REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

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

PETITION NO. 13 OF 2014

-BETWEEN-

NATHIF JAMA ADAM.....APPELLANT

-AND-

1. ABDIKHAIM OSMAN MOHAMED
2. SAHAEL NUNO ABDI
3. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
4. RETURNING OFFICER, GARISSA COUNTY
.....RESPONDENTS

(Being an appeal from the Judgement and Orders of the Court of Appeal at Nairobi in Civil Appeal No. 293 of 2013 (Maraga, Mwera & Mwilu JJA) dated 23rd April, 2014)

JUDGMENT

A. INTRODUCTION

[1] This is an appeal against the Judgement of the Court of Appeal, overruling the decision of the High Court sitting at Nairobi *(Mabeya, J.)* in *Election Petition No. 2 of 2013*, delivered on 24th September, 2013. The upshot of that decision was the invalidation of the election of the appellant, as Governor of Garissa County.

B. BACKGROUND

[2] The appellant, Mr. Nathif Jama Adam, was declared the duly-elected Governor, following the Garissa gubernatorial elections held on 4th March, 2013.

He garnered *37,910 votes*, while his closest contender, Mr. Ali Bunow Korane, garnered *35,098 votes*. Thereafter, the 1st and 2nd respondents, Abdikhaim Osman Mohamed and Sahael Nuno Abdi, who were registered voters in Garissa County, filed a Petition dated 25th March, 2013 in the High Court at Garissa, seeking a nullification of the election results. The 3rd respondent, the Independent Electoral and Boundaries Commission (the IEBC), is the constitutionally mandated body responsible for conducting and supervising elections. The 4th respondent was a duly gazetted agent of the IEBC, under Regulation 4(1) of the Election (General) Regulations, 2012 responsible for conducting the elections in Garissa County.

[3] The 1st and 2nd respondents sought to have the election of the appellant nullified, citing *election irregularities* including allegations that the election was marred by voter intimidation (as a number of explosions occurred in the County on election day); ballot stuffing; failure of agents to sign Form 35; and notably, voting at the Saka Primary School polling station and some other polling stations on *5th March, 2013* – on the morrow of election day. During the pendency of the petition, the 1st and 2nd respondents, twice unsuccessfully, applied for scrutiny (on 7th June, 2013 and on 18th July, 2013).

[4] The appellant and the 3rd and 4th respondents contended that the elections were conducted in accordance with the Constitution, the Elections Act and the Regulations made thereunder. They averred that any irregularities that occurred were administrative, and had not affected the result of the election.

[5] In a Judgement delivered on 24th September, 2013, the High Court *(Mabeya, J.)* dismissed the petition, finding that *although several irregularities had been proven, they were not so substantial as to have affected the results of the election.*

The learned Judge awarded costs to the appellant, and the 3rd and 4th respondents, capped at Kshs. 2.5 million.

[6] Aggrieved by the High Court's decision, the 1st and 2nd respondents appealed to the Court of Appeal. They set out six grounds of the appeal, and the Court delineated the following issues for determination:

> *(i) whether or not the trial Judge appreciated the constitutional and legal threshold for a free, fair and verifiable election;*
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> *(ii) whether or not there were irregularities and errors in the conduct of the Garissa County gubernatorial election and, if so, whether or not those irregularities and errors affected the credibility and integrity and/or the result of that election;*
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> *(iii) whether or not the appellants pleaded for scrutiny, and whether or not the trial Judge exercised his discretion judicially, in refusing scrutiny;*
>
> *(iv) whether or not the appellants discharged their burden of proof; and*
>
> *(v) what is the appropriate order on costs?*

[7] The Court of Appeal held that the trial Judge had indeed appreciated the constitutional and legal threshold for an election, as enshrined in Articles 81 and 86 of the Constitution. However, the appellate Court observed that the trial Court had wrongly held that *the irregularities and errors did not affect the election*, pointing specifically to the unsigned and unstamped Forms 35 which were, as it held, unverifiable, and so should have been excluded.

[8] On the issue of scrutiny, the Court of Appeal observed *that the trial Judge erred in finding that an interlocutory application could not properly invite the trial Court to order scrutiny*. It held that a *proper basis had been laid for scrutiny,* and

that it should have been ordered. The Court of Appeal also faulted the trial Judge for *finding that the voting that was conducted on 5th March, 2013 at Saka Primary School polling station was in order*. Thus, the appellate Court held that the results from that polling station should have been cancelled, *which in turn would have eroded the winning margin*. The Court, however, dismissed the issue regarding whether the IEBC did issue all parties with documents similar to those lodged before the trial Court – holding that this was a matter of fact for determination by the trial Court. The Court of Appeal allowed the appeal and set aside the Judgment of the High Court. The effect was that the appellant's election as Governor of Garissa County was nullified.

[9] Dissatisfied with the Judgement of the Court of Appeal, the appellant, on 29th April, 2014 filed a petition and a Notice of Motion, under certificate of urgency, in this Court. On the same date, Njoki, SCJ heard the application *exparte*. The matter was certified urgent, and conservatory Orders maintaining *status quo* were granted until *inter partes* hearing, before a two-Judge Bench. On 30th April, 2014, *Tunoi* and *Njoki, SCJJ* heard the submissions on interlocutory matters. The learned Judges, in their Ruling in *Civil Application No. 18 of 2014* (dated 9th May 2014), determined that this was an arguable appeal, and pending the hearing and determination of the appeal, they granted *inter alia*: stay of execution of the Judgment and Orders of the Court of Appeal; conservatory Orders against the 3rd respondent certifying the gubernatorial seat for Garissa County vacant, or announcing and conducting by-elections; and conservatory Orders against the Speaker of Garissa County Assembly assuming the office of Governor. The appeal was heard before a full-Judge Bench of this Court, on 22nd May, 2014.

C. SUBMISSIONS BY THE PARTIES

(i) The Appellant's Submissions

[10] The appellant lodged his petition in this Court on 30th April, 2014. He based his appeal on 10 grounds, which he subsequently condensed into five, as follows:

> *(i) the Court of Appeal wrongly interpreted Articles 38, 81 (a),(d) and (e), 86 and 87 of the Constitution, which establish the framework for elections in Kenya;*
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> *(ii) the Court of Appeal usurped and/or exercised a jurisdiction which it lacked, in determining the appeal before it;*
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> *(iii) the Court of Appeal failed to make any finding as to whether or not the 1st and 2nd respondents discharged the "double burden" – the burden of proof, and the standard of proof – required in election petitions;*
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> *(iv) the Court of Appeal was wrong in holding that the voting process carried out on 5th March, 2013 at Saka Primary School was invalid, and that the votes cast should be disregarded in the final tally; and*
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> *(v) the Court of Appeal was wrong in invalidating the election, on account of a denial of an interlocutory application for scrutiny (against which the aggrieved party did not prefer an appeal).*

[11] Senior Counsel, Mr. Ahmednasir Abdullahi, who represented the appellant, submitted that two election petitions had emanated from Garissa County – one in respect of the gubernatorial election, and the other, in respect of the Balambala Constituency parliamentary seat. Counsel submitted that the two cases, which were based substantially upon the same perceived irregularities, had been the subject of unsuccessful petitions before the same trial Judge. At the Court of Appeal, however, markedly different results were recorded. One Bench of that Court upheld the election in Balambala Constituency, and held that the

irregularities *did not affect the outcome of the election*; while another Bench of the same Court nullified the gubernatorial election, *on the basis of the very same irregularities* that arose from this particular Constituency. Learned counsel urged that such an outcome was irregular, and should be corrected by this Court.

[12] Learned counsel invited this Court to consider the place, in this dispute, of Article 10 of the Constitution, which deals with *national values and principles of governance*. It was counsel's contention that, in the light of the said provision, this Court ought to consider the Judgement of the appellate Court as being in contravention of Article 10, as it removed a lawfully elected County Governor on flimsy grounds, without any regard to the laws in place, nor to the evidence presented before that Court.

[13] On the issue whether the Court of Appeal misapprehended the import of Articles 38, 81, 86 and 87 of the Constitution, counsel submitted that the central claim was that, despite the finding that there were certain irregularities affecting the election, the appellate Court failed to analyse *the effect of these irregularities*. He submitted that the Court had no basis to reach the conclusion that the irregularities "narrowed down or obliterated entirely" the winning margin. He urged that the appropriate test is the "*magic-number" test*. The Supreme Court of Canada applied this test in ***Opitz v Wrzenewskyi*** [2012] 3 SCR 769, and held that:

> ***"the election must be annulled if the rejected votes are equal to or outnumber the winner's plurality."***

[14] Counsel submitted that the Court of Appeal had misunderstood the import of the constitutional provisions it relied on, to nullify the election; and that the overall purpose of those provisions was to enfranchise the electorate. Relying on the persuasive authority, ***Haig v. Canada*** [1993] 2 S.C.R. 995, counsel urged that, where there was *substantial compliance with the law*, the election should

not be overturned, unless the irregularities *affected the result*. In his estimation, this was the proper *balance of competing interests*. Learned counsel found support in another Canadian case, ***Mike Baird v. Christina Shellard,*** TFN Judicial Council Decision File JC00103, where it was held that:

> "*While constitutional protections are at the heart of the legal system of a Nation, and while they should be interpreted in a broad and generous fashion, they should not also be interpreted so that every circumvention of the rules or every administrative mistake leads to a claim that a constitutional right is infringed. Such an approach would risk trivialising these important constitutional rights.* ***A court should be reluctant to find that a particular person's constitutional rights have been infringed when what occurred was an administrative mistake made in good faith and corrected as much and as soon as possible***" [emphasis supplied].

[15] Counsel asked this Court to overturn the appellate Court's Judgment, because that Court exceeded its jurisdiction when it delved into matters of fact, contrary to Section 85A of the Elections Act. In support of his submissions, he cited this Court's decision in ***In Re the Matter of the Interim Independent Electoral Commission*** S.C. Advisory Opinion No. 2 of 2011, which holds that a Court's jurisdiction flows from the law. He also relied on the case of ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others,*** S.C. Application No. 2 of 2011, to demonstrate that a Court cannot arrogate to itself jurisdiction through judicial innovation, or craft.

[16] Counsel submitted that the Court of Appeal erred, in re-evaluating the evidence on record on the basis that the evaluation of evidence by the trial Court

was a matter of law, which it may reconsider on appeal. In his view, the provision of Section 85A of the Elections Act, that the appeal in an election petition is to be on matters of "law only", points to an appeal on a "pure" point of law. Counsel relied on Richard D. Friedman's ***Standards of Persuasion and the Distinction Between Fact and Law***(1996), and urged that *evaluation of evidence* belonged to the *fact-finding function*, reposed in the trial Court.

[17] Counsel also relied upon dicta in the Philippines case, ***New Rural Bank of Guimba (N.E.) Inc v. Femina S. Abad and Rafael Susan*** G.R. Number 161818, to the effect that *a question of fact arises where there is doubt as to the existence of a certain set of facts*; and upon the American case, ***James R Ahrenholz v. Board of Trustees of the University of Illinois*** 291 F.3D 674, which held that *a question of law means an abstract legal issue.*

[18] Counsel referred to the persuasive authority in the Canadian case, ***Housen v. Nikolaisen*** [2002] 2 235, in aid of his submission that the foregoing distinction is important, in view of the trial Court's advantageous position resulting from extensive exposure to evidence, and from the benefit of hearing the testimony *viva voce*. Furthermore, relying on the same authority, learned counsel submitted that even if the Court of Appeal had jurisdiction to interfere with the findings of fact of the trial Court, it could only do so where the trial Judge had made a "palpable and overriding error". Thus, counsel contended that the Court of Appeal was wrong in rehashing the evidence of Ali Adam Abdullahi in their Judgment, and then substituting the evaluation of such evidence by the trial Court, with their own. Counsel submitted that the appellate Court's consideration as to whether the trial Judge had properly exercised his discretion, was neither a question of law nor of fact.

[19] Counsel faulted the appellate Court for not making a determination as to whether the 1st and 2nd respondents had discharged their *burden of proof*. He

submitted that since the trial Court found that the 1st and 2nd respondents failed to discharge the burden of proof, then on the basis of this Court's decision in ***Raila Odinga & Others v. the IEBC and Others,*** S.C. Petition No. 5 of 2013 the Court of Appeal should have addressed its mind to the correctness of the decision thus taken by the trial Court. It was urged that the failure of the appellate Court to resolve this question, rendered its Judgment a nullity.

[20] Counsel submitted that the Court of Appeal had erred in impugning the voting at the Saka Primary School polling station, which was extended to 5th March, 2013. He urged that the trial Court record showed that an outbreak of violence is what led to the extension of voting – a matter well within the Presiding Officer's discretion, under Clause 64 of the Elections Regulations. Counsel faulted the Court of Appeal for adding this issue to the cumulative set of irregularities that led to the conclusion in its Judgment.

[21] Counsel submitted that the Court of Appeal erred in reprobating the High Court's denial of interlocutory applications seeking scrutiny. He urged that there was no basis for the appellate Court's position, as the rulings in question were not the subject of any appeal; hence the appellate Court's position on such issues was, in effect, merely concerned with *obiter dicta* in the trial Judgment.

[22] Counsel submitted that the appellate Court had erred, in holding that a *Chamber Summons* was a pleading, merely because the term "Summons" appeared in the definition of "pleadings" in the Civil Procedure Act (Cap. 21, Laws of Kenya), whereas the "Summons" referred to in this matter was a primary document of pleadings, an Originating Summons. Learned counsel submitted that the Court of Appeal had faulted the High Court Ruling dismissing the application for scrutiny, even though the Ruling had not appeared in the Record of Appeal. On this account, counsel urged this Court to reverse the decision of the

Court of Appeal, and uphold the election of the appellant as Governor of Garissa County.

(ii) The 1st and 2nd Respondents' Submissions

[23] Learned counsel, Mr. Gatonye appearing for the 1st and 2nd respondents, submitted that, as the appellant and the 3rd and 4th respondents had filed no cross-appeal, questioning the factual findings of the trial Judge, the appellate Court could not be faulted for failing to analyse the evidence before it, or to consider the burden of proof. Counsel urged that the Court of Appeal had arrived at its decision owing to the trial Court's decision, which was wrongly taken, to dismiss the 1st and 2nd respondents' application for scrutiny and recount – on the ground that such a matter had not been included in the Petition. Counsel impugned the trial Court's position, in particular, because the trial Judge had himself remarked that a recount was necessary to ascertain the election results.

[24] Counsel submitted that given the "slim" winning margin *(of 2812 votes),* which accounted for 3 % of the votes cast, the irregularities and inaccuracies bore a materiality in the electoral outcome. On that basis, counsel submitted, the trial Court erroneously upheld an election compromised by such irregularities. Counsel relied on certain persuasive authorities: ***Pilane v. Molomo & Anor*** BLR 214 (from Botswana); and ***Morgan v. Simpson*** [1975], 1 Q.B. 151 (from England), to submit that an election could be annulled where such irregularities affected the results. He relied too on the persuasive authority of the ***Opitz*** case, in which the Canadian Supreme Court interpreted the term "irregularities" as failures to comply with the requirements of the Act, unless the deficiency is merely technical, or trivial.

[25] Learned counsel contested the submission by the appellant, that alleged electoral irregularities in Balambala Constituency, had earlier been held by the

very appellate Court to have had no materiality as regards the Parliamentary seat there. His reasoning was that the gubernatorial elections are distinct and separate from any other elections in the County, and should always be viewed as such. He gave as an illustration, the fact that the ballot boxes for gubernatorial elections are different from those for the election of a Member of the National Assembly – even though both sets of ballots are cast at the same polling stations within the Constituency.

[26] Counsel relied on the persuasive authority of ***Colonel (Rtd) Dr. Kizza Besigye v. Yoweri Kaguta Museveni & The Electoral Commission,*** [2001] UGSC 3, for the contention that the phrase, "affected the results in a substantial manner," means that the votes that the candidates obtained would have been substantially different if not for the non-compliance with written law. He submitted that the Court of Appeal had correctly found material violations to have occurred, and these rendered the election a nullity, as it was "not substantially conducted in compliance with the Constitution and electoral law." Counsel urged that the alterations which the trial Judge found on numerous statutory forms, should have been investigated, and not overlooked for the reason that they were unpleaded.

[27] Counsel urged that Article 259 of the Constitution should not be interpreted in such a manner as to permit any State organ to diminish the mandatory requirements of Articles 81 and 86 of the Constitution. He agreed with the Court of Appeal, that the trial Judge had misapprehended the *effect of the irregularities* he had unearthed, as only affecting 1,000 votes. It was submitted that the effect was much larger, taking into account: the 12 Forms 35 that did not have the seal of the 3rd respondent; the 31 Forms 35 which were not availed in the trial Court for verification, amounting to 5,000 votes; and the

results for Fafi Constituency, where the Form 36 availed was the one for the senatorial, rather than gubernatorial elections.

[28] Counsel contested the claim that the appellate Court had misdirected itself regarding the *burden* and *standard of proof*. He submitted that the learned appellate Judges had addressed their minds to this, and were right to fault the trial Judge, in respect of burden and standard of proof, as regards proven irregularities.

[29] Counsel contested the claim that the Court of Appeal had denied the appellant the right to a fair trial, by the terms of Article 50(1) of the Constitution. Relying on the authority in ***Peters v. Sunday Post*** [1958] EA 424, and ***Selle v. Associated Motor Boats Co. Ltd.*** [1968] EA 123, counsel submitted that the appellate Court had the jurisdiction to re-evaluate the available evidence and draw its own conclusions. He cited the case of ***Bracegirdle v. Oxney*** [1947] 1 All ER 126, in support of the argument that the Court of Appeal only interfered with the *conclusions of the trial Court that were unsupported by the evidence on record*. Specifically, counsel urged that the Court of Appeal had correctly reconsidered the County Returning Officer's statement, that there were irregularities in the election, and that these were attributable to human error. Counsel submitted that the Court of Appeal had not taken into account extraneous matter, in looking at the effect of clanism on the election – as that had been introduced into the evidence by the 1st and 2nd respondents herein.

[30] On unpleaded issues, counsel for the 1st and 2nd respondents contended that the Court of Appeal rightly faulted the trial Judge for declining to take into account the effect of unsealed Forms 35, and for not ordering scrutiny – even though these were not in the original pleadings. He relied on the decisions in: ***Railways v. E.A. Road Services Limited*** [1975] EA 128; ***Odd Jobs v.***

Mubia [1970] EA 476; ***Manson Onyongo Nyamweya v. James Omingo Magara & 2 Others,*** Kisii High Court Election Petition No. 3 of 2008 and ***Clement Kungu Waibara v. Bernard Chege Mburu***, Nairobi Civil Appeal No 205 of 2011 – in support of the argument that the Court can rely on, and decide upon unpleaded issues which are not objected to at the trial. Counsel agreed with the appellate Court's position, that the trial Judge had misdirected himself when he stated that unpleaded issues could not be the basis for determining the question.

[31] Learned counsel, however, conceded that the Court of Appeal had erred, in holding that the extension of voting at the Saka Primary School polling station from 4th to 5th March, 2013 was done unlawfully. This is because the Returning Officer had power to do so, under Regulation 64 of the Election Regulations.

[32] On the issue whether the Court of Appeal exceeded its jurisdiction, by venturing into matters of fact, counsel urged that the appellate Court had constrained itself to *matters of law*. Relying upon the ***Bracegirdle*** case, counsel urged that *conclusions of fact that are not supported by evidence are matters of law;* and that no new evidence had been introduced at the Court of Appeal, which based its decision upon the evidence presented at the High Court, and thereby reached conclusions of law.

[33] Learned counsel had doubts as to the appropriateness of the precedents invoked by the appellant. As regards the ***Raila Odinga*** case, he argued that the Presidential election petition had dealt with different facts, and did not authorize the dilution of constitutional and statutory standards for elections. He urged that the Canadian cases relied on by the appellant, failed to deal with the specific situation at hand, which focused upon the provisions of the Constitution and the legal mechanisms that govern Kenyan elections. Counsel urged that this Court

ought to consider not only the winning margin, but also other issues including the factor of irregularities. In conclusion, counsel contended that unlike in the Presidential election petition, the burden of proving certain election irregularities had been discharged, in the present petition. He submitted that such irregularities, as they were significant, ought to have led to the nullification of the election of the appellant, as the Governor of Garissa County.

(iii) The 3rd and 4th Respondents' Submissions

[34] Counsel for the 3rd and 4th respondents, Mr. Muganda relied on the English case, ***Islington West Division Case, Medhurst v. Lough and Gasquet*** (1901) 5 O'M & H 120, in suggesting those circumstances in which an election would be a sham. This case cites as instances that will render an election a sham: the destruction of polling stations and ballot boxes; the stuffing of ballot boxes; lack of secrecy in balloting; coercion of voters; partiality of the electoral body; reversal of vote tallies; or where there is massive bribery and corruption.

[35] Learned counsel sought support from a different Judgment of the appellate Court, in relation to Balambala Constituency's Parliamentary election petition, where it was affirmed that the election was free and fair. As it is from this Constituency that the bulk of complaints emanated, counsel urged the Court to consider whether it was proper to take a different view of the gubernatorial elections as conducted in that same Constituency.

[36] Counsel contested the appellate Court's treatment of the evidence. He urged that there was no material basis for that Court to hold that the gubernatorial election was indeterminate. Learned counsel urged that the trial Court, by contrast, had weighed the evidence of the 1st and 2nd respondents, and

found it largely wanting. He criticized the Court of Appeal's restating of that evidence, without giving it the due weight, in view of Section 83 of the Elections Act. It was submitted that the appellate Court's conclusion that the election was indeterminate, arose from a misinterpretation of Articles 38, 81, 86 and 87 of the Constitution; and he invoked in aid the English case, ***Woodward v. Sarsons*** [1875] L.R. 10 C.P. at 743-744.

[37] Counsel submitted that an election cannot be 100% free from irregularities, errors or mistakes, for it is an enterprise conducted by human beings. He cited the case of ***Nana Addo Dankwa Akufo-Addo & Others v. John Dramani Mahama & 2 Others*** [2013] SGL, where the Ghanaian Court held that, to nullify an election conducted in substantial compliance with the Constitution and written law would amount to *"putting in the power of some unscrupulous presiding officer in some polling station to nullify the solemn act of the whole constituency by his act or omission"*. He submitted that the Court of Appeal could not have arrived at the conclusion that the election was "indeterminate," without a mathematical analysis similar to the one conducted by the High Court Judge.

[38] Counsel supported the submission of the appellant that the Court of Appeal did not address the burden and standard of proof, and as such, it had no basis for its decision. He urged that the Court of Appeal had recently affirmed, in the ***Mohamed Mahamat Kuno v. Abdikadir Omar Aden & 2 Others***, Nairobi Civil Appeal No. 298 of 2013 case that, in order to avoid trial by way of surprise, the facts to be proved ought to be only those that have been clearly pleaded. He submitted that when the Court of Appeal based its decision on unpleaded grounds, it essentially violated the parties' rights to a fair trial, contrary to Article 50(1) of the Constitution. Counsel cited several authorities in

support, including ***Esso Petroleum Co. Ltd. V. Southport Corporation*** [1956] A.C. 218, and ***I.E.B.C. & Another v. Stephen Mutinda Mule***, Nairobi Civil Appeal No. 219 of 2013. He submitted that while the 3rd and 4th respondents' submissions had not appeared in the appellate Court's Judgment, that Court proceeded to entertain the 1st and 2nd respondents' unpleaded matters, and that this was improper, in law.

[39] Counsel urged that the Court of Appeal had erred, in reprobating the election results shown on unsigned Forms 35, as those results were not challenged. He submitted that the electorate could not be disenfranchised solely on the basis that there was *some act or omission on the part of the presiding officers*. He urged the Court to uphold the following findings of the trial Court: that, the failure to indicate results on Form 35 did not affect the results; that the cancellation of results in Mathalibah polling station affected all candidates equally; that no evidence was led as to the ejection of agents, the failure to seal ballot boxes, the disappearance of the Returning Officer, the breaking or stuffing of ballot boxes, or the results being unannounced at the polling stations; and that the deferment of the tallying of results was for security concerns, and did not affect the results. In support of those findings, counsel cited the case of ***John Fitch v. Tom Stephenson & 3 Others*** [2008] EWHC 501, in which the English Court observed that "*where possible, the courts seek to give effect to the will of the electorate,*" even where there have been significant breaches of official duty or election rules.

[40] With regard to the extension of voting at the Saka Primary School polling station to 5th March, 2013 counsel submitted that this was justifiable as it was due to the violence that erupted on the voting day, according to witnesses of all parties involved. He submitted that there was proof that the said polling station

had opened late, due to logistical challenges, but there was no proof that the hours of extension of voting were not commensurate with the duration of delay. Counsel submitted that the Court of Appeal had erred, in finding that the process of voting was illegal, and that the results from the said polling station should be cancelled. He urged his case to be supported by a different appellate Court Bench's consideration of the same issue in respect of the Balambala Constituency election petition, ***Mohamed Mahamat Kuno v. Abdikadir Omar Aden,*** Nairobi Civil Appeal No. 298 of 2013, and that Bench's finding that the extension of voting was in accordance with the law.

[41] Counsel for the 3rd and 4th respondents submitted that the Court of Appeal had exceeded its jurisdiction, in delving into *matters of fact,* in its reconsideration of the evidence: specifically, its *consideration of the irregularities on Forms 35; the cancellation of results* at Mathalibah polling station; and *the finding that these were strongholds of the 2nd runner-up in the election*. Further, counsel contested the appellate Court's decision in which it considered *the effect of clanism on the election*. He urged that this was *a matter of fact*, not within the jurisdiction of that Court.

[42] In addition, counsel contested the Court of Appeal's finding that the trial Judge had erred, in refusing to grant an *interlocutory application seeking orders for scrutiny*. He submitted that *no basis had been laid for the grant of such an order, in the terms of Rule 33 of the Elections Petition Rules*. Furthermore, he asserted that the grant of orders for scrutiny was an exercise of the trial court's discretion, and not an automatic right; and thus, the Court of Appeal needed to find that the trial Court had injudiciously exercised this discretion, as a basis for the conclusion it reached. Counsel asked this Court to find that the appellate Court had erred in nullifying the gubernatorial election for Garissa County.

D. ISSUES FOR DETERMINATION

[43] From the submissions, the following issues emerge for determination:

(i) whether the Court of Appeal exceeded its jurisdiction, contrary to Article 164(3) of the Constitution, and Section 85A of the Elections Act;

(ii) whether the Court of Appeal failed to make a finding as to whether or not the 1st and 2nd respondents had discharged the burden of proof, and the standard of proof required in election petitions;

(iii) whether the Court of Appeal erred in finding that the voting process carried out on 5th March, 2013 at the Saka Primary School polling station was invalid, and so the votes cast from there should have been disregarded in the final tally;

(iv) whether the Court of Appeal erred in invalidating the election on the basis of the denial of an interlocutory application for scrutiny, against which the aggrieved party did not prefer an appeal; and

(v) whether the Court of Appeal misinterpreted Articles 38,81(a),(d),(e),86 and 87 of the Constitution, which lay the normative foundation for public elections in Kenya.

E. ANALYSIS

(i) Election Matters: The Jurisdiction of the Court of Appeal

[44] Counsel for the appellant submitted that the appellate Court erred, when it revisited the evidence of Ali Adam Abdullahi, and substituted the trial Court's apprehension of those facts with its own. He urged that the appellate Court's assessment of the issue whether the trial Judge had properly exercised his

discretion, was neither a question of law nor of fact, and that in certain instances the appellate Court Judges had established and made findings on their own sets of facts.

[45] Counsel for the 3rd and 4th respondents submitted that the Court of Appeal had exceeded its jurisdiction, in delving into *matters of fact*, in its reconsideration of evidence. Specifically, that Court's consideration of the irregularities on Forms 35, the cancellation of results at Mathalibah, and the finding that these were strongholds of the 2nd runner-up in the election, were contested by learned counsel. The fact that the Court of Appeal considered the effect of clanism on the election, was contested by counsel as a matter of fact, not falling within the jurisdiction of that Court.

[46] In the case of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others,*** S.C. Petition 2B of 2014, this Court, in quest of guiding principle such as would assure certainty and predictability in electoral disputes, and especially in the context of Section 85A of the Elections Act, thus pronounced itself [paragraphs 81-82]:

> ***"[81] Now with specific reference to Section 85A of the Elections Act, it emerges that the phrase 'matters of law only', means a question or an issue involving:***
>
> ***(a) the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;***

(b) the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;

(c) the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on 'no evidence', or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were 'so perverse', or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence.

"[81A] It is for the appellate Court to determine whether the petition and memorandum of appeal lodged before it by the appellant conform to the foregoing principles, before admitting the same for hearing and determination.

"[82] ***Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the*** *probative value of the evidence* ***tendered at the trial Court, or invites the Court to*** *calibrate any such evidence,*

especially calling into question the *credibility of witnesses,* ***ought*** *not* ***to be admitted****. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand."*

[47] It is on the basis of the foregoing principles that we must determine whether the Court of Appeal delved into matters of fact, and exceeded its jurisdiction provided under Section 85A of the Elections Act. Contrary to what learned counsel for the appellant and for the 3rd and 4th respondents claim, a reading of the Court of Appeal's Judgment illustrates that it only revisited the evidence of the County Returning Officer (R1W1). It did not interfere with the findings of fact provided in paragraph 135 of the trial Court's Judgment, which were that: one ballot box, Serial No. 070696 for Dertu polling station was broken; the TNA agent for Danyere polling station was not given Form 35; there were several party agents who had not signed Form 35; the results for Abakaile polling station were not indicated in the final results; the results for Mathalibah polling station were cancelled, thereby disenfranchising 216 registered voters; the Presiding Officer had not signed some Forms 35; and, close to 1000 votes were unaccounted for, due to some discrepancies and errors in Forms 35 and 36.

[48] However, the Court of Appeal made a finding that the learned trial Judge had ignored *qualitative irregularities*, which had allegedly been brought to his attention; and these include: that he received evidence that the contest was too close to call; he had been told that the voting patterns were closely influenced by clanism; and that candidates received virtually all votes from the areas occupied by their respective clans. These, in essence, were *new factual findings by the*

appellate Court, because the conclusions would have required empirical figures, and other details – none of which appear in its Judgment. Evidence is the basic building block of valid judicial inferences; and Courts of law ought to appreciate the probative value of evidence presented before them; they should avoid all inclination towards conjecture. In this instance, it is clear that due deference was not paid to the trial Court, which would have been the proper forum to establish those facts.

[49] In the ***Munya*** case we held (paragraph 93) that Section 85A of the Elections Act is not an inconsequential provision, and that as much as the Court is free to navigate the evidential landscape, it ought to maintain fidelity to *the record*. The appellate Court, when examining "matters of law", may not ignore the *evidence on record*. Given this principle, we hold, in this case, that the Court of Appeal erred when it established new facts, extraneous to the findings of the trial Court – thus exceeded its mandate provided for under Section 85A of the Elections Act.

(ii) Burden of Proof, and Standard of Proof

[50] On the issue whether the Court of Appeal analysed the discharge of burden of proof by 1st and 2nd respondents, counsel for the appellant and the 3rd and 4th respondents found fault with a statement in the Judgment (paragraph 26):

> ***"The issue then is: did the irregularities in this case affect the result of the Garissa gubernatorial election? We think they did."***

[51] Counsel for the appellant submitted that in arriving at the foregoing decision, the Court of Appeal conducted no analysis on whether the 1st and 2nd respondents, in the first place, discharged their burden of proof. And so, counsel

submits, the appellate Court had no basis for overturning the finding of the trial Judge, that the 1st and 2nd respondents had not discharged their burden of proof.

[52] In the ***Raila Odinga*** case we set out the legal position regarding burden of proof, and standard of proof in election petitions, as follows:

> *"...a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle, be above the balance of probabilities, though not as high as beyond-reasonable-doubt.* ***Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary****"* [emphasis supplied].

[53] The appellate Court affirmed the trial Judge's analysis, evaluation and conclusion on the correct standard and burden of proof, in an election petition. The learned Judges of Appeal concurred with the trial Court's findings on the applicable standard of proof, and proceeded to affirm the correctness of the constitutional principles which had guided the trial Court. The Court of Appeal thus observed (paragraph 23):

> ***"and he got it right on the correct standard of the burden of proof in this kind of case when, after citing and quoting from the authority of*** *RAILA ODINGA –v- IEBC & 3 OTHERS* ***E.P. No. 5 of 2013 he stated at paragraph 17 of his judgment:***

'Accordingly, the Petitioners not only bear the burden of proof to establish that there were violations, omissions, malpractices and irregularities in the conduct of the Garissa gubernatorial election held on 4th March, 2013, but must also illustrate to the court that the said violations, omissions, malpractices and irregularities, if any, affected the result of the election. It is after the Petitioners have established the foregoing that the burden shifts to the respondents, to establish that the results were not affected.'

....

He further guided himself correctly that the standard of proof in election disputes is higher than that of a balance of probability that is applicable in civil cases but lower than that applicable in criminal cases of proof beyond reasonable doubt" [emphasis supplied].

[54] A review of the burden and standard of proof stated by the High Court and affirmed by the Court of Appeal, reveals that it was consistent with the holding of this Court in the ***Raila Odinga*** case, and the ***Munya*** case. A reading of the trial Court's Judgment reveals that the learned Judge found that although the 1st and 2nd respondents had established certain irregularities, they did not discharge the burden of proof, as they *failed to show that the irregularities affected the results*. At the Court of Appeal, the learned Judges considered whether the trial Judge had applied relevant constitutional principles, to arrive at his conclusion. It is clear that the appellate Court concurred with the principles applied by the trial Court, regarding the burden and standard of proof. The appellate Court also considered the irregularities which the 1st and 2nd respondents complained of, and which the trial Court established; and the appellate Court held that the trial Judge had misdirected himself as regards the *effect of such irregularities, upon the election*.

[55] Our reading of the Court of Appeal's Judgment, however, does not reveal the anomaly complained about. The Court of Appeal considered the various irregularities which the trial Judge affirmed, were raised, and were established by the 1st and 2nd respondents. The appellate Court considered whether these irregularities were substantial enough to vitiate the election, and came to this conclusion (paragraph 29):

> ***"...these anomalies...in our view, not only significantly narrowed, if not altogether obliterated, the margin between the 3rd respondent and the runners-up but also rendered the result of the Garissa gubernatorial election indeterminate."***

[56] The issue is not whether the analysis regarding the burden of proof was correct, but whether the appellate Court attempted any analysis of the discharge of this burden. It is evident that the appellate Court undertook an analysis, prior to reaching a divergent opinion from that of the High Court Judge. We are not, in this respect, in agreement with the submissions by counsel for the appellant and for the 3rd and 4th respondents.

(iii) Saka Primary School Polling Station: The Conduct of Elections

[57] Counsel for the appellant and for the 3rd and 4th respondents submitted that the Court of Appeal had erred, by impugning the elections at the Saka Primary School Polling Station, on 5th March, 2013. The Court's position rested on the grounds that, there were no reasons given for the closure of the polling station at 10.40 pm on 4th March, 2013 and that, according to Regulation 66 of the Elections Regulations, only those on the queue after the close of voting time should have been allowed to vote. Further, the appellate Court held that since

IEBC was unable to lead the relevant evidence, it would be difficult to ascertain who voted on 5th March, 2013; and so, the Court held, the results of that polling station should have been cancelled.

[58] Regulation 64 of the Election Regulations provides that:

> *"(1) Notwithstanding the terms of any notice issued under the Act or these Regulations,* ***a presiding officer may, after consultation with the returning officer, adjourn the proceedings at his or her polling station where they are interrupted by a riot, violence, natural disaster or other occurrence, shortage of equipment or other materials or other administrative difficulty, but where the presiding officer does so, the presiding officer shall re-start the proceedings at the earliest practicable moment.***
>
> *...*
>
> *"(3) A presiding officer shall, in consultation with the returning officer—*
>
> *Extend the hours of polling at the polling station where polling has been interrupted under this regulation or for other valid cause, and*
>
> *Where polling in that polling station has started late, extend the hours of polling by the amount of time which was lost in so starting late.*
>
> *"(4) Where hours of polling have been extended as contemplated under sub-regulation (3), the presiding officer shall give a detailed report on the clear facts justifying such extension of hours" [emphasis supplied].*

[59] The Court of Appeal observed as follows at paragraph 35:

> *"...it is clear that an election was held at Saka Primary School Polling Station on 5th March, 2013 because polling had been closed the previous day at about 10.40 pm. The reasons for the closure of that polling centre at about 10.40 p.m. were not given.* ***What came out clearly in evidence though is that polling was closed at that polling station while voters were still on the queue awaiting their turn to vote. That provoked a fight between some two County Assembly candidates. The availed evidence did not disclose any acts of violence prior to the closure of the polling station.*** *But that is of little moment right now. What is of concern is whether the voting that took place on 5th March, 2013 as the Returning Officer, RIWI, admitted was in breach of the law and, if so whether that breach affected the Garissa gubernatorial election"* [emphasis supplied].

[60] Thus, the learned appellate Court Judges were decisively moved by the consideration that the trial Judge had not given reasons for the polling station closing at 10.40 p.m. They arrived at yet another conclusion of fact, when they observed that no evidence had been given to indicate that violence broke out prior to the closure of the polls. The trial Judge had held that he doubted the credibility of PW7 and PW8, and the contradictory facts which they presented regarding the violence at the polling station. But he, in effect, agreed with the Returning Officer's reasons for the postponement of the elections: that, Saka polling station had a high voter turnout, and an incident of violence occurred, which then led to the Presiding Officer adjourning the voting process. This shows that the polling station was closed due to violence, which erupted before the closure of polls. Consequently, the trial Judge held that the Returning Officer had properly exercised his discretion in adjourning polling, in accordance with Regulation 64 of the Election Regulations.

[61] Regulation 64 of the Election Regulations is undoubtedly based upon the citizen's right of franchise, which should not be undermined by violence, or administrative difficulties. We observe that the trial Court Judge appreciated this situation, and noted the procedure required before such a discretion is exercised – that the Presiding Officer must consult with the Returning Officer. This he found, was the case here, and there was no proper basis for invalidating the voting at the Saka Primary School polling station.

[62] However, the Court of Appeal (see paragraph 60, above) held that the trial Court's finding allowing the postponement of polling was contrary to Regulation 66 of the Elections Regulations. This Regulation provides that:

> ***"(1) Subject to regulation 64****, voting shall commence at 6 o'clock in the morning and end at 5 o'clock in the afternoon on the polling day.*
>
> ***"(2) Notwithstanding sub-regulation (1), a person who is on a queue for the purposes of voting before 5 o'clock in the afternoon shall be allowed to vote despite the fact that the voting time may extend to after 5 o'clock.***
>
> *"(3) The voting by Kenyan citizens residing outside Kenya shall be carried out during the Kenyan time specified in sub-regulation (1)"*[emphasis supplied].

[63] Regulation 66 of the Election Regulations deals with extension of voting beyond 5 p.m., where voters are still standing in the queues, on voting day. It does not deal with situations where violence interrupts voting, leading to adjournment. This Regulation is also subject to Regulation 64. In the circumstances, we are of the view that the learned appellate Judges erred, by

proceeding on the basis of Regulation 66, rather than of Regulation 64. Regulation 64 protects the citizen's right to vote in situations such as this, where the security of the polling station and the voters is compromised. Once security is reinstated, it would be *contrary to the Constitution to limit voting* for those who risk their safety to exercise their democratic right.

[64] We also hold that the learned Judges of Appeal, with all due respect, misapprehended the *factual position*, thereby coming to a *wrong conclusion in law*. This erroneous finding of fact was that *the irregular closing of the polling station caused violence to erupt*. As the learned trial Judge noted, only when these provisions for discretion are abused, for purposes of allowing unqualified persons to vote, or to disenfranchise qualified voters, can the electoral process at the affected polling station be nullified.

(iv) Scrutiny of Votes

[65] Counsel for the appellant submitted that the Court of Appeal erred when it faulted the trial Judge for failing to order for scrutiny, because the petitioners had not sought it in the petition. The appellate Court held that the learned Judge was in error because: first, there was an interlocutory application through Chamber Summons (dated 7th June, 2013), which in the learned appellate Judges' minds, was a pleading; therefore, the prayer for scrutiny had been pleaded for. Second, the appellate Judges found that sufficient ground had been laid for seeking scrutiny, and therefore, the trial Judge erred, by "whimsically" applying his discretion.

[66] The first question that arises is whether a Chamber Summons is a pleading, for the purposes of an election Petition? According to Section 2 of the Civil Procedure Act, a pleading is defined as follows:

"...'pleading' includes a petition or summons, and the statements in writing of the claim of demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of a defendant."

This provision is the basis upon which the Court of Appeal held that a Chamber Summons is a pleading.

[67] However, the effect was that the Court of Appeal had sought to overturn years of jurisprudence, on this question. In the case of ***Board of Governors, Nairobi School v. Jackson Ireri Getah***, Civil Appeal Number 61 of 1999 [1999] 2 EA 56, the Court of Appeal (Akiwumi, Tunoi and Bosire JJ.A) dealt with the question whether the Chamber Summons is a pleading. The Court held that:

> "*... we consider it pertinent to consider the issue which the appellant raised, namely,* ***whether a chamber summons is a pleading within the meaning of the term as used in the Civil Procedure Act*** *and Rules made there under. 'Pleadings' is defined in Section 2 of the Civil Procedure Act as follows:-*
>
> > *"includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant:"*
>
> *.... The definition, above, is couched in such a way as to accord with Order IV Rule 1, which prescribes the manner of commencing suits, which rule provides that:*
>
> > *'Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.'*

> ***Chamber summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used in the Civil Procedure Act and Rules made there under. The use of the term*** *'summons'* ***in the definition of the term 'pleading' must be read to mean*** *'Originating summons'* ***as that is*** *'a manner…prescribed'* ***for instituting suits"*** [emphasis supplied].

[68] Pleadings institute suits and lead to joinder of issues, thereby forming "instituting documents," and "responses". Thus, a Chamber Summons when in use as an interlocutory application, *cannot augment the substantive issues after joinder of issues has already occurred*. One substance of the right to a fair trial, under Article 50(1) of the Constitution, is that parties must know the case against them. This position has been upheld in several cases, *inter alia:* ***Philip Mugo Mucheru v. Mbeu Kithakwa***, Nyeri High Court Civil Appeal No. 4 of 2007 (Kasango J.); ***Samuel Ndiba Kihara & Anor. v. Housing Finance Company of Kenya Ltd. & 2 Others***, Nairobi HCCC No. 638 of 2006 (Kasango J.); ***Jecinta Wanjiru Muiruri v. Jane Wangari Mwangi & Anor***, Nairobi HCCC No. 184 of 2006 (Osiemo J); and ***Fredrick Mwangi Nyaga v. Garam Investments & Anor***, Nairobi HCCC No. 249 of 2013. The only exception arises under Order 53 of the Civil Procedure Rules, 2010 where the Chamber Summons is used to commence *judicial review* proceedings. (*See* ***Commissioner of VAT v. Atul Shah***, [1999] 2 EA 58, ***Boniface M. Opiyo v. Afred Oyoko Olunde & Anor***, [1997] LLR 7789, ***In the Matter of Kenya Wildlife Service Act*** and ***In the Matter of the Civil Service Reform Programme and the Kenya Wildlife Retrenchment Programme***, [1998] LLR 7645). We would signal that, as the procedures of the legal process continue to evolve, yet other exceptions may emerge. This has already happened

in the litigation of children's matters, under the Children Act, 2001 (Act No. 8 of 2001),in which some causes are instituted using Chamber Summons.

[69] Rules 8, 10 (3)(b),14 and 15 of the Elections Petition Rules do provide that the Petition, the Supporting Affidavit, the Response of the respondent, and the Replying Affidavit, are all *pleadings*. Further, according to Rules 12 and 15 of the Elections Petition Rules, parties filing pleadings are required to accompany these pleadings with affidavits of witnesses whom they intend to call at the trial. However, in the ***Munya*** case, this Court upheld the Court of Appeal decision in ***Dickson Mwenda Kithinji v. Gatirau Peter Munya & 2 Others***, Nyeri Civil Appeal No. 38 of 2013, that any annexures to the pleadings in an election petition, form part of the pleadings.

[70] Against this background, and in view of the current state of the adjective law of elections, we are of the opinion, with respect, that the learned Judges of Appeal were in error, in finding that a Chamber Summons was a pleading for the purpose of an election petition.

[71] The second question that arises is whether a proper basis had been laid for scrutiny. Counsel for the 1st and 2nd respondents submitted that scrutiny was a central issue before the appellate Court. He argued that the denial of scrutiny even where a proper basis had been laid, was an obstruction of justice, and had the effect that the results of the Garissa gubernatorial election remained "indeterminate". This point, counsel observed, was appreciated by the trial Judge, though he still made no order for scrutiny. The trial Judge held as follows (paragraph 41):

> "*Breaking of ballot boxes is a serious offence. However, proving the breakage alone is not enough to establish whether the irregularity*

affected the results. ***When such an anomaly is noted, the recommended action is to assess the contents of the ballot box to ascertain whether there was tampering with the contents. This can only be done through a scrutiny. In this case, the Petitioners did not pray for scrutiny in their petition and their application for scrutiny was declined***" [emphasis supplied].

[72] Conversely, counsel for the appellant submitted that the issue of scrutiny was an abandoned dispute, not to be revived at the Court of Appeal. This is because it arose from an interlocutory Chamber summons application which did not itself become the subject of appeal; and besides, the appellate Court did not consider the Ruling of the trial Judge, in their consideration of his exercise of discretion, in the matter. In dismissing the interlocutory application of 18th June, 2013, the trial Judge in his Ruling (dated 19th June, 2013), noted the lack of expedition in the applications seeking scrutiny, which had the effect of delaying the trial, in these terms (paragraph 8):

"It should be recalled that on 25th of March, 2013 the Petitioners had made a similar application but limited to the production of Ballot Box serial No.070696 and other ballot boxes said to be in the possession of the Police. An order allowing the production of Ballot Box serial No. 070696 was made while for reasons contained in a Ruling delivered on 7th June, 2013, the prayer for production of the ballot boxes in the possession of the Police was rejected. That, in my view, confirms that the application dated 17th June, 2013 could have been made either at that time or before the 28th May, 2013 when the matter came up for pre-trial directions. Further, at the pre-trial hearing, there was no indication that such an Application was in

the offing. ***To my mind therefore, the Application was but an afterthought meant to delay the trial of the Petition. The Petitioner cannot be allowed to prosecute his Petition by instalments***" [emphasis supplied].

[73] In the ***Munya*** case, this Court pronounced itself on the guiding principles in respect of an application for scrutiny. The following passage (paragraph 153)in that Judgment is relevant:

> ***"From the foregoing review of the emerging jurisprudence in our Courts, on the right to scrutiny and recount of votes in an election petition, we would propose certain guiding principles, as follows:***
>
> ***(a) The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.***
>
> ***(b) The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and***

fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.

(c) The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.

(d) Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules.

[74] The Court of Appeal, in considering the refusal by the trial Judge to grant scrutiny, held as follows (paragraphs 33-34):

"But it would appear that, the judge despite these clear provisions of this law had ***made up his mind not to order scrutiny***

simply because, according to him, it was not pleaded. He erred.

"We are crystal clear in our minds that an order for scrutiny is a discretionary one and that we cannot substitute our discretion for that of the trial court. We are further crystal clear in our minds that judicial discretion must always be exercised judicially and not whimsically and where it is denied reasons for such denial must be stated. *See the* ***Mbogo*** *case.... In this case, as we have stated, there was material in abundance to [warrant] an order for scrutiny even on the Judge's own motion. He himself acknowledged that it was the surest way to resolve the alleged irregularities, a formal application was made and counsel for the appellant repeatedly, orally sought it.*

"Besides the quantitative irregularities mentioned above, there were also qualitative irregularities brought to the attention of the Judge which he nevertheless ignored. ... He ignored all that. In the circumstances, we find that the learned trial Judge erred in his exercise of judicial discretion to deny scrutiny..." [emphasis supplied].

[75] It emerges that, the primary considerations in determining whether to grant scrutiny, are *whether there are polling stations with a dispute as to the election results; whether such a state of affairs has been pleaded in the petition; and whether a sufficient basis has been laid – to warrant the grant of the application for scrutiny.*

[76] We agree with the Court of Appeal, that the learned trial Judge was in error in holding that an order for scrutiny cannot be granted *where it is not pleaded.*

But it is crucial that *the polling stations which are the subject of a possible scrutiny, would have been already signalled in the pleadings, as having contested results*. This is the import of the wording of Rule 33 (1) of the Elections Petition Rules, that an application for scrutiny *can be applied for at any stage*. A foreshadowing of such an application should have been embodied in the main lines of pleading, which mark out the terrain of any legitimate electoral contest.

[77] Our examination of the trial Court's Judgement reveals that the Judge did not deny scrutiny *simply because it was not pleaded*. This fact emerges from the following passage in that Judgment (paragraph 118):

> "***As I have already said, it was incumbent upon the Petitioners to have pleaded in sufficient detail why they required the Court's intervention to order scrutiny and recount. The Petitioners should have specifically stated which polling stations had alleged irregularities and needed scrutiny. In my view, highlighting these issues at the submission stage was tantamount to a fishing expedition where the Petitioners discovered new or fresh evidence as the trial progressed.*** *It would be expected that a party when filing an Election Petition is from the outset seized with the grounds, facts and evidence for questioning the validity of an election****. The Petitioners have in essence tried to introduce new grounds to their Petition and amending it through the backdoor.*** *The so called discrepancies having not been raised, the 1st and 2nd Respondents did not have the opportunity to respond….*"

[78] It is thus evident, that the learned Judge was alive to the guidelines for the exercise of discretion in respect of scrutiny. He correctly held, for instance, that

scrutiny should be *limited to those polling stations in respect of which results are disputed,* and as may have been signalled in the pleadings. As we have determined earlier, the Chamber Summons application could not have been allowed to introduce new grounds to the Petition and, by such a casual design, to make amendments to the Petition.

[79] We are of the opinion that the trial Judge's exercise of his discretion is, in most respects, meritorious; and that his error in stating that scrutiny has to be pleaded, did not lessen the propriety of his decision; for the application before him covered *polling stations that were not pleaded with specific details*. Moreover, the Judge's exercise of discretion was also in consonance with the *constitutional principle of curtailing unnecessary delay, in the resolution of electoral disputes*. Though scrutiny can be directed *suo motu,* a trial Court is not to be impugned for being disinclined to exercise this discretion. With respect, we find that the Court of Appeal lacked sufficient cause for interfering with the exercise of discretion by the trial Judge.

[80] With regard to the appellant's position, that the issue of scrutiny could not be taken up, as it arose from an interlocutory application which was not appealed, our examination of the current state of jurisprudence shows that there is an established procedure in respect of appeals arising from an election petition. (See ***Ferdinand Ndung'u Waititu v. Independent Electoral and Boundaries Commission & 8 Others,*** Civil Application No. 137 of 2013 (UR 94 of 2013) [2013]; ***Cornel Rasanga Amoth v. William Odhiambo Oduol & 2 Others,*** Civil Application No. 26 of 2013 (UR 13/13); the ***Peter Gichuki King'ara*** case; and ***Jared Odoyo Okeyo & Another v. Independent Electoral and Boundaries Commission & 6 Others,*** Civil Appeal No. 16 of 2013).

[81] A central principle running through these decisions is that of *timeliness in deciding election disputes*. In the ***Munya*** case, this Court explicated and rationalised *timelines,* as a vital element in electoral dispute settlement. The Court thus held (paragraph 62):

> ***"Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people's franchise, not to mention the entire democratic experiment. The Constitutional sensitivity about 'timelines and timeliness', was intended to redress this aberration in the democratic process. The country's electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people's will, in name of which elections are decreed and conducted, should not be held captive to endless litigation."***

The principle of *timeliness* in determining electoral disputes, is also enshrined in Article 87 (1) of the Constitution, which exalts *efficiency* and *finality* in electoral dispute resolution. This Court has stated in ***Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others***, S.C Petition No. 10 of 2013 (at paragraph 49), that the legally-vested discretion of the Courts, to assure ends of justice in every case coming up before them, is to be conducted invariably from the *foundations laid in the Constitution*.

[82] We note, as regards issues related to interlocutory motions, that the Court of Appeal has recently conceived the concept of "deferred" and "sequential"

jurisdiction. In ***Peter Gichuki King'ara v. the Independent Electoral and Boundaries Commission and 2 Others***, Nyeri Civil Appeal No. 23 of 2013 case, that Court thus held:

> "***...this Court as an appellate Court has deferred and sequential jurisdiction to hear interlocutory matters arising from an Election Petition. However, the jurisdiction of this Court is only exercisable after a final judgment and decree of the High Court has been made***."

The Court of Appeal in this case, by no means detracted from the Constitution's set time-lines, when it held that though its jurisdiction arises immediately upon the issuance of interlocutory Ruling, it stood deferred until the trial Court's final Judgment is delivered.

[83] This Court has not been called upon to review such paths of jurisprudence as have been conceived in the appellate Court, by way of any submissions. We are not, thus, inclined to consider the matter – especially as it does not detract from the status of vote-scrutiny as a subject of constitutional principle. Consequently, we are, with respect, not in agreement with learned counsel for the appellant, that the appellate Court had not adequately reviewed the trial Court's finding on scrutiny, on the ground that the scrutiny question arose by way of an interlocutory application.

(v) The Framework of Elections, Articles 38, 81(a), (d) and (e), 86& 87 of the Constitution: Did the Appellate Court Misinterpret these?

[84] Counsel for the appellant, and for the 3rd and 4th respondents submitted that this is the main issue in this appeal. They urged that this issue goes to the

application of the law to the facts, and further, deals with the question whether the facts show the election to have been conducted *substantially in accordance with the law,* in instances where *irregularities did not affect the results* of the election, or where *the election was "indeterminate."*

[85] The submissions on this point revolve around *Articles 81 and 86 of the Constitution,* as well as *Section 83 of the Elections Act*. Article 81 sets out the general principles, with Article 81(e)(v) specifically requiring election administration to be impartial, neutral, efficient, accurate and accountable. Article 86 of the Constitution relates to the vital processes of voting, counting and tallying, and requires their conduct be in conformity with the prescribed standards. Section 83 of the Elections Act is the definitive statement of the standard that an election Court must apply, in verifying the election results. That Section is, at the same time, a statement of the burden of proof resting upon the petitioner, in an election petition.

[86] In the ***Munya*** case, this Court considered the three sets of vital provisions, alongside relevant case law: the ***Morgan*** Case; the ***Opitz*** Case; the ***Nana*** *Case* and the ***Raila Odinga*** Case**.** From that framework of principle and governing norm, read alongside persuasive authority derived from the most relevant jurisdictions, we stated the guidelines, in the ***Munya*** Case, as follows (paragraphs 216-218):

> "***It is clear to us that an election should be conducted substantially in accordance with the principles of the Constitution, as set out in Article 81 (e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the Regulations***

thereunder, constitute the substantive and procedural law for the conduct of elections.

"If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities.

"Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election. In this regard, we stand on the same plane as the learned Judges in *Morgan***,** *Opitz* ***and*** *Nana*."

[87] As to the effect of irregularities, and the point at which a Court should overturn an election, we stated that Courts must only act on *ascertained facts,* not *conjecture*, and must demonstrate *how the final statistical outcome has been compromised.* In the ***Munya*** case, this Court had elaborated the foregoing principles in specific terms [paragraphs 205A-206]:

"*We would state as a principle of electoral law, that an election is not to be annulled except on cogent and ascertained factual premises. This principle flows from the recurrent democratic theme of the Constitution, which safeguards for citizens the freedom 'to make political choices' [Article 38 (1)].*
"We consequently hold that the learned Judges of Appeal erred in questioning the credibility of the election on the basis of the

*percentage or margin of victory**, without demonstrating how the final statistical vote-outcome had been compromised***" [emphasis supplied].

[88] In the instant case, once the trial Judge found that certain errors had been proved, he proceeded to recalculate the votes, and noted that the adjustment between the appellant herein and the runner-up (Mr. Korane), would have been *1594 votes*. This shows that *the appellant would still be the winner*. With regard to 1000 that were not accounted for, the trial Judge held (at paragraph 139) that the 1st and 2nd respondents had not provided credible evidence showing that the irregularities complained of, and indeed established, were substantial enough to affect the election results, and that if the 1000 unaccounted for votes were deducted from the appellant, he would no longer be the winner.

[89] Clearly, there is eminent rationality in the trial Judge's arithmetical perception. It is remarkable, with due respect, that the appellate Court was guided by less cognizable indicators, to reach a differing determination, as follows (paragraph 29):

"*The learned Judge estimated the affected votes to have been about 1000. That is clearly wrong because the results in respect of twelve Forms 35 which had neither the seal of the 2nd Respondent nor the presiding officer's signatures should have been excluded on the ground that their authenticity could not be vouchsafed. In James Omingo Magara v. Manson Nyamweya& 2 Others, Civil Appeal No. 8 of 2010, this Court held that when a document is not signed by its author, it means that the author does not own it.* ***It follows therefore that in this case the forms 35 with no presiding officer's signature were worthless and their results should***

have been excluded from the final tally. *In the same vein, the absence of countersignatures against alterations, especially where such alterations related to votes garnered by the candidates, the result of the election on those forms were unverifiable.* ***With these anomalies as well as the cancellation of the entire results for Mathahlibah Polling Station; with results of two streams at Modika Polling Station not reflected; with the 3rd respondent's votes being exaggerated by 859 votes at Borehole 5 Mobile Centre (040), in our view, not only significantly narrowed, if not altogether obliterated, the margin between the 3rd respondent and the runners-up but also rendered the result of the Garissa gubernatorial election indeterminate***" [emphasis supplied].

[90] From the foregoing passage, and from the record, we find that the authenticity of the results on the unsigned and unstamped Forms 35, had not been the subject of challenge. But there had been an irregularity in the handling of statutory forms from the polling station. There was *no explanation of how that irregularity affected the results of the election*. This, clearly, is a censurable condition. But in a dutiful resolution of a legal and electoral dispute, the fundamental question is the *constitutional franchise-right of the people inhabiting the electoral area*. It is *this,* to be protected, in circumstances such as those unfolding in this instance – the default in view being, that of election presiding officers failing to have forms duly signed and stamped. In a similar situation, in the ***Nana*** case from Ghana, the learned Judges had thus held:

"*An election being a process as opposed to it being an event, where*

all stages have been gone through and therefore the elections could be said to have been substantially held in accordance with the

regulations, to nullify the results on this ground per se, would amount to putting in the power of some unscrupulous presiding officer in some polling station to nullify the solemn act of the whole constituency by his single act of omission.

In my view, ***visiting the sins of some public official on innocent citizens who have expressed their choice freely would run counter to the principle of universal adult suffrage,*** *one of the pillars of our democracy, and perpetuate an injustice*" [emphasis supplied].

[91] The trial Judge, in the instant case, quite properly arrived at his determination, which we affirm, as follows [paragraph 89]:

"***In this regard, the Petitioners did not lead any evidence that the lack of signatures or stamp of the presiding officers in Forms 35 for the above mentioned polling stations affected the outcome of the election. Further, the Petitioners did not even challenge the results that were tallied and declared at those polling stations. It is not enough for the Petitioners to merely allege and indicate a failure on the part of the 1st and 2nd Respondent, but it was also essential for them to demonstrate that such failure affected the result of the election."***

[92] The appellate Court's stand in this matter, with respect, lacks anchorage in *facts and statistics* – both being aspects in respect of which the trial Court's determination is firm. The electoral process, therefore, was *in substantial compliance with the Constitution, even though there were irregularities*. The

respondents had an obligation, in the circumstances, to show that the irregularities were of such a gravity as to vitiate the results, and the winner is no longer, in real terms, the winner. This is to be done by way of a *numerical analysis*. Although the appellate Court properly apprehended the applicable test, that Court had no basis for holding that the election was "indeterminate" as the winning margin was "significantly narrowed down or obliterated."

[93] We hold that the learned appellate Judges erred, in their application of the standard of proof. We uphold the trial Judge's finding, that the irregularities did not affect the election-outcome, and that the election conformed substantially to the terms of Articles 38; 81(a), (d) and (e); 86, and 87 of the Constitution.

[94] We note the concern raised by counsel for the appellant and for the 3rd and 4th respondents, regarding the different conclusions arrived at by two different Benches of the same Court of Appeal, on the very same irregularities which arose within Balambala Constituency. The trial Judge had arrived at similar conclusions in respect of the two electoral matters. But in this case, regarding the gubernatorial election, the Court of Appeal held, contrariwise, that the irregularities arising in this Constituency's polling stations had affected the election results; whereas a different Bench of that Court, in ***Mohamed Mahamat Kuno v. Abdikadir Omar Aden*** Nairobi Civil Appeal No. 298 of 2013, held that the irregularities were not so substantial as to affect the results of the election of the Member of the National Assembly for Balambala Constituency.

[95] Such a difference carries the demerit that it will tend to undermine the public confidence, that the judicial arm of the State is a truly impartial arbiter, governed by the objective realities occasioning dispute, and committed to fair and objective criteria of justice. Such a concern clearly falls within the agenda of this

Court, firstly, to "assert the supremacy of the Constitution" [*The Supreme Court Act,* 2011 (Act No. 7 of 2011), Section 3(a)]; and secondly, to ensure that "justice shall be done to all, irrespective of status" *[The Constitution of Kenya, 2010*, Article 15992)(a)]. We call upon all Courts to discharge their responsibilities not only by applying the best criteria in ascertaining the evidentiary premises of matters before them, and by the professional interpretation and application of relevant law, but also by *keeping abreast of the proper findings and determinations of other Courts considering subject-matter common to separate causes.*

F. CONCLUSION

[96] From the analysis undertaken in this Judgment, certain conclusions emerge. Firstly, the appellate Court exceeded its jurisdiction under Section 85A of the Elections Act, by introducing factual evidence, while dealing with the application for scrutiny, and when considering the reasons why the Saka Primary School polling station had adjourned the process of voting. Secondly, the Court of Appeal had not rightly censured the trial Judge's exercise of discretion, with regard to the grant of scrutiny. Thirdly, the Court of Appeal had not appreciated the propriety of the adjournment of voting at the Saka Primary School polling station. Fourthly, the appellate Court, in its consideration of the discharge of burden of proof by the 1st and 2nd respondents, misapprehended the nature of these obligations in election cases, and wrongly found that the 1st and 2nd respondents had discharged their burden of proof. Lastly, the appellate Court erred in finding that there were irregularities that affected the election-outcome, while not undertaking any analysis of the identity and import of that effect.

[97] We are in agreement with the trial Judge that, on the basis of all evidence brought before the Court, the proven irregularities did not have the effect of vitiating the election-outcome. The voices of the voters of Garissa County have been sounded clearly; and we agree with the trial Judge, that the winner of the gubernatorial election of 4th March, 2013 is beckoning unequivocally.

G. ORDERS

[98] The foregoing analysis of the meritorious submissions of learned counsel leads us to certain Orders, which we now set out as follows:

(1) The Judgment of the Court of Appeal sitting at Nairobi, dated 23rd April, 2014 annulling the election of Nathif Jama Adan as Governor of Garissa County, is hereby reversed.

(2) The Petition of Appeal dated 29th April, 2014, is allowed.

(3) For the avoidance of doubt, the declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of the seat of Governor of Garissa County, is hereby restored.

(4) The parties shall bear their own costs at the High Court and the Supreme Court. The 1st Respondent shall bear his own costs and the costs of the appellant at the Court

of Appeal. The costs of the 2nd and 3rd Respondents at the Court of Appeal shall be borne by the 1st Respondent.

DATED and **DELIVERED** at **NAIROBI** this **9th day of July, 2014.**

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

.....

S. N. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is
a true copy of the original

REGISTRAR, SUPREME COURT