# REPUBLIC OF KENYA

## IN THE SUPREME COURT OF KENYA AT NAIROBI

*(Coram: Rawal DCJ, Tunoi, Ibrahim, Ojwang & Njoki Ndungu SCJJ)*

**PETITION NO. 17 OF 2014**

**IN THE MATTER OF AN APPLICATION TO STRIKE OUT**

**PETITION NO. 17 OF 2014**

**IN THE MATTER OF AN ELECTION PETITION APPEAL ON THE ELECTION OF THE MEMBER OF THE NATIONAL ASSEMBLY FOR NYARIBARI CHACHE CONSTITUENCY**

**–BETWEEN–**

**RICHARD NYAGAKA TONG'I.....1ST RESPONDENT/APPLICANT**

**–AND–**

**CHRIS MUNGA N. BICHAGE.....APPELLANT/1ST RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....2ND RESPONDENT**

**ROBERT K. NGENY.....3RD RESPONDENT**

(Being a*n application to strike out Appeal No. 17 of 2014 from the Judgment and Orders of the Court of Appeal at Kisumu in Civil Appeal No. 48 of 2013 (Azangalala, Mohamed and Kantai JJA) dated the 4th of April, 2014)*

# RULING

## A. INTRODUCTION

**[1]** The applicant, Richard Nyagaka Tong'i, brought before this Court an application by way of Notice of Motion dated 6th June, 2014, founded upon

Section 21 (2) of the Supreme Court Act, 2011, Rules 23, 31 (1) and 33 (1) of the Supreme Court Rules 2012; and all other applicable provisions of the law. He sought Orders as follows:

*(i) the appeal herein, dated 14th May, 2014 be struck off for having been filed out of time as stipulated under Rules 31(1) and 33(1) of the Supreme Court Rules, 2012;*

*(ii) the appeal herein be struck off for having been rendered nugatory by subsequent events, more particularly the Parliamentary elections for Nyaribari Chache Constituency held on 30th December, 2013;*

*(iii) the appeal herein be struck off as it is substantially anchored on issues not raised during trial in Election Petition No. 5 of 2013, or on appeal in Civil Appeal No. 48 of 2013;*

*(iv) the appeal herein dated be struck off for being an abuse of the justice system, and an affront to the rule of law;*

*(v) the costs of and incidental to this application abide the result of the said appeal.*

## B. BACKGROUND

**[2]** This matter emanates from the general elections held on 4th March, 2013. The appellant, Chris Munga N. Bichage, contested the position of Member of the National Assembly for Nyaribari Chache Constituency, and won. The applicant came in second, but was dissatisfied with the results and filed an election Petition, ***Richard Nyagaka Tong'i v. IEBC & 2 Others*** Election Petition No. 5 of 2013 at the election Court in Kisii. On 7th October, 2013, *Muriithi J.* allowed the petition, and declared that the appellant was not validly elected as the Member of National Assembly for Nyaribari Chache.

**[3]** The appellant was dissatisfied with the decision of the election Court, and lodged an appeal at the Court of Appeal in Kisumu, ***Chris Munga N. Bichage v. Richard Nyagaka Tong'i & 2 Others,*** Civil Appeal No. 48 of 2013. During the pendency of the appeal, the IEBC issued a notice dated 23rd October, 2013 setting a date for the by-election for 19th December, 2013. The appellant filed Civil Application No. 39 of 2013 seeking a stay of the by-election, pending the hearing and determination of the appeal. On 22nd November, 2013, the Court of Appeal allowed the application and granted an Order that there be a stay of the by-election pending the hearing and determination of the appeal.

**[4]** On 11th December, 2013, the Court of Appeal dismissed the appeal and reserved the reasons for the decision to be delivered on 21st February, 2014. The by-election took place on 30th December, 2013 and the 1st respondent was declared the elected Member of National Assembly for Nyaribari Chache Constituency. However, reasons for the Judgment were delivered on 4th April, 2014 in a document titled 'Judgment'.

**[5]** Being aggrieved by part of the Judgment and Orders of the Court of Appeal, the appellant filed a Notice of Appeal on 16th April, 2014 and his Petition of Appeal on 14th May, 2014. It is this appeal that the applicant has applied to be struck out.

**[6]** As the Court moved to hear this matter, counsel for the appellant, Mr. Oduol, rose to speak on two preliminary issues. He informed the Court that he had written a letter dated 10th October, 2014 to the Chief Justice, to which he annexed two documents: the first, a hand-written document bearing the title 'Order of the Court,' and signed by three Judges who heard the matter; the second, titled 'Judgement' and signed by a single Judge. Counsel expressed concern that the handwritten Order differed in material terms from the Order extracted by the applicant on 30th May, 2013. He was apprehensive that such contradiction would have a negative effect on the administration of justice.

**[7]** Learned counsel, Mr. Omogeni discounted the propriety of such a line of inquiry, urging that all issues being thus raised could be addressed in a formal reply to the instant application. This was precisely the position taken by learned counsel, Mr. Kinyanjui for the 2nd and 3rd respondents.

## C. PARTIES RESPECTIVE CASES

### *(a) Applicant's submissions.*

**[8]** Learned counsel for the applicant urged that the petition of 14th May, 2014 be struck out, for having been filed out of time. He submitted that the Court of Appeal had dismissed the appeal lodged by the appellant, in a Judgment dated 11th December, 2013; and that the Notice of Appeal and the appeal dated 14th May, 2014 had been lodged 126 days after the decision of the Court of Appeal, outside the mandatory time stipulated in Rule 31 of the Supreme Court Rules, 2012, and should be dismissed under Rule 55 (b) for non-compliance.

**[9]** Counsel further submitted that the governance processes of the Constitution had been duly activated, and had run their full course: immediately after the dismissal of the appeal, a by-election was conducted on the 30th December, 2013, leading to the election of a Member of Parliament who was duly sworn into office, and his election has not been the subject of any contest in accordance with the Constitution. In that context, and citing the cases of ***Peter Munya v. Dickson Mwenda Kithinji & 2 Others,*** *Sup. Ct Application No. 5 of 2014* **(Munya 1)** and ***Zacharia Okoth Obado v Edward Akong'o Oyugi & Others*** *Supreme Court Application No. 7 of 2012,* counsel urged that the appeal has been rendered nugatory, and that any further proceedings in this matter have become a mere academic exercise.

**[10]** Counsel submitted that, as the 1st respondent/applicant's election had not been contested before the High Court, the Supreme Court lacked jurisdiction and cannot entertain the matter.

**[11]** Counsel submitted that allowing this appeal would prejudice the 2ndrespondent, which had expended money conducting the by-election; the constituents of Nyaribari Chache, who have exercised their democratic rights in compliance with a Court Order; and other aspirants not party to this case, as well as the 1st respondent.

**[12]** Learned counsel submitted that what was delivered by the Court of Appeal on 11th December, 2013 was a final Judgement of that Court – and was the final determination of the rights and obligations of the parties. It was urged that the reasons behind the said decision could very well be reserved to a later date, as provided in Rule 32 (5) of the Appellate Jurisdiction Act. (***Sheikha Binti Ali Bin Khamis & Another v. Halima Binti Said Bin Nassib & Others*** **(1959) E.A 500).**

**[13]** Learned counsel submitted that the appellant had been indolent in protecting his rights, and was guilty of laches. He urged that, as the appeal was dismissed on 11th December, 2013, and the appellant did not move to Court timeously for an Order of stay of the by-election, nor file a Notice of Appeal, the matter is *spent,* a constitutional process having taken place, and a new Member of Parliament being now in office. He invoked the principle laid down by this Court in the ***Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others*** **Sup.** Pet. No. 7 of 2014 that litigation must come to an end, and parties cannot re-open concluded causes of action. Counsel urged that to entertain this petition would be tantamount to re-opening Court processes already concluded.

**[14]** Counsel submitted that even if it could be argued that the appellant was trying to obtain an equitable remedy before the Court, equity will not come in aid

of the indolent, and that in this case, the doctrine of laches had set in. He cited relevant case law (***Benjoh Amalgamated Limited & Another v. Kenya Commercial Bank Limited*** [*2014] eKLR* , ***Lindsay Petroleum Co v. Hurd*** *(1874) L.R. 5. P.C 221* and ***Elle Pack v. Aaron Beckerman,*** New Jersey Appellate Division, *A-5465-10T1)*, urging that the appellant elected to participate in the by-election and it is only after he lost, that he chose to come before the Court. Counsel submitted that, this is not a matter deserving the Supreme Court's adjudication, and should be dismissed with costs.

### *(b) The 2nd and 3rd Respondents*

**[15]** Learned counsel, Mr. Kinyanjui for the 2nd and 3rd respondents submitted that when the petition came up before the High Court and Court of Appeal, the instructions were to defend the election of the then Member of Parliament, the appellant in this case. However, the position changed after the Court of Appeal decision leading to the by -election of 30th December 2103. Counsel indicated that he is in full support of the results of the by election, as well as the submissions of learned counsel for the applicant.

**[16]** He submitted that the Judgement that was delivered on 11th December, 2013 was a final Judgement which determined the rights of the parties. He submitted that the principle of non-retroactivity of Court decisions applies to this case, as laid down in the ***Mary Wambui*** case. He noted that none of the appellant's prayers had sought the annulment of the by-election results, and thus, the move by the 1st respondent to strike out the petition was proper.

### *(c) 1st Respondent/ Appellant*

**[17]** Mr. Oduol, learned counsel for the 1st respondent/appellant submitted that this application raises four main issues: firstly, respect for the Constitution; secondly, the rights to seek occupancy of public office; thirdly, the legitimate expectation that one duly elected, exits public office through a process that is

both constitutional, and legally recognized; and fourthly, access to justice pursuant to Article 48 of the Constitution, which the Courts ought to protect.

**[18]**Counsel submitted that the Court of Appeal did not render a Judgement on 11th December, 2013, but only gave an 'Order'. He referred to the decision of the Court of Appeal dated and delivered at Kisumu on 4th April, 2014 which was titled 'Judgment'. This date, learned counsel urged, constituted the proper date of Judgment, and it was only as from then, that the appellant would have filed a Notice of Appeal: in which case, a Notice of Appeal was filed on 16th April 2014 within the 14 days' limitation period, and an appeal filed on 14th May, 2014, within 30 days from the date of Judgement, would not be out of time.

**[19]** In his argument that the essence of a Judgment is its reasoning, counsel submitted that a jurisdictional issue before the Supreme Court under Article 163(4)(a) can only be resolved by looking at the *ratio* of the decision of the Court of Appeal. He relied on decisions from the Nigerian Supreme Court (***Saraki v. Kotoye*** *(1992) II/12 SCNJ 26,*and ***Hon. Zakawanu Garuba & Others v. Hon. Ethi Bright Omokhodion*** *(2100) 12 NWLR (PART 1269)* **145).** He submitted that to file a Notice of Appeal without stating the basis of grievance with the decision of the Appellate Court would be to file an incompetent appeal, liable to be struck out, and thus negating the appellant's rights of access to justice.

**[20]** Counsel submitted that neither the Constitution nor the Supreme Court Act defines the term 'Judgement'; and under the Appellate Jurisdictions Act, there is only a limited depiction: that a Judgement includes '*decree, order, sentence and decision'*. He preferred the definition given in the Civil Procedure Rules, 2010, Order 21 Rule 4, on the basis of which he submitted that an 'Order' is not a 'Judgment'; that a 'Judgement' is a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. He urged this Court to define the term 'judgement', in guidance to all Courts.

**[21]** Counsel submitted that the Court should exercise the power to strike out pleadings sparingly, urging that this was not an apt case for the exercise of such a power. He submitted that where there is a right of appeal, the reasons ought to be given; and only on this basis can one have access to the Supreme Court. In the alternative, counsel urged, should this Court find that the 'Judgment' of the Court of Appeal was rendered on 11th December, 2013, it should exercise its discretion pursuant to Article 159(2) (d) of the Constitution, as read with Rule 53 of the Supreme Court Rules, to allow this petition as it did in the ***Mary Wambui*** case, and in ***Nick Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others***, *Sup. App. No. 16 of 2014***.**

**[22]** Counsel submitted that the issue as to whether the appeal herein is rendered nugatory could only be dealt with at the hearing of the substantive appeal, and so it was prematurely raised, in this instance.

**[23]** Learned counsel urged that the election petition in the High Court had been a nullity, since it was filed 34 days after the declaration of election results, in contravention of Article 87(2) of the Constitution; and that since the by-election of 30th December, 2013 was premised on a nullity, the same should be annulled, on the basis of the principle applied by this Court in the ***Wambui case***, and in ***Anami Silverse Lisamula v. The Independent Electoral & Boundaries Commission & 2 Others***, *Sup Ct. Pet. No. 9 of 2014***.** Counsel submitted that the cause of action was still alive before 4th April, 2014 and that the appellant had not been indolent as alleged. He concluded by urging the Court to strike out the application with costs and allow the petition to be heard in full, as no prejudice would be occasioned to the applicant.

### (d) *Applicant's Rejoinder*

**(24)** For the applicant, learned counsel, Mr. Walukwe contested the appellant's reliance on the definition of "Judgment" under the Civil Procedure Act: on the

ground that the matter had come up before the Appellate Court, which was guided by the Appellate Jurisdiction Act. He submitted that the appellant had been aware of the effect of the Order of 11th December, 2013; and that his participation in the by-election of 30th December, 2013 meant that he acquiesced in the Court decision, and also abandoned his rights of appeal. Counsel urged that the petition could occasion prejudice to the people of Nyaribari Chache, who had already been involved in two separate elections; and to the 1st respondent, who has expended money, time and energy in participating in the elections; as well as to the 2nd and 3rd respondents who expended public funds during these elections; and also to the people of Kenya, as their public funds were utilized in these elections.

## D. ISSUES FOR DETERMINATION

**[25]** From the pleadings, oral and written submissions, the following issues arise for determination:

*(i) whether the appeal dated 14th May, 2014 was filed out of time, and so was liable to be struck out for non-compliance with Rules 31(1) and 33(1) of the Supreme Court Rules, 2012;*

*(ii) whether this appeal has been rendered nugatory.*

## E. ANALYSIS

### *(a) Judgment, and Order*

**[26]** The appellant apprehended that the handwritten Order by the three Appellate Court Judges, of 11th December, 2013 varied in material terms with the Order which he had extracted.

**[27]** Of concern to us is the fact that the appellant had not annexed to his record of appeal the said Order or Judgment of the Appellate Court, of 11th December,

2013. The applicant, by contrast, duly annexed to his application the decision of Court, of 4th April, 2014 (marked **RNT3A)**. The appellant did acknowledge in his replying affidavit (paragraph 20) that the said annexure was indeed the Court of Appeal's Order.

**[28]** There is thus no basis for any possible inference that documents forming part of the Court of Appeal's record had undergone tampering, with the intent to undermine the administration of justice, or to defeat the appellant's Appeal. It is material that the only Order relevant to this application has been produced by way of affidavit, by the applicant, and the appellant in his affidavit has recognized its validity.

***(b) Filing Appeal: Time-line and its Effect***

**[29]** It is the applicant's case that the appeal be struck out, having been filed outside the stipulated time, by virtue of Rules 31(1) and 33(1). It was averred that the appellant filed a Notice of Appeal on 16th April, 2014 and a Petition of Appeal on 14th May, 2014–126 days after the Court of Appeal's Judgment had been delivered. This submission rested on the perception, on the part of counsel, that the decision of the Appellate Court of 11th December, 2013 was a final Judgment, followed subsequently by the stated reasons of 4th April, 2014; that on 11th December, 2013, the Court's Judgment finally determined the rights and obligations of the parties in the dispute; and that, therefore, this is the date from which time for instituting an appeal to the Supreme Court should be reckoned.

**[30]** The appellant takes a stand quite to the contrary: that the Judgment of the Court of Appeal was delivered on 4th April, 2014, and not 11th December, 2013; and that what the Appellate Court delivered on 11th December, 2013 cannot be termed a Judgment of the Court–it was merely an Order that *'was not conclusive as to the rights and obligations of the parties;* and that '*the Court of Appeal had made it clear that a detailed Judgment would be delivered including on the*

*issues of costs, which meant that the Court of Appeal was to sit and pronounce itself on the issues before it.'*

**[31]** The Rules governing the process, format and content of appeals to this Court, and of relevance to this application, are Clauses 31 and 33 of the Supreme Court Rules, 2012. These Rules specify format–criteria and process be followed, in lodging a proper appeal before to the Court. Rule 31(1) is the first procedural criterion and process be met by an intending appellant. It requires intended appeals to be preceded by a Notice of Appeal, within 14 days from the date of the Judgment. This Rule provides thus:

> ***" A person who intends to appeal to the Court shall file a notice of appeal within fourteen days from the date of judgment or ruling, in Form B set out in the First Schedule, with the Registrar of the Court or with the tribunal, it is desired to appeal from."***

**[32]** Another procedural criteria, stated in Rule 33 (1), is that one is to lodge an appeal within 30 days from the date of filing a Notice of Appeal, putting together certain specified elements of the appeal material, namely: Petition of Appeal, and Record of Appeal, accompanied with the prescribed registry fee.

**[33]** Rule 33(2), requires that a Petition of Appeal takes the prescribed form D, provided in the First Schedule:

> ***"A petition for purposes of appeal shall be in Form D set out in the First Schedule and shall contain—***
>
> ***(a) the grounds of objection to the decision appealed against, under concise and distinct heads, without argument or narrative;***

***(b) points which are alleged to have been wrongly decided;***

***(c) the nature of the order which it is proposed to request the court to grant."***

**[34]** It is not mandatory that the Judgment of the Appellate Court be part of the record, though under Rule 33(2) the Petition of Appeal is to specify objections to the decision, and indicate the points of law alleged to have been wrongly decided. A Record of Appeal is also to be filed with the Court, as prescribed in Rule 33(1). The Record of Appeal is a bundle of documents forming part of the proceedings in all the lower Courts, and which are relevant in the adjudication of the matter on appeal before the Supreme Court. One such mandatory item, for purposes of an appeal from a Court of appellate jurisdiction, is the certified Order or Decree of the first appellate Court from which an appeal is to be preferred to the Supreme Court ( ***Rule 33(4)).***

**[35]** The main point of contest in this matter, in the submissions of the parties, is the moment at which the Judgment of the Court of Appeal was delivered, so as to trigger the filing of Notice and Petition of Appeal, in line with the prescribed timelines in Rules 31(1) and 33(1) of the Supreme Court Rules.

**[36]** So, there are two primary issues to be disposed of, in resolving the instant application: does the *Order of 11th December, 2013 constitute a Judgment, appealable to the Supreme Court? And, when should an appeal under Article 163(4)(a) be filed to this Court, in circumstances in which the Court appealed from has deferred to a later date the reasons for its decision?*

***(c) What is "Judgment"?***

**[37]** It is true that the Supreme Court Act, 2011 and its corresponding Rules do not define the term 'Judgment'. The resulting uncertainty is compounded by the variation in the definitions in other bodies of law: the Civil Procedure Rules, 2010 and the Appellate Jurisdiction Act. Order 21, Rule 4 of the Civil Procedure Rules indicates what a Judgment should contain, but does not define the term. It provides as follows:

> ***"Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."***

**[38]** The Appellate Jurisdiction Act, in Section 2, defines a Judgment– as "***includes decree, order, sentence and decision."***

***[39] Black's Law Dictionary***, 8th edition (page 858) defines a Judgment as–

> ***"A court's final determination of the rights and obligations of the parties in a case. The term judgment includes an equitable decree and any order from which an appeal lies."***

**[40]** The Court of Appeal had the occasion, in ***Ngome v. Plantex Company Limited [1984] KLR 792*** to define a "Judgment" as follows:

> ***"...a judicial determination or decision of a Court on the main question(s) in a proceeding, and includes a dismissal of the proceedings, or a suit...."***

**[41]** Indeed, the Court of Appeal had an earlier occasion, in ***Sheikha v. Halima (1959) E.A500,*** to advert to the term, and held that a Judgment is a

decision of Court given in an earlier pronouncement, embodied in a formal Order. The Court held that reasons given in a document read out later would not constitute the Judgment of the Court. In that case, the Court was considering an objection that an application for leave to appeal to the Judicial Committee of the Privy Council had been filed out of time limited by Section 4 of the Order- in-Council of 1951. The decision contested was given on 8th October, 1958, and reasons for the decision were given in writing in a document headed 'Judgment', on 20th October, 1958.

**[42]** The issue in contest was the date of Judgment, within the meaning of Section 2 of the Order- in- Council, for purposes of lodging an application for leave to appeal under Section 4 of the same Order, which prescribed that such an application be made within 60days of the date of the Judgment. Provisions of Order 20 Rule 4 of the Civil Procedure (Revised) Rules, 1948 which stated that *"Judgments" in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision",* were cited, but the Court rejected their applicability, on grounds that the proper signification of the term 'Judgment' was as indicated in the Order- in-Council, rather than the Civil Procedure Rules.

**[43]** Section 2 of the said Order-in-Council defined a Judgment in like terms to the current Appellate Jurisdiction Act, as follows: *" 'judgment' includes decree, order, sentence or decision." In the* ***Halima*** *case,* Forbes V-P concluded that the specification of reasons for a decision is not material to the definition of "Judgment":

> ***"...'judgment' on the appeal was the decision given on 8th October, 1958, which was also embodied in a formal order of the same date, extracted on November 12, 1958. The fact that the document giving the reasons of the court***

***for its judgment was headed 'Judgment' cannot alter the fact that judgment on the appeal had been given on October 8, and that the document merely set out reasons for that judgment and was not itself the judgment."***

**[44]** It is apparent, from the course of judicial practice, that even though Order 21, Rule 4 of the Civil Procedure Rules requires the constituent elements of a Judgment to include concise statement of the facts, points for determination, the decision and reasons for the decision, the elements do not currently, as an inseparable unit, provide a clear terminological definition of the "judgment" concept.

**[45]** From the foundation of current case law, we would hold that a 'Judgment' is a determination or decision of a Court, that finally determines the rights and obligations of the parties to a case, and includes any decree, order, sentence, or essential direction for the execution of the intent of the Court.

***(d) Judgment: Applying the Concept***

**[46]** When should the appellant have filed an appeal before this Court, given that the reasons in support of the Court's decision were deferred to 4th April, 2014? Under Rule 31(1), the appellant ought to have given a Notice of Appeal within 14 days, as from 11th December, 2014 and subsequently filed an appeal in accordance with Rule 33(1), within 30 days as from the date of filing the notice.

**[47]** The appellant's justification of the default is that he had to wait for the reasons for the Judgment, to enable him to draw a competent appeal in accordance with Rule 33(2)(a). He urged that this rule enjoins a party to state, in the Petition of Appeal, concise grounds upon which the petition is premised, and that this is dependent on the ratio specified in the written explanation of the Court. Without a ratio, learned counsel submitted, the appeal would be

incompetent, since no grounds in accordance with Rule 33(2)(a) could possibly be crafted, and consequently, the appeal would be liable to be struck out–thus denying the appellant his right of access to justice, in the terms of Article 48 of the Constitution, and Section 3(e) of the Supreme Court Act, 2011.

**[48]** Counsel cited the Nigerian Supreme Court decisions, ***Saraki*** and ***Zakawanu,*** for the proposition that the grounds of appeal against a decision should constitute a challenge to the ratio of the decision. Learned counsel, Mr. Oduol urged that the jurisdiction of this Court, under Article 163(4)(a) of the Constitution, is so circumscribed that, appeals are limited to those that invoke constitutional interpretation or application– and this is dependent on the reasoning or ratio emanating from the Court of Appeal.

**[49]**That argument by counsel has been at the foundation of two Supreme Court decisions, so far. In ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Limited & Another,*** *Sup. Ct. Petition No. 3 of 2012,* we had set out the requirements that an appellant needs to satisfy, in an appeal under Article 163(4)(a). We stated as follows:

> *"... 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 of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)"*[emphasis supplied].

**[50]** Later in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others,*** Supreme Court Application No. 5 of 2014 **[*Munya 1*]** a two- Judge Bench of this Court held that where no constitutional provisions relied upon are readily identifiable from the body of the Judgment of the Appellate Court, a party only needs to show that the reasoning and the conclusions of the Court took a constitutional trajectory. In the words of this Court (para.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"*** [emphasis supplied].

**[51]** It is this Court's position, as expressed in ***Lawrence Nduttu*** and ***Munya 1***, that to found a further appeal to this Court, pursuant to Article 163(4)(a),a petitioner is to show a basis of dissatisfaction with the constitutional interpretation and application as rendered in the reasoning and conclusion of the Appellate Court, in such a manner that the appeal properly falls under that Article. A petition of appeal to the Supreme Court is to particularize constitutional issues said to be erroneously decided in the Appellate Court, so it falls to this Court to render a final interpretation or application.

**[52]** Does the duty to specify the constitutional issues arising from the decision of the Court of Appeal, under Rule 33(2)(a), exempt the filing of a Notice of Appeal (required by Rule 31(1)) where delivery of reasoning or ratio of Judgment

has been deferred to a date beyond 14days? It is apparent to us that, if Rules 31, 32 and 33 are to be given their full meaning, the process of filing an appeal in the Supreme Court has several sequential stages: beginning from the filing of a Notice of Appeal, where a decision of the Appellate Court has been given. Such procedural requirements presuppose that a decision of the Appellate Court, together with the rationale for the decision, are immediately obtainable after Judgment: so the appellant is to comply, save where this Court has on application, or *suo motu* under Rule 53 of the Supreme Court Rule, ordered otherwise.

**[53]**Ordinarily, a Notice of Appeal is an indication of intention, provoked by a Judgment of the Appellate Court, to appeal the whole or part of a decision. Taken in the context of Article 163(4)(a), an intention to appeal is ignited by the Appellate Court's determination and pronouncement on constitutional questions that are in controversy.

**[54]** Where an Order of the Appellate Court has been issued, but the reasons to support the final decision on the relevant constitutional questions have been withheld, it is still possible, in our perception, to identify constitutional controversies arising, and draw a Notice of Appeal under Rule 31(1). Even though it may not be possible to apprehend the Appellate Court's full reasoning on the interpretation and application of the relevant constitutional issues, it is possible for an appellant to identify, from the memorandum of appeal put forth before that Court, constitutional questions, on a provisional basis, to be laid before the Supreme Court under Article 163(4)(a).

**[55]** We are aware, as noted by the appellant's learned counsel, that a Notice of Appeal, is not a mere indication of an intention to appeal. It is a notice accompanied with a statement of the critical constitutional questions believed to have been wrongly decided by the Court below.

**[56]** Thus, an appellant will evolve his or her conviction on the propriety of appealing, on the basis of the position taken by a Court or tribunal on the questions featuring in the memorandum of appeal. Without the earlier Court's reasons for its decision, it is conceivable that an intending appellant would still be able to pick out elements in the Appellate Court's summary findings on constitutional questions, in giving a concise statement of intention to appeal.

**[57]** Thus, we are not in agreement that no notice of appeal could be lodged against the Order of the Court of Appeal of 11thDecember, 2013 on account of the appellant not being able to discern issues of constitutional interpretation or application. In our perception, the principle running through the ***Lawrence Nduttu*** and ***Munya* 1** cases is no more than that, the detailed reasoning in the Appellate Court's Judgment is relevant only for drafting a competent *petition of appeal* under Article 163(4)(b), but not a notice of appeal. Thus, where a Court reserves reasons for Judgment to a later date, time for filing the notice of appeal runs as from the time of the decision, rather than that of the detailed reasons for the decision.

**[58]** It was also urged for the appellant that, no prejudice has been occasioned to the 1st respondent by this appeal, and that once the "Judgment" was delivered on 4th April, 2014, the appellant filed a petition setting out clear grounds of appeal, fully intelligible to 1st respondent. Counsel submitted that this Court has held in ***Raila Odinga***, ***Mary Wambui*** and ***Nick Salat,*** that the power to strike out pleadings is a discretionary power, to be exercised judiciously and sparingly, notwithstanding a time-line default, where such default is occasioned by causes that go beyond the appellant's control.

**[59]** Learned counsel, Mr. Omogeni had urged that the appellant was indolent in pursuing his right of appeal, for he did not file a Notice of Appeal against the order of 11th December, 2013, and neither did he seek a stay of the then impending by-election. On this same line of argument, learned counsel, Mr.

Walukwe urged that immense prejudice would be occasioned to the people of Nyaribari Chache, who have had to participate in two sets of elections; to the 1st respondent who has spent money, time and energy in participating in those elections; to the 2nd and 3rd respondents' who expended public funds in those elections; and to the people of Kenya, who would lose their (public) funds.

**[60]** In ***Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others,*** Sup. Ct. Application No. 12 of 2014, this Court invoked its inherent powers under Rules 3(5) and 53 and admitted a Petition of Appeal filed out of time, without an application seeking extension of time, so as to serve the ends of justice in that case. The Court thus explained its stand:

> ***"We pause here and ponder as to …. the balance between the Rules of procedure which are… important for the efficient, fair and even-handed process on one hand and the core principle of imparting substantial justice on the other. Rule 53 of the Court's Rules does allow the Court to extend time limited by the Rules. The 1st respondent has submitted that no application for extension of time has been made. However, we are persuaded to invoke the inherent powers of this Court under Rules 3(5) and 53 of the Court's Rules which allow the Court to perform any such act [as may be] necessary to meet ends of justice."***

**[61]** In that case, the applicant had filed within time a Notice of Appeal, but failed to file a petition within the 30 days limited by Rule 33(1). She had applied for the matter to be certified as one of general public importance, thus qualifying for admission to appeal under Article 163(4)(b). While still pursuing a

certification before the Court of Appeal, she changed her mind and brought the appeal to the Supreme Court, which excused the delay and accepted her explanation as satisfactory and reasonable. The Court also noted that no prejudice would in the circumstances, be suffered by the other parties.

**[62]** Such is the context in which we have considered the instant case. The puzzle as to whether the bare Orders of the Court, by themselves, constitute a Judgment, or whether the intending appellant ought to have waited for a reasoned edict properly described as a Judgment, is a complex juristic issue that was apt to confound. On this account, we readily take the position that the appellant's error was in all respects reasonable and excusable. The appellant has sufficiently explained, that the delay in giving reasons by the Court of Appeal made it impossible to formulate a competent appeal, to be filed with this Court under Rule 33(2)(a). It is evident that the appellant was at all times conscious of his obligation to file a competent petition, that meets the terms of Article 163(4)(a); and once the Court of Appeal rationalized the pertinent issues in written format on 4th April, 2014, he embarked on the pursuit of his right of appeal; in accordance with Rule 31(1) he filed a notice of appeal, and later, a petition of appeal under Rule 33(2)(a).

**[63]**As stated in ***Mary Wambui,*** this Court is conferred with unfettered inherent powers, under Rule 3(5) of the Supreme Court Rules, 2012 to make such Orders, or give such directions as may be necessary in the interest of justice. By allowing the appeal to be heard on the merits, we of course, give no signal that the appeal is a good one, with a prospect of success. We do not believe that any party to this case, or the voters of Nyaribari Chache, or the people of Kenya, would be prejudiced by affording the appellant a right to be heard on appeal. We, therefore, invoke the inherent powers of this Court under Rule 3(5), to deem the

Notice of Appeal dated 16th April 2014, and the Petition of Appeal dated 14th May, 2014 as duly filed before this Court.

**[64]** Learned counsel, Mr. Omogeni submitted that after the Court of Appeal's Judgment dismissing the appellant's appeal, several constitutional processes have set in, and run through to completion: a by-election was conducted on the 30th December, 2013, and a Member of Parliament duly elected and sworn into office, without any contest being lodged. It was urged that the appellant is seeking to resuscitate an already-concluded matter, in violation of the principle of non-retroactivity Court Orders, by the terms of the ***Mary Wambui case***.

**[65]** We are of the opinion that the question whether this appeal has been rendered nugatory is one that touches on the merits of the appeal, and cannot be determined at this interlocutory stage, without a full hearing.

## F. ORDERS

**[66]** The course of reasoning adopted in this Ruling, and the specific findings already set out, lead us to a set of Orders as follows:

***(a) The application of 6th June, 2014 is disallowed.***

***(b) The costs of this application shall abide the hearing and disposal of the appeal.***

**DATED** and **DELIVERED** at **NAIROBI** this 19TH **Day of February, 2015.**

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| ..... | ..... |
| **K.H. RAWAL** | **P. K. TUNOI** |
| **DEPUTY CHIEF JUSTICE &VICE PRESIDENT OF THE SUPREME COURT** | **JUSTICE OF THE SUPREME COURT** |
| ..... | ..... |
| **M. K. IBRAHIM** | **J.B. OJWANG** |
| **JUSTICE OF THE SUPREME COURT** | **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 OF KENYA**