will be infringed upon by the denial of admission of new evidence.

[87] In the circumstances, was there a reasonable opportunity of hearing given to the Appellant? In this regard, what then are the norms or components of a fair hearing? In the matter ***of Indru Ramchand Bharvani & Others v. Union of India & Others, 1988 SCR Supl. (1) 544, 555,*** the Supreme Court of India, found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing Bal Kissen Kejriwal v. Collector of Customs, Calcutta & Others, AIR 1962 Cal. 460). It is important to restate that a literal reading of the provisions of the Constitution of Kenya show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that: "***it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court.***" (See Steel and Morris v. United Kingdom, [2005] ECHR 103, paragraph 59).

[88] We are unconvinced that the Appellant was accorded a fair hearing at both the trial Court and the Appellate Court with regards to his academic qualifications. The trial Court disregarded the *consent* of the pre-trial conference and the Appellant erroneously equated *'cross-examine'* to *'strict proof'*. These culminated in his inability to properly state or defend his academic credentials. This invariably means that both superior Courts did not do justice to this case. This Court is inclined to remedy this situation.

[89] We must state that we find it curious, nay, inexplicable that, although the petition before the Court of Appeal contained several grounds of appeal challenging the election of the Appellant, the appellate court chose to shelve all but one, without any consideration whatsoever. As a result, the finding of that court and the only issue for determination in the appeal before this Court is a singular one: *whether or not the Appellant had the requisite academic qualifications to run for the seat of Governor*. The additional evidence sought to be introduced are academic, educational and employment records of the Appellant. It is directly relevant to the single issue before the court and will most likely impact upon the Appeal. It seeks to remove any vagueness or doubt over the status of the academic qualifications in question and therefore has a direct bearing on the main issue in the suit.

[90] We are convinced that disallowing the additional evidence would deny the Appellant a fair trial, which is a non-derogable right under our Constitution. In addition, we are satisfied that allowing the additional evidence is not prejudicial to any party and will be in the interests of justice as the evidence is necessary and crucial in making of a proper judicial finding as to whether the Appellant had the requisite academic credentials to vie for governor of Wajir County which are core issues before the Court.

[91] We emphasize here that this Court will always undertake a methodical analysis of any issues it is seized of, draw the whole dispute to a meaningful conclusion with directions and final orders, in the broad interests of both the parties, and of due guidance to the judicial process and to the Courts below.

F. ORDERS

[91] Consequently, we make the following Orders:

(i) The Application by the Appellant is allowed;

(ii) The Appellant will serve the Respondents with the additional evidence by way of affidavit;

(iii) The Respondents will respond to the additional evidence by way of affidavit;

(iv) The Petition will be set down for hearing on a priority basis;

(iv) Parties shall bear their own respective costs.

DATED and **DELIVERED** at **NAIROBI** this 28th day of September 2018.

.....

D.K. MARAGA
CHIEF JUSTICE/PRESIDENT
OF THE SUPREME COURT

.....

P.M. MWILU
DEPUTY CHIEF JUSTICE/VICE PRESIDENT
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

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a
true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA