REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO. 13 OF 2018

—BETWEEN—

MUSA CHERUTICH SIRMA .....PETITIONER

—AND—

1. **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....**
2. **NDIRANGU PETER KURIA— ELDAMA RAVINE CONSTITUENCY RETURNING OFFICER.....** **RESPONDENTS**
3. **MOSES LESSONET .....**

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*(Being an Appeal from the Ruling and Order of the Court of Appeal in Kenya at Nakuru **(P.N Waki, F. Sichale & Ole Kantai JJ. A)** delivered on 31st May, 2018, in Election Petition No. 9 of 2018.)*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Petitioner approaches this Court under Article 163(4)(a) of the Constitution, contesting the Ruling of the Court of Appeal dated 31st May, 2018 which struck out his Notice of Appeal dated 7th March, 2018 as well as a Record of Appeal dated 28th March, 2018.

B. BACKGROUND

a) Proceedings before the High Court

[2] The Petitioner was a candidate in the General Election held on 8th August, 2017, for the position of Member of the National Assembly for Eldama Ravine Constituency. The 3rd Respondent, who was also a candidate in the said election was declared the winner. Aggrieved by that declaration, the Petitioner filed a Petition in the High Court at Kabarnet—***Election Petition No. 1 of 2017*** — seeking a nullification of the election results.

[3] Upon considering the matter, the High Court *(Muriithi J)* dismissed the Petition and held that the 3rd Respondent was validly elected as Member of the National Assembly for Eldama Ravine Constituency. That decision was delivered on 2nd March, 2018.

b) Proceedings before the Court of Appeal

[4] Being dissatisfied by the High Court's determination of the issues before it, the Petitioner sought to appeal that decision at the Court of Appeal. In doing so, on 9th March, 2018, he filed a Notice of Appeal dated 7th March, 2018 at the High Court at Kabarnet. Subsequently, on 29th March, 2018, the Petitioner filed a record of Appeal dated 28th March, 2018, at the Court of Appeal in Nakuru.

[5] In response, the 3rd Respondent filed a Notice of Motion Application dated 6th April, 2018, seeking to strike out the Petitioner's Notice of Appeal on grounds that it was filed in the wrong registry and he also sought another order to strike out the Record of Appeal on grounds that it was predicated on a "non-existing" Notice of Appeal. In the same vein, the 1st and 2nd Respondents also jointly filed a similar application dated 10th April, 2018, seeking to strike out the Petitioner's

Record of Appeal on grounds that there was no proper Notice of Appeal on record as contemplated by Rule 6 of the Court of Appeal (Election Petition) Rules, 2017 (hereinafter 'Court of Appeal Rules 2017') and that there was no security for costs deposited with the Court as contemplated under Rule 26 of the Rules, aforesaid. The two applications were consolidated and heard simultaneously.

[6] By a Ruling delivered on 31st May, 2018, the Court of Appeal *(Waki, Sichale & Ole Kantai JJA*), agreed with the Respondents and struck out the Petitioner's Notice of Appeal dated 7th March, 2018 as well as the Record of Appeal dated 28th March, 2018. That marked the end of the Petitioner's attempted appeal at the Court of Appeal hence the present appeal.

c) Proceedings before the Supreme Court

[7] The Petitioner's Appeal dated 26th June, 2018 and filed on 27th June, 2018 seeks the following orders:

(i) The Petition of appeal be allowed.
(ii) The Ruling and subsequent orders of the Court of Appeal delivered on 31st May, 2018 be set aside in its entirety.
(iii) The Election Petition appeal filed before the Court of Appeal be heard on merit substantively by a different bench within timelines stipulated by this Court.
(iv) Costs of the petition be borne by the Respondents.
(v) Any other relief that the Court may deem fit to grant.

[8] The Appeal is premised on the following summarized grounds:

(i) That the learned Judges of the Court of Appeal erred in law by striking out the Notice of Appeal dated 7th March 2018 and the Record of

Appeal dated 28th March 2018 thereby violating the Petitioner's right of access to justice as enshrined under Article 48 of the Constitution and right to fair hearing as enshrined under Articles 25 and 50 of the Constitution as well as Article 38 rights thereof.

(ii) *That the Learned Judges of the Court of Appeal erred gravely in law in holding that there was no evidence presented to the Court on how the Court of Appeal registry declined to admit the Notice of Appeal dated 7th March 2018, yet the Petitioner's advocates' clerk, one Onyango Henry Obonyo, filed an affidavit detailing the filing process of the Notice of Appeal.*

(iii) *That the Learned Judges erred in law and in fact by holding that the Petitioner's intention was to file the Notice of Appeal in the High Court at Kabarnet when the Petitioner went to great lengths to file the Notice of Appeal in both Courts (High Court at Kabarnet Registry and Court of Appeal Registry at Nakuru) on the same day i.e. 9th March 2018.*

(iv) *That the Learned Judges of the Court of Appeal erred gravely in law in treating the concept of the appropriate Registry for filing a Notice of Appeal as being the same as the constitutional timelines set down for filing of election petitions.*

(v) *That the Learned Judges of the Court of Appeal erred gravely in law in treating a Notice of Appeal and a Record of Appeal as one and the same thing.*

(vi) That the learned judges of the Court of Appeal erred gravely in law by failing to take into account and applying Rule 5 of the Court of Appeal (Election Petition) Rules, 2017.

(vii) That the learned Judges of the Court of Appeal erred gravely in law by failing to hold that the applications dated 6th April 2018 and 10th April 2018 to strike out the Notice of Appeal dated 7th March 2018 had been filed out of time.

(viii) That the learned Judges of the Court of Appeal erred gravely in law by taking the draconian measure of striking out the entire Record of Appeal and in so doing failing to determine whether the Member of National Assembly elections for Eldama Ravine Constituency were conducted in accordance with Articles 81 and 86 of the Constitution of Kenya.

(ix) That the learned judges of the Court of Appeal erred in law by awarding uncapped costs while striking out the Notice of Appeal dated 7th March 2018 and the Record of Appeal filed on 29th March 2018.

[9] In response to the Petition of Appeal, on 17th July, 2018, the 3rd Respondent filed a Notice of Preliminary Objection dated 14th July, 2018, contesting the jurisdiction of this Court to hear the Petitioner's appeal under Article 163(4)(a) of the Constitution. A similar objection was also raised by the 1st and 2nd Respondents who filed a Notice of Preliminary Objection dated 17th July, 2018 and filed on 18th July, 2018, stating that this Court has no jurisdiction to hear the Petitioner's appeal as of right under Article 163(4) (a) of the Constitution.

[10] When the matter came up for hearing on 2nd October, 2018, we directed that both the Preliminary Objections and the appeal would be heard simultaneously.

C. THE PARTIES' RESPECTIVE CASES

i. The Petitioner's case

[11] The Petitioner relies on the undated written submissions filed on 14th August, 2014 and the oral highlights made in Court. His counsel, Prof. Ojienda SC, urged that the appeal properly invokes this Court's jurisdiction under Article 163(4)(a) of the Constitution and submitted that the appeal challenges the Court of Appeal decision declining to hear the Petitioner's appeal at the Court of Appeal on grounds that the Notice of Appeal dated 7th March, 2018, was filed at the High Court Registry in Kabarnet as opposed to it being filed at the Court of Appeal Registry in Nakuru. He further submitted that the said decision of the Court of Appeal was made in violation of the Petitioner's rights under Articles 38, 48, 50 and 159 of the Constitution.

[12] Counsel submitted in addition that the Notice of Appeal dated 7th March, 2018, was filed within 7 days as is required by law and it was also served on time. And that the Notice of Appeal was lodged both in the High Court in Kabarnet and the Court of Appeal Registry in Nakuru.

[13] Counsel furthermore invited the Court to consider the circumstances that led to the filing of the Notice of Appeal at the Kabarnet High Court Registry. He submitted in that regard that the Petitioner's advocate's clerk went to lodge the Notice of Appeal at the Nakuru Court of Appeal Registry but, the clerk was turned away by a Court of Appeal Registry staff who directed the clerk to first lodge the Notice of Appeal at the Kabarnet High Court and then later present it to the Court

of Appeal. Counsel submitted that the clerk strictly followed the instructions and upon lodging the Notice of Appeal at the Kabarnet High Court, he immediately presented it to the Court of Appeal on the same day. He emphasized that the Notice of Appeal therefore bears two stamps, for the High Court in Kabarnet and the Court of Appeal in Nakuru, all dated the same day i.e. 9th March 2018.

[14] Counsel in the above context has urged that the proceedings at the High Court and the Court of Appeal led to certain conclusion that this case involves the interpretation or application of the Constitution and seeks a determination whether the Petitioner's right of access to justice under Article 48 of the Constitution and a right to fair hearing under Articles 25 and 50 of the Constitution were violated by the striking out of his Notice of Appeal dated 7th March, 2018 as well as the Record of Appeal dated 28th March, 2018. Counsel further urged that the Petitioner also seeks a determination on whether his political rights under Article 38 of the Constitution were violated by the Court of Appeal in declining to determine the appeal on merit and hence failing to interrogate whether the election of the Member of Parliament for Eldama Ravine Constituency was conducted in accordance with constitutional principles and electoral laws.

[15] Counsel further submitted that this Court ought to interpret Article 159(2)(d) of the Constitution *vis-a-vis* Rule 5 of the Court of Appeal Rules, 2017 and advise on the relationship between due regard to procedural technicalities and substantive justice. According to Counsel, the place of filing a Notice of Appeal is not a jurisdictional question but a procedural technicality which the Court of Appeal ought to have addressed as such.

[16] Counsel in making the above point referred to the Court of Appeal decision in the case of ***Owino Paul Ongili Babu v. Francis Wambugu Mureithi &***

2 Others Election Appeal No. 18 of 2018; [2018] eKLR where the Court (*Warsame, Musinga & M'inoti JJA*) declined to strike out the appeal even though the Notice of Appeal had been filed in the High Court Registry as opposed to the Court of Appeal Registry. Counsel urged that, similarly, in the present case, the Court of Appeal ought to have paid due regard to substantive justice as opposed to procedural technicality. We must note that the said decision is pending for determination on appeal before this Court.

[17] Counsel in addition urged that the Court of Appeal elevated the Court of Appeal Rules, to the constitutional level of timelines in solving electoral disputes, yet, he submitted that the rules are only directions of a procedural nature and should not affect the substance of any appeal. He thus urged that a Notice of Appeal merely signifies the intention to appeal a decision and should not be equated to the contents of the substantive appeal.

[18] Counsel further submitted that the Court of Appeal erred by failing to hold that the Motions to strike out the Notice of Appeal and the Record of Appeal had been filed out of time, contrary to Rule 19 (1) of the Court of Appeal Rules, aforesaid which provides that; "*A person affected by an election petition appeal may, within seven days from the date of service of the notice of appeal or record of appeal, as the case may be, apply to the Court to strike out the notice or the record of appeal on the ground that no appeal lies or that some essential step in the proceedings has not been taken within the time prescribed by these Rules.*" Rule 19 (2) in addition provides that; *"Where no application is filed within the period stipulated under sub-rule (1), a person may not raise the issue later."* He submitted that it was apparent that the Respondents ought therefore to have filed their applications to strike out the Notice of Appeal and Record of Appeal within 7 days from service and not after more than 28 days as was the case in the present matter.

[19] In conclusion, counsel urged the Court to dismiss the Preliminary Objections filed by the Respondents and order that the appeal filed in the Court of Appeal be heard on merit. He added that if the matter is remitted back to the Court of Appeal, the 6 months' timeline within which an appeal ought to be heard would start running from the time when a different bench of the Court of Appeal is constituted and therefore there is no lawful bar to that proposed course of action.

ii. 1st and 2nd Respondents' case

[20] The 1st and 2nd Respondents filed their submissions dated 7th August, 2018 in support of their Preliminary Objection dated 17th July, 2018. Mr. Karanja, Counsel for the 1st and 2nd Respondents submitted that the Appeal before this court is fatally flawed since it does not involve a question of interpretation or application of the Constitution. He added that none of the constitutional provisions whose violation the Petitioner is alleging were a subject of interpretation or application before the Court of Appeal and cannot therefore be an issue of deliberation by this Court.

[21] Counsel further submitted that the single issue before the Court of Appeal was whether the document filed as a Notice of Appeal was the document contemplated under the Court of Appeal Rules, 2017. He thus urged that such an issue is not a question of constitutional interpretation and that the appeal before us instead seeks interpretation of the Rules of the Court of Appeal and not the Constitution. Counsel emphasized that the mere allegation that a question of constitutional interpretation or application is involved, without more, does not automatically bring an appeal within the ambit of Article 163(4)(a) of the Constitution.

[22] Counsel furthermore cautioned the Court against assuming jurisdiction on a case such as the present one, which seeks to transmute an ordinary question of interpreting a Rule under the Court of Appeal Rules, 2017 to one of constitutional interpretation, so as to fit into the purview of Article 163(4)(a). In that regard, he referred to the cases of ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board*** SC Petition No. 5 of 2012; [2012] eKLR and ***Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu Waititu and 4 Others,*** SC Petition No. 18 & 20 of 2014; [2014] eKLR which laid the principles of appeals under Article 163(4)(a) of the Constitution. According to Counsel, the Petitioner's case would, to the contrary, only merit consideration under Article 163(4)(b) of the Constitution which would require a certification that the matter involves a question of general public importance, a course of action not taken by the Petitioner.

[23] With regard to the merit of the Court of Appeal decision, Counsel urged that the non-compliance with Rule 6 of the Court of Appeal Rules, 2017, which provides for the content and form of the Notice of Appeal meant that there was no real dispute before the Court of Appeal as the Rules were clear on the place of filing the Notice of Appeal. He contended that in the absence of the filing of the Notice of Appeal at the right Registry, then there was no proper appeal before the Court of Appeal and hence the Court of Appeal had no jurisdiction to purport to assume a jurisdiction which had not been invoked.

[24] On the allegation by the Petitioner's advocate that his clerk was directed by a Court of Appeal Registry staff to file the Notice of Appeal at the High Court in Kabarnet, Counsel submitted that there was no tangible evidence on record confirming that position. He thus submitted that the said staff should have been

requested to swear an affidavit detailing the position as alleged but this was not done.

[25] In conclusion, Counsel submitted that even if this Court were to find that the Court of Appeal was wrong in striking out the Petitioner's Notice of Appeal and the Record of Appeal, the timeline within which an appeal should be heard by the Court of Appeal had/has already lapsed. It would therefore be an exercise in vain to remit the matter back to the Court of Appeal as prayed and he thus urged the Court to uphold the 1st and 2nd Respondents' Preliminary Objection and strike out the Petitioner's purported appeal.

iii. 3rd Respondent's case

[26] The 3rd Respondent filed his submissions dated 31st July, 2018 in support of his Preliminary Objection dated 14th July, 2018. By the said Notice of Preliminary Objection, Counsel for the 3rd Respondent Mr. Kipkoech, advanced the argument that this Court has no jurisdiction to hear the Petitioner's appeal which has purportedly been brought under Article 163(4)(a) of the Constitution. According to him, the appeal before the Court does not therefore meet the pre-requisite of an appeal as of right under Article 163(4)(a) and ought to be dismissed.

[27] In addressing the issue of fair hearing raised by the Petitioner, Counsel submitted that the record would show that the Petitioner was accorded a fair hearing both in the High Court and the Court of Appeal and that a disagreement with the finding of any Court does not amount to a violation of one's right to a fair hearing. Counsel also questions how the Petitioner's right of access to justice has been denied, yet, he submitted that the Petitioner was always fully

represented and his advocate was always in Court during the proceedings at the High Court and also at the Court of Appeal.

[28] Counsel further urged that the Court of Appeal came to the right conclusion that there was no proper Notice of Appeal before it. That indeed, no Notice of Appeal was intended to be filed at the Court of Appeal as can be seen from the record which speaks for itself. He referred to the case of ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others*** SC Application No. 16 of 2014; [2014] eKLR where this Court stated *inter -alia* that the filing of a Notice of Appeal is a jurisdictional pre-requisite and without it, no appeal can properly be said to be existing.

[29] On the issue of timelines, Counsel submitted that this Court is bound by the timelines provided for under Section 85A of the Elections Act within which an appeal should be heard and that unless the timeline is extended by Parliament, this Court cannot grant any such extension. As such, he urged that the 6 months' period within which an appeal should be heard and determined by the Court of Appeal has already lapsed and this Court cannot therefore remit the matter back to the Court of Appeal for hearing on merit as prayed by the Petitioner.

[30] Counsel has finally urged the Court to dismiss the appeal and uphold the 3rd Respondent's Preliminary Objection with costs.

D. ISSUES FOR DETERMINATION

[31] Flowing from the foregoing, the following issues arise for consideration:

(a) Whether the appeal meets the jurisdictional threshold under Article 163(4)(a) of the Constitution.

(b) Whether this Court should interfere with the exercise of discretion by the Court of Appeal under Rule 5 of the Court of Appeal (Election Petition) Rules, 2017.

(c) What reliefs are available to Parties?

(d) Costs.

E. ANALYSIS

(a) Whether the appeal meets the jurisdictional threshold under Article 163(4)(a) of the Constitution?

[32] While we have on numerous occasions delimited the extent of our powers under Article 163(4)(a) of the Constitution, the question of the scope of this Court's jurisdiction will continue to occupy our judicial minds. At the outset, we must state that even though appeals arising from election petitions are clothed with certain unique features which make them distinguishable from other matters, the principles of how a case merits our consideration under Article 163(4)(a) are applied across the board regardless of the specific nature of the appeal. Indeed, Article 163(4)(a) of the Constitution does not give any special preference to election petitions appeals but rather the said provision provides that appeals shall lie from the Court of Appeal to the Supreme Court "as of right in any case involving the interpretation or application of [the] Constitution." Therefore, a litigant must bring himself within the confines of that Article for his case to be admissible as of right.

[33] In the above context, in ***Evans Odhiambo Kidero & 4 others v. Ferdinand Ndungu Waititu & 4 others*** SC Petition 18 & 20 of 2014; [2014] eKLR, we attempted to inject meaning to the words in Article 163(4)(a) of the Constitution and in that regard, we said that interpreting the Constitution

involves "revealing or clarifying the *legal content, or meaning* of constitutional provisions, for purposes of resolving the dispute at hand." On the other hand, constitutional application "entails creatively interpreting the constitution to eliminate ambiguities, vagueness and contradictions, in furtherance of good governance."

[34] Further, in clarifying the contours of Article 163(4)(a) of the Constitution, we thus pronounced ourselves in the case of ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another*** SC Petition No. 3 of 2012; [2012] eKLR [paragraph 28]:

> ***"The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)."***

[35] The position adopted above was further strengthened in the case of ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others***, SC Petition No. 10 of 2013; [2014] eKLR, where we emphasized that [paragraph 37]:

> ***"In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under Article 163(4)(a) of the Constitution."***

[36] The principles of how to approach the Court under Article 163(4)(a) were developed further in this Court's decision in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** SC Application No. 5 of 2014; [2014] eKLR where we pronounced that [paragraph 69]:

> ***"The import of the Court's statement in the Ngoge Case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application."***

[37] Furthermore, in ***Aviation & Allied Workers Union of Kenya v. Kenya Airways Limited & 3 Others*** SC Petition No. 4 of 2015; [2017] eKLR we held that [paragraph 36]:

> ***"It behoves the appellant to indicate with precision any relevant provision of the Constitution that affects its case, and the context in which it becomes necessary for the Court to render interpretation. In an appeal such as this, the appellant ought to show how the other superior Courts incorrectly interpreted, or applied the relevant provision of the Constitution, and how the right interpretation when applied, would impact upon its case. And "interpretation" or "application", in this regard, resides in the assumption of a task that transcends [not] just the reference to the rich generality of constitutional principle; it is a task that focusses upon specific clauses of the Constitution, and calls for the attribution of requisite meaning, tenor and effect."***

[38] Arising from the above cited decisions, we restate that for an appeal to qualify for the exercise of this Court's jurisdiction under Article 163(4)(a) of the Constitution, the Petitioner, such as in this case, must show how the Appellate Court disposed of the matter by way of interpreting or applying a particular provision of the Constitution. However, like we have previously stated in our decisions, the mere reference by a Superior Court below to a constitutional provision does not activate this Court's jurisdiction. The Court must have been involved in a deliberate exercise of delineating the meaning of identified constitutional provisions so as to resolve the dispute at hand. We shall therefore embark on examining the case at hand in order to find out its justiciability in the context of our jurisdiction under Article 163(4)(a) of the Constitution.

[39] In that regard, the Petitioner invites the Court to determine whether his right of access to justice and fair hearing enshrined under Articles 48 and 50 of

the Constitution, respectively, were violated by the act of the Court of Appeal striking out his Notice of Appeal and Record of Appeal. The Petitioner also seeks the Court's interpretation of the extent of the application of Article 159(2)(d) of the Constitution in arriving at decisions made under Rule 5 of the Court of Appeal Rules, 2017.

[40] The Respondents however strongly contest the jurisdiction of this Court to determine the Petitioner's appeal as framed under Article 163(4)(a) of the Constitution. They urge that none of the constitutional provisions whose violation the Petitioner is alleging were the subject of interpretation or application by the Court of Appeal. Further, that a disagreement with the finding of a Court on any issue does not amount to a violation of one's rights. They thus submit that what was in issue in the Court of Appeal was the interpretation of the Court of Appeal Rules, 2017 and not any provision of the Constitution as alleged.

[41] We have considered the submissions made and it is not in dispute that the appeal before us arises out of the Court of Appeal decision to strike out the Petitioner's Notice of Appeal dated 7th March, 2018 as well as his Record of Appeal dated 28th March, 2018 thereby prematurely ending his quest for justice. The key determinant of that decision was the interpretation by the Appellate Court of Rule 5 of the Court of Appeal Rules, 2017 which reads as follows:

> ***"The effect of any failure to comply with these Rules shall be a matter for determination at the Court's discretion subject to the provisions of Article 159(2)(d) of the Constitution and the need to observe the timelines set by the Constitution or any other electoral law."***

[42] The said Article 159(2)(d) of the Constitution provides that:

"Justice shall be administered without undue regard to procedural technicalities."

[43] The Petitioner now seeks this Court's determination of what amounts to due regard to procedural technicalities *vis-a-vis* substantive justice. Whereas the Petitioner's argument in that context appears convincing at face value, we are still called upon to examine whether the Appellate Court's reasoning involved interpretation or application of provisions of the Constitution in order to gauge the Petitioner's case against the threshold of Article 163(4)(a) of the Constitution.

[44] We furthermore note that in arriving at its decision, the Court of Appeal took into consideration Rule 6 of the Court of Appeal Rules, 2017, which requires a Notice of Appeal to be filed in the Court of Appeal Registry. In interpreting the effect of non-compliance with Rule 6, the Court of Appeal was guided by Rule 5 which requires it to exercise its discretion subject to the provisions of Article 159(2)(d) of the Constitution and the need to observe timelines set by the Constitution or any other electoral law. As can be deduced from the Court of Appeal decision, in interpreting the place of Article 159(2)(d) as invoked in Rule 5, the Court of Appeal relied on this Court's decision in ***Raila Odinga & 5 Others v. Independent Electoral & Boundaries Commission*** SC Petition No. 5 of 2013; [2013] eKLR (***Raila Odinga 2013***), in which we explained the flexibility of Article 159(2)(d) and the need to determine each case on its own merits while taking into account the unique circumstances of a case. The Court of Appeal also relied on the decision of ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others*** SC Application No. 16 of 2014; [2014] eKLR (***Nicholas Salat***) where we held that the filing of a Notice of Appeal is a jurisdictional pre-requisite, and therefore taking everything in totality and our decisions above, the Court of Appeal arrived

at the conclusion that the Petitioner had a mandatory obligation to comply with the Rules aforesaid and once he did not, then his appeal was still-born.

[45] It is apparent to us in the above context that the issue in controversy in this case is the extent of the application of Article 159(2)(d) of the Constitution in determining the effect of non-compliance with the Court of Appeal Rules, 2017 as opposed to violation of Articles 25, 38 and 50 as submitted by Counsel for the Petitioner. Article 159(2)(d) was indeed the only subject of constitutional interpretation by the Court of Appeal alongside Rule 5 which requires the Court to be guided by Article 159(2)(d) in arriving at any decision under Rules. If we are to assume jurisdiction, that is the same issue that would fall for consideration before us. To that extent therefore, and taking into account our decisions above, we are persuaded that this Court has jurisdiction to hear the Petitioner's appeal under Article 163(4)(a) of the Constitution limited to that issue only.

[46] We also note that the Petitioner's Counsel also suggested that this Court's jurisdiction under Article 163(4)(a) of the Constitution accrues because in his opinion, the Petitioner's right of access to justice under Article 48 and the right to fair hearing under Articles 25 and 50 of the Constitution were violated by the striking out of the Notice of Appeal and the Record of Appeal. Unfortunately, we disagree with that contention. The Petitioner is certainly aggrieved by the decision of the Court of Appeal. A dissatisfaction with a decision of the Court of Appeal such as in this case, cannot be elevated into a question of constitutional interpretation or application. Articles 25 and 50 of the Constitution were not a subject of interpretation or application by the Court of Appeal. A party therefore cannot invoke the jurisdiction of this Court under Article 163(4)(a), where the appeal is merely founded on the assertion that the Court of Appeal's determination infringed on his rights.

[47] Before we proceed, and for clarity, we would like to distinguish the case at hand from the decision of ***Peter Odiwuor Ngoge t/a O P Ngoge & Associates Advocates & 5379 others v. J Namada Simoni t/a Namada & Co Advocates & 725 others*** SC Petition No. 13 of 2013; [2014] eKLR (***Ngoge*** case) where the Court of Appeal had struck out the Petitioner's Notice of Appeal necessitating him to file an appeal to this Court alleging violations of various provisions of the Constitution. In finding that we had no jurisdiction to hear the matter under Article 163(4)(a) of the Constitution, we held as follows [paragraph 55]:

> ***"This matter, we believe, has not taken a trajectory of constitutional interpretation or application. As set out earlier-on, this matter involved the exercise of the appellate Court's discretion under Rule 81 of the Appellate Jurisdiction Rules, to strike out a Notice of Appeal. That issue, clearly, involves no constitutional interpretation and/or application. We are persuaded that the issues raised by the appellants do not meet the constitutional threshold in Article 163(4)(a)."***

[48] The ***Ngoge*** case did not in any way involve interpretation or application of the Constitution, but rather involved the exercise of the Court's discretion with regard to allowing a withdrawal or striking out of a Notice of Appeal. However, in the present case we are, as the Court of Appeal was, invited to interpret the place of Article 159(2)(d) of the Constitution in determining the effect of non-compliance with the rules of procedure including as regards the place and timelines for filing a notice and record of appeal at the Court of Appeal. We thus reiterate that we have jurisdiction to determine the matter at hand.

(b) Whether this Court should interfere with the exercise of discretion by the Court of Appeal under Rule 5 of the Court of Appeal (Election Petition) Rules, 2017?

[49] As stated above, the case before us involves principally the exercise of the Court of Appeal's discretion under Rule 5 of the Court of Appeal Rules, 2017. The said Rule provides that the effect of non-compliance with the Court of Appeal Rules, shall be a matter for determination at the Court's discretion. In the past, we have been very hesitant to assume jurisdiction in cases where a litigant is challenging the exercise of discretion by another Court.

[50] For example, in ***Teachers Service Commission v. Kenya National Union of Teachers & 3 Others***, SC Application No. 16 of 2015; [2015] eKLR, the question before us was *whether Article 163 (4)(a) of the Constitution confers upon this Court jurisdiction to entertain an interlocutory application challenging the Court of Appeal orders issued in exercise of its discretionary authority under Rule 5(2)(b) of the Court of Appeal Rules, 2010*. In finding that we had no jurisdiction, we held that [paragraph 36]:

> ***"In these circumstances, we find that this Court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule 5 (2) (b) of that Court's Rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court."***

[51] In arriving at our decision, we recognised that the Court of Appeal exercises discretionary powers in issuing orders under Rule 5(2)(b) aforesaid. We also acknowledged that the application then before us arose from an

interlocutory decision of the Court of Appeal meaning that there was no substantive appeal pending before us. For those two reasons, we held that we had no jurisdiction to interfere with the Court of Appeal orders.

[52] Of relevance also is the case of ***Daniel Kimani Njihia v. Francis Mwangi Kimani & Another***, SC Application No. 3 of 2014; [2015] eKLR in which the Applicant approached the Court of Appeal seeking extension of time to file a record of appeal. When the Court of Appeal declined to grant him the extension, he sought leave to appeal the Court of Appeal's decision on the grounds that his intended appeal raised questions of general public importance. The Court of Appeal denied him certification necessitating him to come before us seeking a review of that decision. Like the Court of Appeal, we dismissed his application for certification. In doing so, we acknowledged the nature of the discretionary powers of the Court of Appeal and pronounced ourselves as follows [paragraph 21]:

> ***"Not all decisions of the Court of Appeal are subject to appeal before this Court. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court's mandate. Such discretionary decisions which originate directly from the Appellate Court, are by no means the occasion to turn this Court into a first appellate Court, as that would stand in conflict with the terms of the Constitution."*** [Emphasis added.]

[53] While reiterating the above finding, we note that even though the matter before us is not challenging a Court of Appeal decision issued under Rule 5(2)(b)

of the Court of Appeal Rules, 2010, the Appeal still questions the exercise of the Appellate Court's discretion under a different legal regime. And as we said in ***Basil Criticos v. Independent Electoral and Boundaries Commission & 2 others*** SC Petition No.22 of 2014; [2015] eKLR, interfering with such an exercise of discretion would be tantamount to directing the Appellate Court on how to exercise its powers, in essence restraining its liberty. That is not to say that such a discretion must be exercised arbitrarily and without regard to the law. That is why in ***Deynes Muriithi & 4 others v. Law Society of Kenya & another*** SC Application No 12 of 2015; [2016] eKLR (***Deynes***) we affirmed the principle that ordinarily this Court will not interfere with an exercise of another Court's discretion, but, where there is an injustice apparent on the face of the Order sought to be appealed or where there is an infringement of fundamental freedoms, then this Court would not close its eyes to such an illegality.

[54] In that case, at paragraph 51, we rendered ourselves as follows:

> ***"[W]henever it becomes plain that the Orders made by other Courts are destined to occasion grave injustice, and this is apparent on the fact of the decision in question, this Court, as the ultimate custodian of constitutional integrity, may not turn a blind eye to such a decision, where it stands in conflict with express provisions of the Constitution."***

[55] In reiterating the above position, we affirm that we would only interfere with the Appellate Court's exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been

exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court's exercise of discretion. We further note the submission that different benches of the Court of Appeal have issued conflicting decisions on the effect of non-compliance with the Court of Appeal Rules, 2017. However, while we are aware, from other pending appeals before us, of that fact, the issue before us is specific to the Petitioner and we shall address it as such. Subject to a general statement later, as regards those conflicting decisions.

[56] In that context and specific to this case, the Court of Appeal made a factual finding that:

> ***"On the face of the document that was filed at the High Court at Kabarnet, it was the intention of the 3rd respondent to file the document at the High Court in Kabarnet. That is what the document says on its face. The document also shows that it was lodged with the Deputy Registrar at the High Court in Kabarnet. It cannot therefore be said that the 3rd respondent at any time complied with filing a proper notice of appeal as required by the rules of this Court regarding election petition appeals where a notice of appeal must be filed at the Registry of the Court."***

[57] The Court of Appeal was thus categorical that Rule 6 of the Court of Appeal Rules, 2017, requires any person intending to appeal the decision of the High Court, to file a Notice of Appeal in the prescribed format at the Court of Appeal Registry and not at the High Court Registry as was the case herein. It emphasised on the role played by a Notice of Appeal as was enunciated in this Court's

decision of ***Nicholas Salat*** where we stated that the filing of a Notice of Appeal is a jurisdictional pre-requisite and cannot be equated to a mere technicality. The Court was also guided by the case of ***Raila Odinga 2013*** in which we advised on the need to take the unique circumstances of each case into consideration when determining the extent of the application of Article 159(2)(d) of the Constitution. The Court of Appeal also went further and noted that no evidence was tabled to support the allegation that a Court of Appeal Registry official misled the Petitioner's advocate's clerk by directing him to file the Notice of Appeal at the High Court in Kabarnet. Taking all these matters into account, the Court of Appeal then concluded that the Record of Appeal filed by the Petitioner contained an invalid Notice of Appeal and hence incompetent and ought to be struck out.

[58] On our part, we can only interfere with the Appellate Court's exercise of discretion if the Appellant can show that:

i. The Appellate Court acted on a whim or that;
ii. Its decision is unreasonable and
iii. It is made in violation of any law or the Constitution or that;
iv. It is plainly wrong and has caused undue prejudice to one party.

[59] The Appellate Court having applied its mind to the specific circumstances of the case before it and the Appellant not having shown that any of the above criteria was misapplied and while we are aware that the Court of Appeal post 2017 has made different decisions on this question, taking into account the unique circumstances of each case before it, we are unable to interfere with the exercise of discretion by the Court of Appeal and we so find and hold.

[60] On the latter issue however, we are aware that the Court of Appeal (Election Petition) Rules, 2017 were published on 28th July 2017 and parties (and their advocates) may not have been aware of them by the time Notices of Appeal from Election Courts were being filed in 2018. The Court of Appeal thereafter, sitting as different benches of the Court made a number of decisions in exercise of discretion in the manner described above. With the Rules now being in the public domain and notwithstanding our refusal to interfere with the exercise of discretion in this case, parties are now on notice as to where and how Notices of Appeal under the Court of Appeal Rules aforesaid ought to be filed. The apparent conflicting decisions of that Court should not therefore be an issue in the next election cycle. That is all there is to say on that matter.

(c) Reliefs

[61] The above holding disposes of the prayers in the Petition of Appeal that the "appeal be allowed" and "the Ruling and subsequent orders of the Court of Appeal delivered on 31st May 2018 be set aside in its entirety". We have shown why those orders cannot be granted. The prayer for hearing of the Appeal at the Court of Appeal on its merits is a consequential one and it is obvious why it cannot be allowed.

[62] Regarding the striking out of the Record of Appeal, once we have found that the Notice of Appeal was properly struck out, no record of appeal can stand.

(d) Costs

[63] The only remaining issue at this point is to decide on who is to bear the burden of costs in these proceedings. Ordinarily, costs follow the event. However, in this case, we shall exercise our discretion and direct the parties to bear their

own costs (See ***Jasbir Singh Rai & 3 Others v. Tarlocham Singh Rai & 4 Others*** SC Petition No. 4 of 2012; [2014] eKLR.)

F. ORDERS

(a) The Petition of Appeal dated 26th June, 2018 is hereby dismissed.

(b) Each party shall bear its own costs.

[64] Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **18th** day of January **2019**

.....	**.....**
D. K. MARAGA	**M. K. IBRAHIM**
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	**.....**
J. B. OJWANG	**S. C. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	**.....**
NJOKI NDUNGU	**I. LENAOLA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a
true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA