

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO. 30 OF 2018

—BETWEEN—

SILVERSE LISAMULA ANAMI.....PETITIONER

—AND—

**INDEPENDENT ELECTORAL &
BOUNDARIES COMMISSION.....1ST RESPONDENT**

**HENRY BAHATI LUMITI—RETURNING
OFFICER SHINYALU CONSTITUENCY.....2ND RESPONDENT**

JUSTUS GESITO MUGALI M’MBAYA.....3RD RESPONDENT

(Being an appeal from the Judgment and Order of the Court of Appeal (P.Waki, F. Sichale & Otieno-Odek JJA) at Kisumu in Election Petition Appeal No. 7 of 2018 delivered on 19th July, 2018.)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Petitioner moves this Court under Article 163(4)(a) of the Constitution and Rule 31(1) of the Supreme Court Rules, 2012 challenging the decision of the Court of Appeal dated 19th July, 2018 which dismissed his appeal thereby affirming the election of the 3rd Respondent as the Member of the National Assembly for Shinyalu Constituency.

B. BACKGROUND

[2] The Petitioner was a contestant for the position of Member of the National Assembly for Shinyalu Constituency during the election held on 8th August, 2017. The 3rd Respondent, also a candidate in the said election, was declared the winner having garnered 20,572 votes against the Petitioner's 16,402 votes. Another contestant, Adrian Mambili Meja, came third with 9,813 votes. The Petitioner and Adrian Mambili Meja were both dissatisfied with that declaration. Accordingly, they filed separate petitions at the High Court, **Election Petition No. 1 of 2017** and **Election Petition No. 4 of 2017**, respectively. The two petitions were consolidated and heard together as **Election Petition No. 1 & 4 of 2017** at the High Court at Kakamega.

(a) Proceedings before the High Court

[3] The Petitions cited several irregularities and illegalities in the conduct of the election. The said malpractices against the 3rd Respondent were particularized as: bribery and treatment of voters; illegal fundraising during the campaign period; personal friendship with the Returning Officer, hence bias; campaigning on the eve of the election; assisted voters voting in the absence of parties' agents; lack of transparency in the counting of votes; ejection of party agents from polling stations; some Forms 35A not being signed by the Presiding Officers and violence and intimidation of voters. The Petitioner further urged that the 3rd Respondent was not validly nominated by the Orange Democratic Movement (ODM) a political party, to vie for the position of the Member of the National Assembly for Shinyalu Constituency.

[4] In considering the case, the Election Court framed 5 issues for determination as follows:

- (1) *Whether the Court sitting as an election court has jurisdiction to hear and determine the validity of the nomination of the 3rd Respondent.*
- (2) *Whether there were irregularities and malpractices in the election and if so, whether such irregularities or malpractices affected the outcome of the election.*
- (3) *Whether the Petition of the 2nd Petitioner is defective.*
- (4) *Whether the election of the Member of Parliament for Shinyalu Constituency was conducted in accordance with the law.*
- (5) *What orders are warranted in the Petition?*

[5] As regards the issue whether the High Court had jurisdiction to determine whether the 3rd Respondent was validly nominated, the Court observed that the issue of nomination was dealt with by the Political Parties Disputes Tribunal (PPDT) and the Independent Electoral and Boundaries Commission (IEBC) Dispute Resolution Committee. As such, the Learned Judge of the High Court expressed himself as follows on the issue:

“I am of the considered view that it is the Political Parties Disputes Tribunal and the IEBC Disputes Resolution Committee that have the mandate to determine issues of nomination of candidates. Any party dissatisfied with their decision should either file an appeal or seek a review with the High Court. Section 74(3) of the Elections Act, 2011 require IEBC to determine all disputes relating to nominations and elections before the date of the nomination or election in issue. This is for good measure,

meant to ensure that all disputes relating to nominations and elections are finalized before elections are held. This also means that any preferred appeal should be finalized before the nomination or election in issue. In this case, the decisions of the IEBC Disputes Resolution Committee and the Political Parties Disputes Tribunal were not appealed before the High Court. The 1st petitioner cannot raise the validity of the nomination of the 3rd respondent in this election court. I therefore find that this court has no jurisdiction to deal with the matter raised in the petition concerning the nomination of the 3rd respondent.”

[6] Delving into allegations of irregularities and malpractices, the Court found that most of the allegations had not been proved and the proved ones had no effect on the outcome of the election. In the ultimate, in a Judgment delivered on 19th February, 2018, the High Court (*Jesse Njagi J*) dismissed the two Petitions with costs to the Respondents.

(b) Proceedings before the Court of Appeal

[7] The Petitioner was aggrieved by the findings of the High Court; and filed an appeal —**Election Petition Appeal No. 7 of 2018**—at the Court of Appeal in Kisumu. He faulted the Election Court for: allowing the filing of fresh documents by the 1st Respondent after the close of his case; dismissing his application for scrutiny; finding that ODM, not being a party to the Election Petition, would be prejudiced if it were to consider the issue whether the 3rd Respondent was validly nominated; failing to find that unsigned forms do not

carry valid results; failing to distinguish party nominations and the process under which the Returning Officer received nomination papers.

[8] On the issue of nomination, the Appellate Court held that the Election Court could not consider matters that were dealt with by the PPDT or the IEBC Dispute Resolution Committee. On the issue of bribery and unsigned forms, the Appellate Court also agreed with the Election Court that the evidence produced was not sufficient to prove the allegation of bribery and that the unsigned forms had no effect on the results. On other issues, it found that there was no evidence to sustain them and dismissed the Petitioner's allegations. Consequently, in a Judgment delivered on 19th July, 2018, the Court of Appeal (*Waki, Sichale & Otieno-Odek JJ.A*) dismissed the appeal with costs.

(c) Proceedings before the Supreme Court

[9] Aggrieved by that determination, the Petitioner preferred a further appeal to this Court. His Petition of Appeal dated 29th August, 2018 seeks the following reliefs:

- (a) The Petition be allowed and the Judgment and order of the Court of Appeal dated and delivered on 19th July 2018 be set aside.*
- (b) The Judgment/Decree and subsequential orders of the High Court dated 19th February, 2018 be set aside.*
- (c) A declaration be issued that the 3rd Respondent was not validly elected and declared as the Member of the National Assembly, Shinyalu Constituency.*

- (d) *A declaration that the 3rd Respondent committed election offences and should be prosecuted for such offences and barred from contesting in any subsequent by-election for Member of the National Assembly for Shinyalu Constituency.*
- (e) *Fresh elections be held for Member of the National Assembly for Shinyalu Constituency in Kakamega County on such terms as the Honourable Court may decide.*
- (f) *Costs of this Appeal, the Court of Appeal and the High Court be awarded to the Petitioner.*

[10] The Petition is premised on the following summarised grounds:

- (a) *That the learned Judges of Appeal erred by finding that the High Court did not have jurisdiction to hear and determine the question of nomination of a candidate in an election petition.*
- (b) *That the learned Judges of Appeal erred by finding that the 3rd Respondent was validly nominated by the Independent Electoral and Boundaries Commission.*
- (c) *That the learned Judges of Appeal erred by downplaying the critical importance of the question of qualification of a candidate as provided for under Article 99(1) of the Constitution.*
- (d) *That the learned Judges of Appeal erred by excusing the disobedience by the ODM of a Court Order.*

(e) *That the learned Judges of Appeal erred by failing to appreciate that the election failed to meet the principles of verifiability, transparency and accountability standards set out in the Constitution.*

[11] Upon being served with the Petition, the 3rd Respondent filed a Notice of Preliminary Objection and Grounds of Objection dated 10th September, 2018 contesting this Court's jurisdiction to hear the Petitioner's Appeal under Article 163(4)(a) of the Constitution.

C. PARTIES' SUBMISSIONS

i. The Petitioner's case

(a) Jurisdiction of the Court

[12] The Petitioner urges that this Court has the requisite jurisdiction to hear and determine his case under Article 163(4)(a) of the Constitution. He submits in that regard that the pleadings before the superior Courts raised questions of constitutional interpretation and application of the Constitution especially with regards to Articles 88(4)(e), 99 and 105(1) of the Constitution as well as on whether the election being impugned met the constitutional threshold of a free and fair election. He also argues that his appeal meets the requisite jurisdictional threshold under Article 163(4)(a) of the Constitution since it principally seeks a determination on the qualification and eligibility of a candidate to participate in an electoral contest.

(b) The validity of the nomination of the 3rd Respondent

[13] The Petitioner on this point argues that Article 99(1) (a) & (c) of the Constitution provides that a person is eligible for election as a member of

Parliament if the person is a registered voter; and satisfies the educational, moral and ethical requirements prescribed by the Constitution or by an Act of Parliament. In the regard, he submits that the IEBC, which is obligated to uphold and respect the Constitution, cannot therefore validate nomination papers of a candidate who does not satisfy the requirements of Article 99(1) of the Constitution. In this context, he submits that the 3rd Respondent is not the person that was nominated by the ODM Party, thus the Returning Officer had no authority to amend the nomination certificate issued by that Party. He underscores that, the Returning Officer should have satisfied himself that the person allegedly nominated by the Party was a registered voter, which the 3rd Respondent was not.

[14] In making the above submissions, the Petitioner relies on the case of ***John Harun Mwau & 2 Others v. Independent Electoral and Boundaries Commission & 2 Others*** SC Petitions Nos. 2 &4 of 2017; [2017] eKLR which affirmed that nomination is a crucial component in the electoral process. He thus faults the superior Courts for finding that the 3rd Respondent was a registered voter in Shinyalu Constituency and that his nomination was valid. As such, the Petitioner calls upon this Court to establish whether a person could be nominated in one name and be allowed vie for an election in another name.

(c) Whether an election Court has jurisdiction to settle pre-election disputes

[15] It is the Petitioner's case that Article 105 (1)(a) of the Constitution confers the High Court as the Election Court with jurisdiction to hear and determine *any* question whether a person has been validly elected as a member of Parliament. He takes the view that questions challenging the election of a person can range from nominations to qualifications of the person. His further contention is that

Article 105 does not in any way limit the High Court's power and neither does it exclude the jurisdiction of the High Court to hear and determine certain issues. In addition, he submits that even though the IEBC may have jurisdiction under Article 88(4)(e) to hear pre-election disputes, such conferment does not take away the equivalent jurisdiction of an Election Court on similar matters. He thus urges that the IEBC and the High Court have concurrent jurisdiction on pre-election disputes.

(d) Whether the election met the principles of a free and fair election under Article 81(e) of the Constitution.

[16] The Petitioner urges that Article 81 lays down the principles which the electoral systems should comply with for the elections to be free and fair. The said principles are: elections which are free from violence, intimidation, improper influence or corruption, transparent, and administered in an impartial, neutral, efficient, accurate and accountable manner. He thus posits that those are the principles which the Election Court must examine and test against the facts placed before it when determining the question of validity of an election.

(e) Whether ODM disobeyed the PPDT Order of conducting a fresh nomination

[17] The Petitioner submits that the PPDT ordered the ODM party to conduct fresh nominations in accordance with the Constitution and other electoral laws. However, he contends that ODM disobeyed the said Order and instead of conducting fresh nominations, gave a direct nomination certificate to one, Justus Kizito Mugali. The Petitioner thus faults the Appellate Court for affirming the decision of the High Court that ODM did not disobey the PPDT Orders and asks this Court to overturn that decision.

ii. The 1st and 2nd Respondents' case

(a) Jurisdiction of the Court

[18] It is the 1st and 2nd Respondents case that this Court can only assume jurisdiction and entertain an appeal under Article 163(4)(a) of the Constitution where the focal points for determination are questions of constitutional interpretation or application. In urging so, they place reliance on the case of **Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another** SC Petition No. 3 of 2012; [2012] eKLR where this Court stated that the superior Court's decision which is being appealed must have been disposed on the basis of constitutional interpretation or application.

[19] They thus urge that the Petitioner has not shown which questions of constitutional interpretation or application were before the Court of Appeal. Accordingly, they submit that the only avenue available to the Petitioner is to file an appeal under Article 163(4)(b) of the Constitution claiming that the issues raised are of general public importance. In the alternative, they submit that the calibrated constitutional issues now before the Supreme Court were sufficiently canvassed by the parties in both superior Courts and that there is no jurisprudential question now before the Court to warrant this Court's intervention.

(b) Validity of the nomination of the 3rd Respondent

[20] According to the 1st and 2nd Respondents, the contention by the Petitioner before the superior Courts was that the 3rd Respondent ought not to have been

nominated in view of the fact that his name as appearing on the register of voters was different from the one appearing on the ODM nomination certificate was unmeritorious. Thus, they urge that the Petitioner did not lead evidence to show that the 3rd Respondent was not qualified by virtue of him not being a registered a voter as is now being alleged.

[21] It is their further case that, when the 2nd Respondent nominated the 3rd Respondent as the bonafide ODM flagbearer, one Oscar Tsimbalaka Mwanzi, filed a complaint before the IEBC Dispute Resolution Committee contesting that nomination. The IEBC Committee then made a decision on the issue and no appeal was preferred against that finding. As such, they urge that in the absence of an appeal, the 3rd Respondent was validly nominated.

(c) Powers of an election Court with regard to questions arising from nomination of candidates

[22] The 1st and 2nd Respondents takes the view that an election Court cannot exercise supervisory jurisdiction over the decisions of the PPDT or the IEBC Dispute Resolution Committee. They thus urge that Article 88(4)(e) of the Constitution and Section 74(1) of the Elections Act vests the IEBC with jurisdiction to determine disputes arising from nominations but excluding elections petitions and disputes subsequent to the declaration of election results. They further submit that there exists an elaborate mechanism with specified timelines and procedure for resolution of nomination disputes. Hence, they urge that it is only when that procedure is exhausted that the supervisory jurisdiction of the High Court under Article 165(6) of the Constitution can be triggered. As such, the jurisdiction of the High Court under Article 105 of the Constitution cannot be invoked when questioning a nomination issue as that Article must be read together with Article 88(4)(e) of the Constitution.

(d) *Alleged contempt of PPDT Orders*

[23] The 1st and 2nd Respondents submits that the issue of the alleged contempt of PPDT Orders is a factual issue that has not attained the threshold of constitutional interpretation and application under Article 163(4)(a) of the Constitution. That further, the ODM party did not in any case disobey the Orders but rather it issued the 3rd Respondent with a direct nomination certificate. In any case, the 1st and 2nd Respondents contend that the Petitioner already made an attempt to cite ODM for contempt by filing Miscellaneous Election Petition No. 3 of 2017 ***Silverse Anami Lisamula v. Justus Gezito Mugali and Others.*** They urge that the High Court considered the evidence adduced before the Court and dismissed the application for contempt of Court. As such, the Petitioner, having failed to apply for a review of that decision, cannot bring that same matter to the Supreme Court.

iii. 3rd Respondent's case

(a) *Jurisdiction of this Court*

[24] The 3rd Respondent urges that the Petitioner's case does not raise any question of constitutional interpretation or application to reach this Court by way of an appeal as of right under Article 163(4)(a) of the Constitution. He further states that the complaints being raised here relate to collateral matters which the superior Courts have already pronounced themselves on with finality and clarity hence, this Court's further input is unnecessary. That further, he submits that the Petitioner fails to define with specificity which Articles of the Constitution require

either interpretation or application and how the superior Courts failed in so doing.

[25] It is also the 3rd Respondent's case that the questions which the Petitioner now seeks a determination of, were not raised in previous proceedings. As such, he states that the Petitioner's case fails the test propounded in the cases of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** SC Application No. 5 of 2014; [2014] eKLR and ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board*** SC Petition No. 5 of 2012; [2012] eKLR. He thus urges the Court to find that the Petitioner's Appeal does not meet the requisite jurisdictional threshold under Article 163(4)(a) of the Constitution and dismiss it.

(b) Whether the election Court has jurisdiction to hear matters arising from nomination of candidates

[26] It is the 3rd Respondent's case that Article 88(4)(e) vests the IEBC with exclusive jurisdiction to settle disputes arising from nominations. He thus urges that the jurisdiction of the Election Court is limited to questions of the validity of an election excluding pre-election disputes. In urging this issue, he relies on the case of ***International Centre for Policy and Conflict & 5 Others v. Attorney General and 4 Others*** Petition No. 552 of 2012; [2013] eKLR where the Court held:

“Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted....Where the Constitution and or statute

establishes a dispute resolution procedure, then that procedure must be used.”

[27] In the above context, it is his contention that where the Constitution allocates power to an authority and that authority exercises power within the parameters of the Constitution, then a Court of law has no jurisdiction to reverse that decision except on judicial review. As such, he states that unless a party appeals the decision of the IEBC Dispute Resolution Committee, the matter determined thereon cannot be re-opened by the election Court.

(c) Validity of his nomination

[28] The 3rd Respondent explains that the Petitioner was initially contesting for nomination on an ODM Party ticket. However, he opted out of the ODM Party to contest as an independent candidate after he was defeated in the said nomination. He explains that after he emerged the winner of the ODM party nomination contests, one **Oscar Tsimbakala Mwanzi**, challenged the outcome, as a result of which the PPDT ordered the party to conduct a fresh nomination. However, since the Petitioner had opted out of the nomination exercise, the 3rd Respondent remained the sole candidate leading to the ODM Party issuing him with a direct nomination.

[29] With regard to the alleged mismatch of names, the 3rd Respondent submits that upon realizing the mistake in the issuance of his nomination Certificate in a name not matching with that in his identity Card, he swore an affidavit clarifying that the names **Justus Kizito Mugali** and **Justus Gesito Mugali M’Mbaya** referred to one and the same person. As such, before accepting the nomination, the Returning Officer satisfied himself that the pre-requisites of Article 99(1) of the Constitution had been met. He thus urges that he was validly nominated by the ODM party and was properly issued with a nomination certificate by IEBC.

(d) *Alleged disobedience of the PPDT Order*

[30] The 3rd Respondent reiterates that the ODM party issued him with a direct nomination since he was the sole candidate. He thus states that the actions of the ODM party to offer direct nomination to him were in obedience of the PPDT directions. In conclusion, he urges the Court to uphold his Preliminary Objection and dismiss the appeal.

D. ISSUES FOR DETERMINATION

[31] Upon considering the Petition, the oral and written submissions by Counsel for the parties and the responses by the Respondents, we are of the view that the following issues arise for determination:

- (a) *Whether this Court has jurisdiction to hear and determine the Petitioner's appeal under Article 163(4)(a) of the Constitution.*
- (b) *Whether the election Court has jurisdiction to adjudicate over issues relating to the pre-election period, such as nomination and qualification of candidates, in view of Article 88(4)(e) of the Constitution.*
- (c) *Whether the ODM party disobeyed PPDT Orders to conduct a fresh nomination for the Party's candidates in Shinyalu Constituency.*
- (d) *Whether the election for Member of the National Assembly for Shinyalu Constituency failed to meet the*

principles of verifiability, transparency and accountability as set out in the Constitution.

(e) What reliefs, including costs, are available to the parties?

E. ANALYSIS

(a) Whether this Court has jurisdiction to hear and determine the Petitioner's appeal under Article 163(4)(a) of the Constitution

[32] Even though the Respondents disagree with the submission that this Court has the requisite jurisdiction to hear the Petitioner's appeal under Article 163(4)(a) of the Constitution, we are of the contrary view. This is because, the Petitioner's case *inter-alia* seeks a determination of the question whether an election Court has the jurisdiction to determine pre-election disputes in view of Article 88(4)(e) of the Constitution which gives the IEBC authority to deal with such disputes. The Petitioner also seeks to know the place of Article 105(1)(a) of the Constitution which gives power to the High Court to determine questions touching on the validity of an election of a member of Parliament. As such, the Petitioner's case revolves around the interpretation of Articles 88(4)(e) and 105 of the Constitution.

[33] In addition, he has raised the issue (albeit peripherally) whether the impugned election met the constitutional principles of verifiability, accountability and transparency under Articles 81 and 86 of the Constitution. We have no doubt that the said constitutional provisions were the subject of interpretation in the two superior Courts' decisions. With the above in mind therefore, we take the affirmative position that the Petitioner's case meets the already set criteria for admission under Article 163(4)(a) as has been succinctly propounded in various decisions of this Court. (See for example the cases of ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Limited & Another*** SC Petition No. 3 of

2012; [2012] eKLR, ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others*** SC Application No. 5 of 2014; [2014] eKLR and ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others***, SC Petition No. 10 of 2013; [2014] eKLR.)

(b) Whether an election Court has jurisdiction to determine pre-elections disputes

[34] The issue was extensively canvassed before us and it is the crux of the Petitioner’s case that the High Court, as an election Court has jurisdiction under Article 105(1)(a) of the Constitution to determine ANY QUESTION whether a person has been validly elected as a member of Parliament including resolving any questions concerning the qualification of a candidate or the validity of his nomination. In urging so, he opines that Article 105(1)(a) does not in any way limit the jurisdiction of the High Court to determine any question that goes into the validity of an election. As such, he takes the view that unlike the IEBC whose power is limited by Article 88(4)(e) to handle only pre-election disputes, an election Court has the authority to adjudicate over both pre-election disputes and disputes subsequent to the declaration of results. To that extent therefore, he contends that the election Court and the IEBC have concurrent jurisdiction on pre-election disputes.

[35] Taking a divergent view, the Respondents urge that it is only the IEBC which has the mandate, under Article 88(4)(e), to adjudicate over pre-election disputes such as disputes arising from nominations. In this regard therefore, all the Respondents agree with the finding of the High Court and the Court of Appeal that an election Court has no jurisdiction to handle matters arising from party nominations or those that seek to question the qualification of candidates since such issues would be classified as “pre-election” disputes.

[36] On our part, we are of the view that this issue can only be properly determined in the context of the factual background to this case. It is the Petitioner's case that the 3rd Respondent is not the person that was nominated by the ODM Party to vie for the position of a member of the National Assembly for Shinyalu Constituency. He submits that the ODM party gave a direct nomination to one, **Justus Kizito Mugali**, who, according to the Petitioner, is a different person from the 3rd Respondent as he was not the person known as **Justus Kizito Mugali**. It is also submitted that when the ODM party issued the nomination certificate to the said **Justus Kizito Mugali**, one **Oscar Tsimbalaka Mwanzi**, wrote to the Returning Officer asking him not to accept the nomination of the 3rd Respondent. However, the Petitioner submits that, the Returning Officer went ahead and accepted the nomination of the 3rd Respondent as the person nominated by the ODM party under the names of **Justus Gesito Mugali M'Mbaya**. It is on that basis that the Petitioner urges that the Returning Officer amended the name of the person nominated by the ODM party.

[37] After the Returning Officer had accepted the contested nomination, **Oscar Mwanzi**, filed a complaint before the IEBC Dispute Resolution Committee alleging that the 3rd Respondent was not a registered voter in Shinyalu Constituency and also questioning the validity of his alleged nomination. At the IEBC Committee it was urged that the person who was issued with a nomination certificate was one **Justus Kizito Mugali**, yet the identity card of the 3rd Respondent, who was the person in physical possession of the nomination certificate, indicated that his names were **Justus Gesito Mugali M'Mbaya**. It was also urged that the said **Justus Kizito Mugali** was not a member of the ODM Party and hence he could not be legitimately issued with a nomination certificate. Upon hearing the parties, the IEBC Committee dismissed the complaint on the basis that, "*identification of a candidate is both by comparing*

the number appearing on the Identity Card with that appearing in the voters register as against the candidate's name. It is equally by way of the biometric system.” As such, the IEBC Committee was satisfied that the complaint was without merit. We note that no appeal was preferred against that decision.

[38] The Petitioner, who was not a party to the IEBC proceedings, sought to re-litigate that same issue before the superior Courts and now before this Court. He urges that the person allegedly nominated by the ODM Party, one **Justus Kizito Mugali** was not a registered voter and hence, the Returning Officer should have satisfied himself that the person so nominated was qualified under Article 99(1)(a) to participate in the election of a Member of Parliament. Furthermore, he submits that the person issued with the direct nomination by the ODM Party was not the person that appeared on the ballot papers since the 3rd Respondent's name is not **Justus Kizito Mugali**. He thus proffers that the 3rd Respondent was neither qualified nor nominated to vie for the position of the Member of the National Assembly for Shinyalu Constituency.

[39] In response, the 3rd Respondent submits that upon realizing a mistake in the name in which the ODM nomination certificate was issued, he swore an affidavit deponing that the name **Justus Kizito Mugali** and **Justus Gesito Mugali M'Mbaya** refer to one and the same person. He submits that it is only after the swearing of that affidavit, that the Returning Officer accepted his nomination. Counsel for the 1st and 2nd Respondents however confirmed that the said affidavit is not on record, a matter not contested in any event.

[40] When those facts were presented before the superior Courts, the Courts first determined whether an election Court has jurisdiction to adjudicate over a pre-election dispute, namely, whether the 3rd Respondent was validly nominated and whether he qualified to be nominated as a candidate. In answering that question, the election Court was of the view that:

“The Constitution and Acts of Parliament have set the law applicable in party nominations. The jurisdiction to do so has been donated to the Political Parties Tribunal and IEBC Disputes Resolution Committee. An election petition is a creation of a special legislation vide the Elections Act and the Elections Petitions Rules. Where the law provides a procedure for redress, it is that procedure that should be followed.”

[41] Thus, the election Court held that where any party is dissatisfied with the decision of either the PPDT or the IEBC Dispute Resolution Committee, such a party should file either an appeal or a review of the said decision. As such, it held that since the decision of the IEBC Dispute Resolution Committee was not appealed, the Petitioner could not raise that same issue before it. It therefore found that an election Court has no jurisdiction to determine such a pre-election dispute.

[42] Similarly, the Court of Appeal adopted the same approach as the election Court and found that the issue of qualification and the nomination of the 3rd Respondent was fully determined by the IEBC Dispute Resolution Committee and that no judicial review or appeal was preferred against that finding. As such, it held that an election Court had no powers to consider matters that were before that Committee.

[43] In faulting the superior Courts’ decisions, the Petitioner urges that he could not legitimately appeal against the decision of the IEBC Dispute Resolution Committee since he was not a party to the proceedings. On that issue, the Court

of Appeal held that even though he was not a party, the judgement delivered was in *rem* hence he was bound by it.

[44] Thus, from the above background, it is clear that what falls for our determination is whether an election Court is divested of jurisdiction to determine pre-election disputes, particularly where the issues in contestation were the subject of determination by either the IEBC Dispute Resolution Committee or the Political Parties Disputes Tribunal (PPDT).

[45] The answer to that question lies in the interpretation of Articles 88(4)(e) and 105(1)(a) of the Constitution. Article 88(4)(e) provides:

“(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(f) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results. [Emphasis added.]

[46] The above provision clearly delineates the mandate of the IEBC with regard to the settlement of electoral disputes. The contention however lies in the proper interpretation to be given to Article 105(1)(a) which outlines the jurisdiction of the High Court, sitting as an election Court, with regard to determination of questions of membership to Parliament. The Article is headed, “determination of questions of membership”. It reads as follows:

“105. (1) The High Court shall hear and determine any question whether—

(a) A person has been validly elected as a member of Parliament.”

[47] The Petitioner has in the above context urged that Article 105(1)(a) gives the High Court power to determine *any question* that goes into the validity of the election of a member of Parliament. Validity in its normal sense connotes legitimacy—something that meets the legal test. The issues raised by the Petitioner which requires adjudication are with regard to the nomination and qualifications of a candidate. In this respect, Article 99 provides for qualifications and disqualifications for election as member of Parliament. The relevant parts of Article 99 provide:

“99. (1) Unless disqualified under clause (2), a person is eligible for election as a member of Parliament if the person—

(a) Is registered as a voter;

(b) Satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament; and

(c) Is nominated by a political party, or is an independent candidate...”

[48] Article 99 shows that it is not every person that would qualify to vie for the election of a member of Parliament. One must meet certain pre-requisites as detailed in that Article. According to the Respondents therefore, all matters touching on qualification or disqualification of candidates or arising from nominations are pre-election disputes which ought to be adjudicated exclusively

by either the PPDT or the IEBC Dispute Resolution Committee. The Petitioner disagrees.

[49] In the above context, it is not in doubt that the IEBC has been given the mandate to settle electoral disputes (including disputes relating to or arising from nominations) excluding *election petitions and disputes subsequent to the declaration of results*. Hence, even though the Constitution has not defined what “electoral disputes” in this regard means, it specifically provides that some of those envisaged disputes, which are under the purview of the IEBC, would emanate from nominations. Nomination is one of the qualifications through which one becomes eligible to participate in an election. The IEBC in that context is expressly excluded from adjudicating over election petitions. That mandate is pursuant to Article 105 donated to the High Court. But what exactly are election petitions? The Constitution does not expressly define the term “election petition”. However, Article 105(1) (a) and (b) as well as (3) provides as follows:

“105.(1)The High Court shall hear and determine any question whether–
(a) a person has been validly elected as a member of Parliament.
or
(b) the seat of a member has become vacant
(2) ...
(3) Parliament shall enact legislation to give full effect to this Article.”

[50] The legislation established by Parliament as ordained by the Constitution is the Elections Act, 2011. The said Act defines a “petition” as an application to the election Court under the Constitution or under the Act. Further, Section 75 whose heading is “election petition” provides, with regard to county election petitions, that “a question as to validity of an election of a county Governor shall be

determined by the High Court within the County or nearest County.” Hence, it would seem that an election petition is an application that seeks to determine the validity of an election.

[51] We have already established that the High Court, as an election Court, has been given the mandate to examine a question whether a person has been validly elected and in essence, adjudicate over an election petition. If for example a person is not qualified for election, would such a person be validly elected? Indeed, if a person does not meet the set-qualifications such as being a registered voter, or being of certain educational standards or being nominated by a political party or an independent candidate and such a person is “elected”, then that cannot be said to be a valid election. In fact, the election would be a nullity. When the election Court is therefore given the mandate to examine the validity of an election, it necessarily means that the said Court would have the power to investigate the legitimacy of that election including on issues of eligibility to contest in an election. In that context, and according to Article 105(1)(a), the election Court stands as the custodian of the Constitution in matters of elections with the ultimate mandate of investigating the legitimacy of an election.

[52] Having so stated, we are aware that there are conflicting decisions emanating from the superior Courts with regard to powers of the election Court to determine pre-election disputes. One such position was expressed by the Court of Appeal (Ouko, Murgor & Otieno-Odek JJ.A) in the case of ***Kennedy Moki v. Rachel Kaki Nyamai & 2 Others*** Election Petition No. 4 of 2018; [2018] eKLR where the learned Judges held:

“[57] Convinced that election is a process which includes nomination of candidates, we take the view that subject to finality and constitutional time lines of the jurisdiction of

other competent organs, an election court has jurisdiction to hear and determine pre-election nomination disputes if such dispute goes to eligibility and qualification to vie and contest in an election. If a nomination certificate is issued to a person who is neither qualified nor eligible to vie in an election, the Certificate is not conclusive proof of eligibility and qualification to vie. If a dispute arises as to the validity of such a certificate and eligibility to vie, an election court has jurisdiction to determine the validity of the nomination certificate and the eligibility to vie of the person bearing the certificate.

[58] In our view, the provisions of Article 88 (4) (e) of the Constitution and Section 74 (1) of the Constitution are not clauses that oust the jurisdiction of an election court. Article 88 (4) (e) confers jurisdiction of the Electoral Commission in settling of nomination disputes. The said Article does not confer jurisdiction on the Commission to hear election petitions. The Article reserves the jurisdiction of an election court to determine election petitions. A nomination dispute that goes to the root of the electoral process, or one that determines qualification and eligibility of a candidate to vie, is an issue of substance that goes to the root of the election, and an election court has jurisdiction to hear and determine the dispute.”

[53] A differing position was taken by the Court of Appeal in the present matter where it expressed itself as follows:

“It is our considered view that the election Court was divested of considering matters that had been dealt with by the PPDT and/or the DRC of the 1st Respondent. One may as well imagine that if this was not the case, then litigation would be open ended and time lines to file an appeal and/or judicial review would be of no consequence as matters determined by the PPDT and/or DRC would later be urged in an election Court inspite of their determination in the PPDT and/or DRC. Such a fluid situation will not augur well in the administration of justice. The issue that was before the 1st Respondent’s Disputes Resolution Committee was that the 3rd Respondent was not a registered voter in Shinyalu Constituency. The DRC considered the complaint and dismissed it. No review or appeal was filed.”

[54] How do we resolve the apparent conflicting positions taken by the Court of Appeal and election Courts? Our view is that Articles 88(4)(e) and 105(1) and (3) must be read holistically and that whereas the IEBC and PPDT are entitled, nay, empowered by the Constitution and Statute to resolve pre-election disputes including nominations, there are instances where the election Court in determining whether an election is valid, may look to issues arising during the pre-election period only to the extent that they have previously not been conclusively determined, on merits, by the IEBC, PPDT or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the Constitution. Where a matter or an issue has been so determined, then the election Court cannot assume jurisdiction as if it were an appellate entity since that jurisdiction is not conferred on it by the Constitution.

[55] In holding so, we are aware of our decision in ***George Mike Wanjohi v. Steven Kariuki & 2 others*** SC Petition No. 2A of 2014; [2014] eKLR (***Wanjohi***) which affirmed the powers of the IEBC in determining disputes arising before the declaration of results in line with Article 88(4)(e) of the Constitution. In that case, we held that any dispute arising after the declaration of results could only be resolved by an election Court under Article 105(1) of the Constitution. However, unlike the present case, the ***Wanjohi*** decision did not analyse the extent of the powers of an election Court, if at all, with regard to adjudication of disputes arising before the declaration of results such as a contestation touching on nominations or qualification of candidates. Nonetheless, the decision recognised the broad powers of an election Court in protecting and safeguarding the electoral values and principles enunciated in the Constitution. In that regard, at paragraph 110 we held thus:

“By the design of the general principles of the electoral system, and of voting, in Articles 81 and 86 the Constitution, it is envisaged that no electoral malpractice or impropriety will occur that impairs the conduct of elections. This is the basis for the public expectation that elections are valid, until the contrary is shown, through a recognized legal mechanism founded in law or the Constitution. Any contests as to the credibility, fairness or integrity of elections, belongs to no other forum than the Courts. The charge of commission of administrative error, fraud, deliberate misconduct, or some element of corrupt practice in elections, are questions that go to the root of the validity of elections and which, if apparent subsequent to the

declaration of results, are expressly excluded from the scope of the dispute-resolution powers of the IEBC under Article 88(4)(e).” [Emphasis added.]

[56] Consequently, our holding in the present case enriches the jurisprudence in this area by expounding on the broader powers of an election Court with regard to determining questions of validity of an election. To put our holding into context therefore, there is evidence that the question whether the 3rd Respondent was a registered voter in Shinyalu Constituency by fact of a difference in names – **Justus Kizito Mugali** as opposed to **Justus Gesito Mugali M’Mbaya** – was determined by the IEBC Dispute Resolution Committee which resolved that the names referred to the same person and proceeded to issue a nomination certificate to the 3rd Respondent. No appeal or judicial review proceedings were instituted to challenge that decision and although the Petitioner was not a party to the proceedings, it has not been shown that he was unaware of them or that when he became aware of the same, he took any action save the filing of the election Petition before the election Court. On what basis can this Court now find otherwise? We submit none. In any event, the decision of that quasi-judicial body within the IEBC stands and has never been overturned. The election Court and the Court of Appeal were bound by it and therefore properly declined to assume jurisdiction on that matter. We see no reason to overturn that decision.

(c) Whether the ODM party disobeyed PPDT Order to conduct a fresh nomination?

[57] The Petitioner submits that the ODM refused to conduct fresh nominations in disobedience of the PPDT Orders. On their part, the 1st and 2nd Respondent urge that on 20th May, 2017, the Petitioner filed **Miscellaneous Election Petition No. 3 of 2017** in which he sought to cite the ODM party for contempt

of the Orders issued by the PPDT. They urge that the said application was dismissed by the High Court on 30th May, 2017 for lack of merit.

[58] We agree with the 1st and 2nd Respondents that the Petitioner cannot now use the Supreme Court to review the decision of the High Court on contempt which decision has not transcended through the normal appellate mechanism, if at all. Above all, we agree with the finding of the superior Courts that since ODM is not a party to these proceedings, even if we had jurisdiction on this issue, we cannot delve into its merits since our orders, one way or the other, would be in vain. We shall say no more on that issue.

(d) Whether the election met the principles of verifiability, transparency and accountability as set out in the Constitution

[59] Before we proceed to the last issue on remedies, we note that the Petitioner had also alleged that the elections for the Member of National Assembly for Shinyalu Constituency was not free from violence, intimidation, improper influence and corruption. As a result, he alleged that the 3rd Respondent was not validly elected. With respect, the Petitioner, in making that point, only quotes constitutional principles which were allegedly breached without showing at all how the Court of Appeal erred in its determination of that issue. He does not give a single explanation of how, in his view, the said constitutional principles were breached. As such, with regard to that issue, we find no merit in the Petitioner's assertions and would instead dismiss the same.

(e) What relief including costs are available to the parties?

[60] With regard to the prayer seeking the setting aside of the Judgment of the High Court and the Court of Appeal, in view of our findings above, it is clear why that prayer cannot be granted. Similarly, and for the same reasons, the other prayer seeking a declaration that the 3rd Respondent was not validly elected as a member of the National Assembly for Shinyalu Constituency, cannot be granted.

[61] The Petitioner has also sought a declaration that the 3rd Respondent had committed election offences and should be prosecuted for such offences. That claim was not prosecuted at all, hence it obviously falls on the wayside. The other prayer was a request to have fresh elections in Shinyalu Constituency. Again, that prayer is not tenable since we have not disturbed the election of the 3rd Respondent. The last prayer was for grant of costs in this Court as well as in the Court of Appeal and in the High Court. With regard to that issue, we are cognisant of the principle that costs follow the event. However in this case, the Petitioner is not necessarily a loser. Indeed, his cause is partly successful with the potential of greatly contributing to the jurisprudence of this country with regard to the choice of forum when handling pre-election disputes. Equally, we have found no fault on the part of the Respondents in the conduct of the impugned election. In view of those considerations, we shall exercise our discretion and hold that each party shall bear their costs of this Appeal.

F. THE CONCURRING OPINION OF D.K. MARAGA, CJ & P

[62] I have had the advantage of reading in draft the majority Judgment. I concur with the majority decision and the final orders save for one aspect of it that relates to the election Court's jurisdiction to determine pre-election nomination disputes.

[63] I fully endorse the majority view expressed thus in paragraph [51] of its Judgment:

“We have already established that the High Court, as an election Court, has been given the mandate to examine a question whether a person has been validly elected and in essence, adjudicate over an election petition. If for example a person is not qualified for election, would such a person be validly elected? Indeed, if a person does not meet the set-qualifications such as being a registered voter, or being of certain educational standards or being nominated by a political party or an independent candidate and such a person is “elected” then that cannot be said to be a valid election. In fact, the election would be a nullity. When the election Court is therefore given the mandate to examine the validity of an election, then it necessarily means that the election Court would have the power to investigate the legitimacy of that election including on issues of eligibility to contest in an election. In that context, and according to Article 105(1)(a), the election Court stands as the custodian of the Constitution in matters of elections with the ultimate mandate of investigating the legitimacy of an election.”

[64] I, however, have a difficulty with the majority view in paragraph [54] of its Judgment which seeks to oust the election Court’s jurisdiction to determine a matter that has *“conclusively [been] determined, on merits, by the IEBC, PPDT or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the Constitution. Where a matter or an issue has been so determined, then the election Court cannot*

assume jurisdiction as if it were an appellate entity since that jurisdiction is not conferred on it by the Constitution.”

[65] My humble view is that whether or not a matter has been conclusively determined by the IEBC under Article 88(4)(e) or PPDT under Section 40 of the Political Parties Act No. 11 of 2011 and gone through the appellate or judicial review process thereunder stated or contemplated, if it is an issue of qualification or eligibility or any other aspect that goes to the root of an election, the election Court has jurisdiction to revisit it if raised in an election Petition.

[66] In this case, although the pre-election nomination dispute was initially on whether or not the 3rd Respondent was a registered voter, for him to contest in the Shinyalu Member of the National Assembly election, a pre-requisite decreed by Article 99(1)(a) of the Constitution, it transmuted into one of whether or not one **Justus Kizito Mugali**, nominated by ODM to contest in that election, was one and the same person as **Justus Gesito Mugali M’Mbaya**, a registered voter in that Constituency. For me, with that transmutation, the issue ceased to be one of qualification/eligibility and therefore not one that went into the root of the election. As such, having been conclusively resolved by IEBC, I agree that the election Court did not have jurisdiction to entertain. I am therefore in agreement with the final Orders of the majority decision.

G. ORDERS

(a) The Petition of Appeal dated 29th August, 2018 is hereby dismissed.

(b) The Judgement of the Court of Appeal is hereby affirmed and the election of the 3rd Respondent as Member of the

National Assembly for Shinyalu Constituency is hereby upheld.

(c) Each party shall bear its costs of the Appeal.

[67] Orders accordingly.

DATED and DELIVERED at NAIROBI this 8th day of February, 2019

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

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
J. B. OJWANG
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

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

**THE REGISTRAR
SUPREME COURT OF KENYA**