# REPUBLIC OF KENYA

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

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

**PETITION NO. 4 OF 2014**

**-BETWEEN-**

**ZACHARIA OKOTH OBADO.....APPELLANT**

**-AND-**

**1. EDWARD AKONG'O OYUGI**
**2. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**
**3. JAIRUS OBAGA/ COUNTY RETURNING OFFICER, MIGORI COUNTY**
**.....RESPONDENTS**

*(Being an Appeal against the Judgment and Order of the Court of Appeal sitting at Kisumu in Civil Appeal No. 39 of 2013 (Onyango Otieno, Ouko & Ole Kantai, JJA) dated March 28, 2014)*

## JUDGMENT

### A. INTRODUCTION

**[1]** This is an appeal against the Judgment of the Court of Appeal sitting at Kisumu, dated 28th March, 2014 in Civil Appeal No. 39 of 2013, which overruled the decision of the High Court sitting at Homa Bay in Election Petition No. 3 of 2013. The outcome of that decision was the invalidation of the election of the appellant, as the duly-elected Governor of Migori County.

**[2]** The appellant lodged his Petition of Appeal in this Court on 3rd April, 2014. His petition is premised upon several grounds, as follows:

> *(i) The learned Judges of Appeal erred in law and fact, as they interpreted and applied Articles 81 (a),(d),(e),86 and 38 of the*

*Constitution, when they held that human fallibility (such as human fatigue and errors) is sufficient to vitiate an election, without considering the effect of those errors on election outcome, thus ignoring the provisions of Section 83 of the Elections Act.*

*(ii) The learned Judges erred and misdirected themselves in law and in fact, in failing to appreciate that, as vote re-tallying had been undertaken by the consent of the parties (which re-tallying returned the appellant as the winner with an even greater margin), Articles 81(e) and 86(a) and (d) of the Constitution had been fully complied with.*

*(iii) As a corollary to the foregoing, by the learned Judges failing to appreciate that the gubernatorial elections for Migori County had been conducted in accordance with Articles 81 and 86 of the Constitution, they contravened and infringed the appellant's constitutional right to fair trial, as provided under Articles 25 (c), 27(1) and 50 (1) of the Constitution.*

*(iv) The learned Judges of Appeal manifestly exhibited bias against the appellant, and denied him his unlimited constitutional rights to fair trial under Article 25 (c) as read with Article 50(1) of the Constitution.*

*(v) The Court violated the provisions of Articles 87(1), 88(5) and 94(1) of the Constitution as read with Section 85A of the Elections Act, when it made various conclusions of fact, thus exceeding the scope of its jurisdiction which lies in matters of law only.*

*(vi) The appellate Court misapplied the law in Article 163(7), when it lowered the standard of proof required to invalidate an election. The Court deviated from the well-established standard of proof in election petitions, and overlooked the Supreme Court decision in* ***Raila***

***Odinga & Others v. Independent Electoral and Boundaries Commission & Others,*** Petition No. 5 of 2013.

*(vii) The learned Judges of Appeal misinterpreted and misapplied Article 180(4) of the Constitution, by taking into account the margin of victory as a factor in determining the validity of an election, thus departing from the provision that a candidate who receives the greatest number of votes, simpliciter, is declared elected.*

*(viii) The appellate Court erred in law, in faulting the trial Judge (who held that although tallying may have been done erroneously, it neither affected the results nor the entire election process), when it held that the elections in Migori County experienced several breaches of the Constitution, especially of Articles 1,2 and 249.*

*(ix) The learned Judges of Appeal erred in law, when they failed to interpret the Constitution purposively, in a manner that would promote its objectives and values, as envisaged under Article 259.*

*(x) The appellate Court exercised its judicial authority and mandate in a manner that violated the purposes and principles of the Constitution, contrary to the provisions of Article 159(2) (e), when it took into account irrelevant and uncontested issues, in nullifying the election of the appellant herein.*

**[3]** The appellant seeks the following orders from this Court:

*(a) the entire judgment /orders of the Court of Appeal sitting in Kisumu Civil Appeal No. 39 of 2013, delivered on 28th March, 2014, be set aside, and the Judgment and Decree of the Election Court at Homa Bay, in Election Petition No. 3 of 2013 delivered on 5th September, 2013 be reaffirmed;*

*(b) in place of the orders by the Court of Appeal dated 28th March, 2014 in Kisumu Civil Appeal No. 39 of 2013, a declaration do issue that the*

*gubernatorial elections for Migori County conducted by the 2nd and 3rd respondents on 4th March, 2013 were conducted in accordance with the Constitution;*

*(c) as a consequence of prayers 1 and 2 above, a declaration do issue that the appellant was duly elected Governor of Migori County;*

*(d) that the costs of this appeal, and costs of proceedings in the Court of Appeal and the High Court, be awarded to the appellant herein; and*

*(e) any other orders that this Court may deem it fit to grant.*

## B. BACKGROUND

**[4]** The origin of the appeal is the declaration of the appellant as the duly-elected Governor of Migori County, in the elections held on 4th March, 2013.

**[5]** The 1st respondent, Edward Akong'o Oyugi, filed a petition dated 2nd April, 2013 in the High Court at Homa Bay, Election Petition No. 3 of 2013, challenging the declaration of the appellant as the duly-elected Governor of Migori County. He sought, *inter alia*: an order for tallying and examination of the votes cast, and the results declared; a declaration that the appellant was not the duly-elected Governor of Migori County; a declaration that he, the 1st respondent, was the validly elected Governor of Migori County; and also that the election of the appellant be set aside, and a fresh election ordered.

**[6]** On 13th June, 2013 the High Court ordered *inter alia,* a scrutiny and recount of all ballots cast at the Ombo and Kengariso polling stations; an examination of the tally of all the eight constituencies in Migori County; and the Deputy Registrar to examine all the Form 35s used, and come up with the correct tally. On 5th July, 2013, the High Court received the Deputy Registrar's report on the scrutiny and re-tally, which formed part of its proceedings.

**[7]** On 5th September, 2013, the High Court (*Maina J*), upon hearing the petition and considering the evidence presented, including the Deputy Registrar's report, dismissed the petition, and held that the declaration of the appellant as the Governor for Migori County was valid. That Court ordered the 2nd respondent, IEBC, to pay costs of Ksh. 1 million, to both the appellant and the 1st respondent, with the 3rd respondent bearing his own costs.

**[8]** The 1st respondent, being aggrieved by the decision of the High Court, appealed to the Court of Appeal in Kisumu (Civil Appeal No. 39 of 2013), on 31 grounds which he summarised as follows:

(i) the learned Judge contravened Rule 17 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 on the framing of contested and uncontested issues in the petition;

(ii) the learned Judge erred in her finding regarding the vote-tallying, and failed to order for full scrutiny after receiving evidence of errors in vote tallying;

(iii) the learned Judge's interpretation of the relevant law and application of the evidence was erroneous;

(iv) in the exercise of her judicial authority, the learned Judge exceeded her jurisdiction by treating the Deputy Registrar's report as conclusive on the issue of tallying; and

(v) the learned Judge erred in capping the costs that could be taxed and awarded by the taxing officer at Ksh.1 million, thus interfering with the judicial discretion of the taxing officer.

**[9]** The prayers sought at the Court of Appeal included, that: (i) the certificate issued by the High Court under Section 86 of the Elections Act, 2011 be quashed, (ii) the election and declaration of the appellant as Governor of

Migori County be set aside; and (iii) the 2nd respondent be ordered to conduct a fresh election for the gubernatorial seat in Migori County.

**[10]** The 2nd and 3rd respondents on their part, filed a cross-appeal, challenging the High Court's decision condemning the 2nd respondent to pay costs and the 3rd respondent to bear his own costs.

**[11]** The Court of Appeal in its decision delivered on 28th March, 2014 allowed the appeal. It set aside the Judgment of the High Court, stating that: *"**the election of Governor, Migori County was so badly conducted that it failed to meet the constitutional and legal requirements of a free and fair election; and that the irregularities affected the results**."* The appellate Court further ordered that the Independent Electoral and Boundaries Commission (IEBC) be notified to proceed and conduct a fresh election under Section 86(2) of the Elections Act. The cross-appeal of the 2nd and 3rd respondents, as to costs, was dismissed.

**[12]** Aggrieved by this decision, the appellant filed an appeal before this Court on 3rd April, 2014 seeking to set aside the Judgment of the Court of Appeal. Together with his petition, the appellant filed a Notice of Motion under certificate of urgency, seeking conservatory orders to stay the execution of the Court of Appeal decision, pending the hearing and determination of this appeal.

**[13]** The matter was certified urgent on 3rd April, 2014 by *Ibrahim, SCJ*. The application was heard *inter partes* before a two-Judge Bench on 8th April, 2014 *(Ibrahim and Njoki, SCJJ),* whereupon the following orders, *inter alia*, were issued:

*(i) stay of execution of the whole Judgment and/or orders of the Court of Appeal dated 28th March, 2014 pending hearing and determination of the appeal;*

*(ii) a conservatory order against the Speaker of Migori County Assembly assuming the office of Governor pending hearing and determination of the appeal;*

*(iii) a conservatory order against the 2nd respondent certifying the gubernatorial seat of Migori County vacant, pending hearing and determination of the appeal.*

## C. SUBMISSIONS

### *(a) Appellant's Submission*

*Objection to Replying Affidavits by the 1st Respondent*

**[14]** Learned Senior Counsel, Mr. Okong'o Omogeni objected to the replying affidavit filed by one Anne Anyanga Omodho, urging that the same be struck out, as she was not a party to the proceedings. He submitted that the appeal was filed pursuant to Article 163(4) of the Constitution, and was not a fresh petition but an appeal; arising from the decision of the Court of Appeal; and that, in these circumstances, the parties should remain as they appeared before the High Court and in the Court of Appeal.

**[15]** Learned counsel objected to paragraph 61 of the replying affidavit of the 1st respondent which, he submitted, purported to introduce new evidence and, if allowed, would occasion prejudice to the appellant. He submitted that a party could not adduce new evidence when dealing with appeals from the Court of Appeal to the Supreme Court.

**[16]** It was counsel's contention that new evidence was being tendered without any opportunity being accorded to the appellant to respond to the same. Further, the said paragraph 61 introduced issues that were not in dispute in the Court of Appeal, and which did not form part of the petition.

Therefore, counsel urged, it was in the interest of fairness and justice, for the said paragraph to be struck off the record. He submitted that, even taking into account the provisions of Article 159(2)(d) of the Constitution, which extolled substantive justice, rather than bare technicality, there was need to distinguish the present case on the basis that the appellant will have no opportunity to respond to the issues raised.

**[17]** With regard to the main appeal, learned Senior Counsel, Mr. Ahmednasir Abdullahi, for the appellant, submitted that profound legal issues arose, bearing upon the correctness of the decision of the Court of Appeal. He urged that the said decision should not stand, as it would become an obstacle to the holding of successful elections in the country at large. He summarized the eight grounds of appeal listed in the Memorandum of Appeal to just four:

> (i) jurisdiction of the Court of Appeal;
>
> *(ii)* burden of proof, and the doctrine of *stare decisis;*
>
> (iii) whether the election of Migori County Governor was in compliance with the Constitution, and the statutory provisions on elections; and
>
> (iv) purpose and meaning of Article 180(4) as read together with Article 259 of the Constitution.

*Jurisdiction of the Court of Appeal*

**[18]** Counsel submitted that the Court of Appeal had exceeded its jurisdiction in election petitions, and made conclusions on *matters of fact*. It was his submission that, pursuant to Articles 87(1), 88 (5) and 94(1) of the Constitution and Section 85A of the Elections Act, appeals to the Court are limited to *matters of law* only.

**[19]** Counsel submitted that the basic jurisprudence on jurisdiction had been established in ***Owners of Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd*** [1989] KLR 1, with the parameters of the concept being laid; and in ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and 2 Others*****,** Supreme Court Civil Application. No 2 of 2011, where this Court held that a Court cannot arrogate to itself jurisdiction exceeding the limits conferred by law; neither can it expand its jurisdiction through judicial craft. It was his submission that the appellate Court had, in this instance, expanded its jurisdiction through judicial craft and innovation.

**[20]** Learned counsel submitted that the Court of Appeal did not evaluate the findings of the High Court, but rather, substituted its own opinion for that of the trial Court – doing so on a matter of *fact,* and not *law*, contrary to Section 85A of the Elections Act. It was his submission that where the right of appeal is limited to issues of law, a Court cannot, when determining an appeal, delve into issues of fact. The appellant cited various cases in support of his argument, including: ***Zachariah Chisepo v. Chibuku Breweries*** SC 5/04**,** and ***Hwange Colliery Co. v. Francis T.N Zambuko*** LC/MT/05/13 [decisions by the Zimbabwe Supreme Court, and Labour Court respectively]; ***Mukisa Biscuit Manufacturing Co. v. West End Distributors Ltd*** [1969] EA 696; and ***James R. Ahrenholz v. Board of Trustees of the University of Illinois*****,** Case No. 00-810 [of the United States Court of Appeals for the 7th Circuit].

**[21]** Counsel also found support in decisions by the Supreme Court of the Philippines: ***Nancy T. Lorzano v. Juan Tabayag,*** JR [2012] G.R. No.189647, and ***New Rural Bank of Guimba (N.E) Inc. v. Femina S. Abad and Rafael Susan*** (2008) G.R No. 161818 – where the Court distinguished between *question of law* and *question of fact,* and observed that a question of law exists *when there is controversy as to the correct application of law on a certain set of facts,* or *where the issue does not call for*

*an examination of the probative value of the evidence presented*. He further relied on the Supreme Court of Canada decision in ***Housen v. Nikolaisen*** [2002] 2 SCR 235.

**[22]** Learned counsel urged that the appellate Court had overstepped its jurisdiction when it made conclusions of fact based on *issues that had not been pleaded.* He submitted further that the appellate Court adopted and based its Judgment upon the proceedings before the Deputy Registrar of the High Court, on tallying and scrutiny – yet those proceedings were not part of the High Court proceedings, even though their results were adopted as part of the High Court proceedings. It was counsel's argument that the Court, by relying on the proceedings before the Deputy Registrar, misapplied Articles 25 (e) and 50 (1) of the Constitution on the *right to fair hearing*.

**[23]** Counsel submitted that Rule 10 (1) (e) of the Elections (Parliamentary and County Elections) Petition Rules, 2012 required a petitioner to *state the grounds of the petition;* and therefore, when an issue of fact is not *pleaded at the trial Court,* it would amount to a breach of the right to fair hearing, if an appellate Court arrives at its decision based on the same. He pointed to issues in the Court of Appeal Judgment which he submitted, were disputed facts raised for the first time by that Court, and then made the basis for nullifying the election. Counsel's argument was that the case was determined outside the pleadings and the evidence adduced, and that the decision was based on allegations, to which the appellant had no opportunity to respond.

*Standard of proof, and the doctrine of* ***stare decisis***

**[24]** Counsel submitted that, by virtue of Article 163(7) of the Constitution, the decisions of this Court are binding on all other Courts. He urged that the appellate Court had erred in its application and interpretation of Article 163(7) of the Constitution as read with Section 83 of the Elections Act, by

disregarding this Court's binding decision in ***Raila Odinga v. Independent Electoral Boundaries Commission & Others,*** Supreme Court Election Petition No. 5 of 2013, wherein the Court held that the gist of Section 83 of the Elections Act, in relation to whether or not an election was valid, was not based upon the *number of errors* found, but upon the *effect of those errors on the results*.

**[25]** It was learned counsel's submission that the appellate Court, when analysing these closely contested elections, chose to rely upon authorities from the Supreme Court in the United States and India, but deliberately disregarded this Court's binding decision in the ***Raila Odinga*** case, especially on the discharge of the *burden of proof*.

**[26]** Counsel further submitted that the Court of Appeal had created a new standard of proof, one *'higher'* than the balance of probability, when the test ought to be merely '*above'* balance of probability. It was urged that the Court had failed to determine whether on a balance of probability, the burden of proof had been discharged by the 1st respondent; and that this was a breach of the doctrine of *stare decisis*.

*Whether the conduct of election was in breach of constitutional provisions*

**[27]** Counsel submitted that the appellate Court had enumerated several clerical errors, on the basis of which it held that the election was not conducted in accordance with the Constitution, even though the Court undertook no analysis as to how such errors had affected the election outcome. Relying on the decision of the Supreme Court of Canada, in ***Opitz v. Wrzesnewskyj*** 2012 SCC 55, counsel submitted that an election challenged on the basis of *administrative errors* which did not affect the result, as in the instant case, was different from one challenged on grounds of *fraud, corruption or illegal acts*. He called for the application of the *'magic number'*

*test,* as applied in the ***Opitz*** case: namely, that an election should be annulled only ***if the number of invalid votes is equal to or greater than the number of votes rightly earned by the successful candidate.***

**[28]** Learned counsel submitted that no evidence had been adduced to the effect that the conduct of the election violated any of the provisions under Articles 38, 81 and 86 of the Constitution. He urged that, if the general principles under the Constitution were duly met, it was untenable to infer that the election was "so badly conducted" as to be in contravention of the Constitution. He further submitted that the errors signalled by the appellate Court did not fall within any recognized categories, and that the Court had misapplied the Constitution, by reading Articles 81 and 86 in isolation from Section 83 of the Elections Act, which provides:

> ***"No election shall be declared to be void by reason of non-compliance with written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the results of the election."***

**[29]** The appellant further submitted that the Court of Appeal had relied on ***Morgan v. Simpson*** [1975] 1 QB 151, an English case worth distinguishing from the instant one. Counsel urged that the 1st respondent had not proved that the clerical errors materially affected the declared result of the election, as was the case in the ***Morgan*** case. Counsel submitted that upon the conduct of re-tallying, the said errors proved not to have affected the results – as the appellant was still the winner, with an even wider margin: yet the Court of Appeal held that it was difficult to ascertain the winner, on account of errors in tallying and in the transposition of results.

**[30]** Learned Senior Counsel submitted that imperfection in the conduct of elections was inevitable, as was witnessed in a case before this Court, the ***Raila Odinga*** case; and so a breach of statute at election time ought to be shown to have had an impact on the results. In advancing his argument, counsel cited the Ghanaian case, ***Nana Addo Dankwa Akufo-Addo & 2 others v. John Dramani Mahama& 2 Others*** [2013] SGL, and the ***Opitz*** case in which the Supreme Court of Canada thus observed:

> *"At issue in this appeal are principles to be applied when a federal* ***election is challenged on the basis of irregularities. We are dealing here with a challenge based on administrative errors. There is no allegation of any fraud, corruption or illegal practices. Nor is there any suggestion of wrongdoing by any candidate or political party.*** *Given the complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the- job experience and the short time frame for hiring and training them, it is inevitable that administrative mistakes will be made.* ***If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election"*** [emphases supplied].

**[31]** Learned counsel submitted that the Court of Appeal misapplied and misinterpreted Articles 38, 81, and 86 of the Constitution when it held that, *the failure to comply with procedural steps aimed at determining entitlement will directly affect the result of the election, leading to it being vitiated.* He invoked the ***Nana Addo Dankwa*** Case, in which the Supreme Court of Ghana observed that:

> ***"...the entire process, but for this singular act of omission, complied with the law..... I think that [the call for its invalidation] is not rooted in shared common sense and undermines the entire process of the elections having innocent voters disenfranchised on purely technical grounds. It is observed that the election statutes are to be construed liberally in order to give effect to the expressed wish of the electorate. It being so, rules that are provided to effectuate constitutional rights should not be applied technically as though they were mathematical formula. I am of the opinion that the evidence before us clearly points in the direction of a substantive approach unblended by strict adherence to technicalities."***

**[32]** It was counsel's submission that the appellate Court breached Article 259 of the Constitution, by its perception that human errors were attributable solely to negligence and irresponsibility. Such a perception, it was urged, would not give the right criteria in considering whether the election was free and fair. He relied on the ***Opitz*** case, in which the Canadian Supreme Court held as follows:

> *"In our view, adopting a strict procedural approach creates a risk that an application under Part 20 could be granted even where the result of the election reflects the will of the electors who in fact had the right to vote. This approach.... runs the risk of enlarging the margin of litigation and is contrary to* ***the principle that elections should not be overturned, especially where neither candidate nor voters have engaged in any wrongdoing"*** [emphasis supplied].

**[33]** Learned counsel submitted that the Constitution gives exclusive jurisdiction and mandate to the IEBC to hold elections for all elective positions

in the country, but that the effect of the Court of Appeal's decision was to transfer that role to 1st respondent's witness; the Court of Appeal assigned that responsibility to the 1st respondent's witness when it took into consideration the results generated by his campaign secretariat, which, it was urged, lacked legal sanction under the election law.

**[34]** Learned Senior Counsel, Mr. Okong'o Omogeni, for the appellant, sought to demonstrate that the Court of Appeal had no basis for making a declaration that there was no compliance with the provisions of Article 81 and 86 of the Constitution. He submitted that both the trial Court and the appellate Court had unanimously held that the allegations of missing names in the voter register, intimidation, bribery, violence, and denial of candidates' agents the opportunity to sign Form 35, had not been proved. He urged that the Court of Appeal had agreed, that the only serious allegation before it was the tallying of votes, and that this could not be the basis of a finding that there was no compliance with Articles 81 and 86 of the Constitution.

**[35]** Counsel submitted that the Court of Appeal's statement that "*figures alone, if the process is flawed, are worthless,*" was misleading, as there was no evidence on record that the entire electoral process was flawed, nor was there anything to indicate that the vote-details entered in Form 35 had been questioned. The only issue for determination, counsel urged, was the erroneous transposition of votes from Form 35 to Form 36.

**[36]** With regard to verification under Article 81 of the Constitution, counsel submitted that a re-tallying of Form 35's for the entire county was undertaken by the trial Court, and upon completion the *appellant's lead increased from 163 to 577.* Relying on the example of the ***Raila Odinga*** case, counsel urged that this was clear evidence that the results of the gubernatorial election could be verified, and once this was achieved, the constitutional threshold was realised.

**[37]** Counsel submitted that the only error in regard to Kubwaha and Biamiti polling stations was the failure to have those results transcribed on Form 36. However, counsel urged, the correct results were declared at the polling station, and therefore it could not be said that the people of Kuria West Constituency did not know the results of those two polling stations. Besides, counsel submitted, the error of transposition was cured when the trial Court conducted a re-tally of all Form 35's, and the results of the two polling stations were duly taken into account.

**[38]** Counsel asked the Court to take note of the remark by the High Court Judge, that the 1st respondent had not made any application for scrutiny and recount of the votes cast in Migori County; and therefore, the only prayer left was for the Court's determination of the totality of votes garnered by each candidate – and this was ascertained by a re-tally of Form 35s, still confirming the appellant to have been the winner, with an even wider margin.

**[39]** Learned counsel urged the Court to confirm the will of the people of Migori County, as would be discerned from Form 35s, during the re-tally by the High Court. He commended to this Court the decision of the Supreme Court of Ghana in ***Nana Addo Dankwa,*** which held that the Court should be more concerned with *substantive justice* and not technicalities.

*Purpose and Meaning of Article 180(4), as read with Article 259 of the Constitution*

**[40]** Counsel submitted that the Court of Appeal had deviated from the provision of Article 180 (4) of the Constitution: that a candidate who receives the *greatest number of votes* shall be declared elected – when it considered the *margin of victory*, in determining the validity of the election. It was his submission that the appellate Court misapplied the said Article, as read with Section 83 of the Elections Act, in holding that errors in transposition and tallying made it difficult "[*outright], [to] determine the winner"* –

notwithstanding the fact that a re-tally done by the trial Court, with the consent of all parties, had increased the appellant's margin of victory.

**[41]** Learned counsel submitted that, once scrutiny is done in an election petition, there would be no proper perception of irregularities, as scrutiny is meant to *filter, validate or invalidate the results;* and once it was done, and the results showed the winner remaining the same, there was no reason to invalidate the election.

**[42]** Counsel urged that the appellate Court, while exercising its judicial authority under Article 159 of the Constitution, violated the provisions of Article 259, by failing to *interpret the Constitution purposively*, in a manner that advances the rule of law, and human rights and fundamental freedoms as incorporated in the Bill of Rights. Such a shortfall, counsel urged, also implied a failure to promote the purposes, values and principles of the Constitution. He submitted as well, that the appellate Court had misinterpreted and misapplied Article 259 of the Constitution, by holding that the elections of Migori County were in breach of Articles 1, 38, 81, 86 and 259 of the Constitution.

**[43]** In response to the 1st respondents submission regarding Rule 29 of the *Court of Appeal Rules, 2010* counsel urged that, though the Rule empowered the appellate Court to appraise evidence and address itself to procedural issues, it did not apply to appeals on matters such as *elections;* and thus, where Rule 29 was found to be in conflict with Section 85A of the Elections Act, that Section would prevail.

### *(b) 2nd and 3rd Respondents' Submissions*

**[44]** Learned counsel, Mr. Obondi, for the 2nd and 3rd respondents, supported the appellant's oral application for the striking out of paragraph 61 of the 1st

respondent's replying affidavit, and the affidavit of his witness, Anne Anyanga Omodho. He submitted that the said paragraph introduced new results, declared by one James Oswago in a personal capacity, rather than by the 3rd respondent; it introduced unfamiliar issues, couched as a new petition. With regard to the affidavit by Anne Anyanga Omodho, counsel asked that it be struck out, as it introduced *new claims of rigging*, that had not been raised in the Court of Appeal, or in the High Court. He urged the Court to apply the principle in the ***Raila Odinga*** case, and expunge the said paragraph 61 and the corresponding affidavit of Anne Anyanga Omodho.

**[45]** With regard to the appeal, counsel submitted that the appellate Court had been in breach of the 2nd and 3rd respondents' right to a fair hearing, as contemplated in Articles 51 and 25(c) of the Constitution. It was his submission that the Court of Appeal failed to consider the evidence of re-tallying, submitted by the Deputy Registrar in respect of Uriri Constituency, and the Siala Primary School polling station in Rongo Constituency, even though the Returning Officer had given an appropriate explanation.

**[46]** Counsel submitted that the Court of Appeal had taken decisions on the basis of issues which had not been the subject of the proceedings. He urged that the pertinent issue related to Regulations 79, 79(2) (d) and 83(1) (b) of the Election Regulations; however, the appellate Court relied on Regulations 76-87 of Election Regulations, to make a finding that "human error was an unacceptable explanation for any electoral malpractice". Counsel submitted that the regular course for that Court was to take a decision on the basis of the *evidence on record*; and in support, he invoked authority: ***Ng'ang'a & Another v. Owiti & Another*** (No.2)(2008)1 KLR (EP); ***IEBC & Another v. Stephen Mutinda Mule & 3 Others*** Nairobi C.A No.219 of 2013; ***Adetoum Oladeji (NIG) Ltd v. Nigeria Breweries PLC*** S.91/2002; and ***Kenya Ports Authority v. Kunston (Kenya) Ltd*** [2009] EA 212.

**[47]** Counsel also submitted that the Court of Appeal had dismissed the cross-appeal, without giving any reasons. He contended that the dismissal was a demonstration of bias on the part of the Court.

**[48]** Counsel urged that the Court of Appeal had misapplied the general principles of elections, as contemplated in Articles 81 and 86 of the Constitution. He faulted the Judgment of that Court, on the basis that it had misapplied the Constitution, with respect to the issue of accuracy of election results. He submitted that the appellate Court had failed to apply this Court's decision in the ***Raila Odinga*** case. To support his argument, counsel invoked yet other cases: ***Opitz*** case; ***Joho v. Nyange*** [2006] eKLR; ***Mbowe v. Eliufoo*** [1967] E.A; ***Tinamy Issa Abdalla v. Swaleh Salim*** C.A .No. 36 of 2013.

**[49]** Counsel submitted that the appellate Court had misapplied Articles 87(1) and 94(1) of the Constitution, by disregarding Section 83 of Elections Act. In this regard, counsel argued that the Court had wrongly attached to the relevant provisions a requirement of *full compliance*, instead of *substantial compliance*, with electoral law.

**[50]** Learned counsel submitted that the appellate Court had failed to appreciate the fact that Form 35, in the case of the Migori and Lwanda Primary School polling stations, was duly availed, and was the primary document of accounting, rather than Form 36: the effect being that the Migori gubernatorial results were indeed verifiable, and in tandem with the electoral law – so that the few errors witnessed did not vitiate the integrity of the election.

**[51]** Counsel submitted that the appellate Court had misapplied Articles 87(1), 94(1) and 164(3) of the Constitution, by disregarding Section 85A of the Elections Act; and that the Court evaluated the evidence in a manner contrary to the terms of that statutory provision.

**[52]** Counsel submitted that the Court of Appeal had improperly interpreted Article 180(4) of the Constitution, to the effect that a certain margin of victory was required, for one to be declared the winner in a gubernatorial election – though without attempting to define such margin. He urged that the appellate Court had erred, as there was no such margin.

### *(c) 1st Respondent's Submissions*

**[53]** In response to the appellant's objection to the two replying affidavits for the 1st respondent, learned counsel Mr. Mwenesi, for the 1st respondent, submitted that the issue in paragraph 61 of the 1st respondent's affidavit had a notoriety reflected in the public domain, and touched on the matter before the Court. He urged that if substantive justice was to be attained, without undue regard to technicalities, then a party was entitled to bring to the Court's attention, just as the Court was entitled to know, all the happenings that affect the matter before it. He invoked the case of ***Commissioner of Lands v. Coastal Aquaculture Ltd*** *Civil Appeal No. 252 of 1996,* wherein the appellate Court, in concurrence with counsel, itself referred to matters from the newspaper, that had occurred between the final submissions and the date of delivery of Judgment. He urged that the Court had the power to take judicial notice of *general events* within the Republic, that touched on the matter before it.

**[54]** With regard to the replying affidavit of Anne Anyanga Omodho, counsel submitted that she had been the running-mate of the 1st respondent, and, until the litigation process is completed, she will retain that position; and she had, besides, also filed an affidavit in the original election petition – and so there would be no prejudice if the Court allowed her affidavit.

**[55]** Learned counsel drew a parallel with the affidavits in the High Court by one Jared Omach, and one Tobias Onunga, who were not parties to the

petition; he argued that if only parties to the petition were entitled to bring matters to the Court's attention, then the affidavits of the two should also have been rejected.

**[56]** It was his submission that the 1st respondent was asking the Court, on oath, to have a *broad view of relevant events*, and the Court could not, on bare technicality, fail to consider this point. Counsel urged that the issue of the affidavits was a "grey area", and the Court bore the responsibility to develop the law, by addressing such uncertainties. He submitted that the rights of the 1st respondent, and of the electorate of Migori County under Article 38 of the Constitution, were affected; and so this Court, as the ultimate appellate Court, had the authority to consider a question relating to a fundamental right under Article 20(3) of the Constitution, and to interpret it in such a way as to give effect to that right. Counsel urged the Court to reject the objections to the replying affidavits, and proceed to consider the substance of the appeal.

**[57]** Mr. Mwenesi, in contesting the appeal, relied on the replying affidavit of Prof. Edward Oyugi, the 1st respondent, dated 30th April, 2014, together with his written submissions filed on 2nd May, 2014.

**[58]** Learned counsel submitted that the appellate Court had made no error warranting the invocation of *this Court's jurisdiction* under Article 163 (4)(a) of the Constitution, which limits such jurisdiction to appeals on *matters of interpretation and application of the Constitution*. He submitted that the grounds of appeal filed before this Court show that the Supreme Court was equally being asked to delve into *matters of fact* – especially in view of the ground framed by the appellant, that 'the *Court of Appeal erred in law and* ***fact'.***

**[59]** In response to the contention that the appellate Court considered matters of fact, counsel submitted that the learned Judges of Appeal had only

considered the discrepancies apparent on the face of the record and in the proceedings, in relation to the re-tally. He urged that the appellate Court, by considering such matters, could not have violated the provisions of Articles 87(1), and 88(5) of the Constitution as read together with those of Section 85A of the Elections Act. Learned counsel urged that a Court of law cannot draw conclusions on issues presented before it, without taking into account the *factual situation arising from the case;* and it was not possible in the circumstances, for the Court to confine itself to the bare, abstract questions of law.

**[60]** Counsel submitted that elections, by their very nature, involve intricate *processes which are all factual in nature*, and which flow from the terms of Article 38 of the Constitution. He urged that by virtue of Article 249 of the Constitution, which requires Independent Commissions to protect constitutionalism and fundamental rights and freedoms, the appellate Court in seeking to hold the 2nd respondent accountable, was obligated to consider *matters of fact.*

**[61]** Again on the *issue of jurisdiction,* counsel submitted that the 1st respondent herein had presented an appeal anchored on *matters of law*, in accordance with Section 85A of the Elections Act – and thus, the appellate Court was within its jurisdiction, in determining the matter.

**[62]** Learned counsel submitted that the appellate Court had been alive to the pitfall of delving into issues of fact, when it made reference to the *dicta* in the case of ***Peter Gichuki King'ara v. Independent Electoral and Boundaries Commission & 2 Others*** *Civil Appeal No.31 of 2013,* to the effect that a misdirection, or a lack of direction on material points, would qualify as a *matter of law*; and there was, thus, no possibility of that Court exceeding its jurisdiction, when, in fact, the learned Judges had duly considered the extent of their jurisdiction.

**[63]** Counsel then submitted that the contention that the appellate Court lacked jurisdiction, was misplaced, and the Court could not be faulted for setting aside an election that was "riddled with irregularities". He urged that his client's position was by no means weakened by the principle in the persuasive ***Opitz*** case. He specifically drew attention to paragraph 89 of the Judgment in that Canadian Supreme Court case:

> ***"...We turn now to our assessment of the evidence at poll 31. Mr. Wrzesnewskyj must first establish the existence of an 'irregularity' that is, non-compliance with the Act that goes to entitlement. The 16 missing registration certificates at poll 31 give rise to two possibilities, one being that the certificates were never completed the other that the certificates were completed but went missing after the election. If Mr. Wrzesnewskyj could establish that the certificates were never completed, this would amount to an 'irregularity'."***

**[64]** Counsel submitted that *Rule 29 of the Court of Appeal Rules* grants the appellate Court the leeway to reappraise the evidence on record, and draw inferences. He urged that in reappraising the evidence the Court may review, or reassess the evidence that came up before the High Court. Therefore, counsel submitted, the appellant's argument that the Court of Appeal lacked jurisdiction, ought to be dismissed. He urged such a position to be affirmed by the fact that the Court of Appeal was a creation of the Constitution, under Article 164, and it *has jurisdiction to hear appeals from the High Court, as well as any other Court prescribed by an Act of Parliament.*

**[65]** Counsel argued that the Elections Act, having been enacted a year after the Constitution was promulgated, lacked the stature to confine an appeal on

electoral matters to *issues of law* only – contrary to the requirements of the Constitution.

**[66]** Learned counsel urged the Court to adopt the decision in the case of ***Choitram v Nazari*** [1984] KLR 327, in which it was held that it is the business of Courts to read and analyse the pleadings and all materials on record, and to apply the law; and this is what the Court of Appeal had done.

**[67]** Counsel urged that the ***Raila Odinga*** case was distinguishable, for the reason that this Court had cited Section 83 of the Election Act for purposes of defining the concept of burden of proof, but had not considered the salient elements of that Section. To support his argument counsel referred to the case of ***Moses Masika Wetang'ula v. Musikari Nazi Kombo & 2 Others [2014]*** *eKLR,* where the Court of Appeal considered the wording of Section 83 of the Elections Act.

**[68]** Counsel urged the Court to affirm the decision of the Court of Appeal, faulting the Election Court for overlooking the irregularities shown to have marred the electoral process.

**[69]** Learned counsel submitted that the trial Judge too had found that Article 86 (c) of the Constitution had not been complied with; and the 2nd respondent through its County Returning Officer, had admitted to inaccuracies and errors; thus, the Court of Appeal could not overlook these findings by the Election Court, as it was duty-bound to consider how the Election Court had applied Articles 81 and 86 of the Constitution, in relation to Section 83 of the Elections Act.

**[70]** Learned counsel relied on the Court of Appeal decision in ***Khatib Abdalla Mwashetani v. Gideon Mwangangi Wambua & 3 Others*** [2014] eKLR, urging that the principles of the Constitution are given effect by

the written law, the statutes and the subsidiary legislation. He submitted that the Court, in an election matter, has to apply the test in Section 83 of the Elections Act, and where it appears that an election was not conducted in accordance with the principles laid down in the Constitution and the written law, the Court must set it aside.

**[71]** In urging this Court to affirm the appellate Court's decision, counsel noted that Court's finding, that the original petitioner had shown that the vote-tallying was irregularly conducted, and thus, Article 86(c) of the Constitution had in essence been contravened, by the negligent and casual conduct of the officers under the charge of the 2nd respondent.

**[72]** Counsel submitted that the fact that the Returning Officer declared the results in a form dated 8th of April 2013, one month after the conclusion of the exercise, was an election malpractice, and was evidence that the principles on elections as provided for under the Constitution were not complied with. He sought to distinguish the persuasive authority of the ***Opitz*** case, on the basis that it referred to a *statute,* and not *the Constitution*.

**[73]** Counsel submitted that Article 10 of the Constitution was clear in its terms, and binds all Courts to protect the democratic gains achieved thus far, in our country's history. He urged that where there are transgressions of those terms, the electoral process becomes a nullity.

**[74]** With regard to Article 81 of the Constitution, counsel submitted that the relevant constitutional principles are: accuracy, accountability and transparency in elections. He urged that the Election Court had found errors in the electoral process, occasioned by the negligence of officers of the 2nd respondent, but ignored the gravity of such errors; whereas the Court of Appeal tested the allegations against the principles of the Constitution, and found that the errors offended these, and thus, the election results could not stand.

**[75]** Learned counsel submitted that the irregularities and errors exposed, upon re-tallying at the High Court, showed a flawed process which could not produce a just result. He submitted that although the appellate Court had relied on *unpleaded issues* to arrive at its decision, this was not fatal to the matter.

**[76]** Learned counsel urged that the margin of victory attributed to the appellant at the trial Court, after the scrutiny and re-tally, was arrived at in a manner inconsistent with the Elections Act. He submitted that the Deputy Registrar at the High Court had allowed in figures from Kubwaha and Biamiti polling stations, which originally had not been part of the election results declared, and the manner in which data from the two polling stations were generated was "contrary to the law." Counsel urged that the results of the two polling stations had not been reported or collated, with no explanation for the anomaly, and even during cross-examination at the Election Court, the appellant could not tell the number of votes he secured in the two polling stations.

**[77]** Counsel submitted that the Returning Officer had computed the totals of results for the two stations in the absence of the agents, and passed off the figures as legitimate, contrary to the terms of the Elections (General) Regulations, 2012. And counsel faulted the action of the Returning Officer in announcing the final tally for the County gubernatorial election without the results for the two polling stations. He urged that the Election Court should have found such an announcement of results to have been an anomaly, affecting the overall outcome of the elections, and by extension, raising an important question as to the principle of accuracy and verifiability of election results.

**[78]** As regards the terms of Article 163(7) of the Constitution, counsel urged that the appellate Court did not misapply the law, by lowering the standard of

proof required to invalidate an election, and it did not deviate from the standard of proof in election petitions, as determined by this Court in the ***Raila Odinga*** case.

## D. ISSUES FOR DETERMINATION

**[79]** Out of the pleadings, and the written and oral submissions of the parties, the following issues arise for determination:

(i) *whether the Court of Appeal acted in excess of its jurisdiction as conferred by Section 85A of the Elections Act, as read with Article 87(1) of the Constitution, by delving into issues of fact;*

(ii) *whether the appellate Court disregarded the doctrine of* ***stare decisis,*** *by failing to apply a binding decision of the Supreme Court – thereby contravening Article 163(7) of the Constitution;*

(iii) *whether the Migori County gubernatorial elections were conducted in compliance with the principles in Articles 81(e) and 86 of the Constitution, as read together with the provisions of Section 83 of the Elections Act;*

(iv) *whether the Court of Appeal properly applied the doctrine of supremacy of the Constitution, enshrined in Article 2 of the Constitution;*

(v) *whether the appellate Court misapplied Article 180(4) of the Constitution, by considering the margin of error, as a basis for nullifying the election;*

(vi) *whether the Court of Appeal considered unpleaded facts in arriving at its determination, hence denying the appellant his right to a fair hearing, enshrined in Article 50(1) read together with Article 25 of the Constitution.*

## E. ANALYSIS

### *(i) Affidavit, New Evidence: Objections*

**[80]** At the commencement of this hearing, counsel for the appellant and for the 2nd and 3rd respondents asked us to expunge from the record the affidavit of one Anne Anyanga Omodho, as she was not a party to the proceedings. They also sought an order striking out paragraph 61 of the 1st respondent's replying affidavit, since it introduced new results declared by one James Oswago, rather than by the responsible public agency, the 3rd respondent. The gravamen was that such material was introducing altogether-new issues into the current petition.

**[81]** This Court, upon considering the submissions of counsel for all the parties on the application, issued an order expunging from the record the affidavit of Anne Anyanga Omodho, since she was not a party to the proceedings at the trial Court, nor at the Court of Appeal. We take notice that although she was the 1st respondent's running-mate during the election, she was not a party at the trial Court, nor at the Court of Appeal; but throughout the proceedings at the trial Court and the Court of Appeal, her interests were entirely addressed by, and pegged on the pleadings of the 1st respondent.

**[82]** We take judicial notice that a gubernatorial-election candidate and his running-mate vie under one ticket. Therefore, the election of the gubernatorial candidate translates to an automatic election of his running mate. The import of this is that, when the election of the gubernatorial candidate is challenged, that of his running-mate is also in question. Likewise, when a gubernatorial-election candidate who lost in the election succeeds in his petition challenging the governor in office, that translates to success on the part of his running-mate as well.

**[83]** We are persuaded that at this advanced stage in the proceedings, it is not in the interest of justice to allow for new affidavit-evidence to be filed. This Court pronounced itself on a similar issue in the ***Raila Odinga*** case, when we held that:

> ***"The parties have a duty to ensure they comply with their respective time-lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.***
>
> ***The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence."***

In the matter before us, the 1st respondent filed the affidavit of Anne Anyanga Omodho at a time when the rest of the parties could not have had sufficient time to effectively reply to it, before the date of hearing. For this reason we did issue, and now confirm, an order expunging the affidavit from the record.

**[84]** In the same vein, we did issue and now confirm, an order to strike out paragraph 61 of the 1st respondent's replying affidavit, as it sought to introduce new issues that had not been canvassed before. The affidavit sought to introduce the *issue of rigging*, which had been canvassed neither at the High Court, nor at the Court of Appeal. This Court has on previous occasions pronounced itself on the nature of an appeal, and the extent of our appellate jurisdiction. In ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board,*** SC Petition No. 5 of 2012, this Court held that:

> ***"In our opinion, a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a superior Court of first instance is to be resolved at that forum in the first place, before an appeal can be entertained. Where, before such a Court, parties raise a question of interpretation or application of the Constitution that has only a limited bearing on the merits of the main cause, the Court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court".***

We are of the opinion that the issue of rigging was a *new issue*, which the 1st respondent sought to introduce for the first time at the Supreme Court, and therefore, it cannot be entertained.

**[85]** We also note that paragraph 61 of the 1st respondent's replying affidavit was based on results purported to have been declared by one James Oswago. These are not the *official-election results*. The results that this Court will recognize as the officially-declared results are those declared by the public

electoral body, in the prescribed manner, and by the designated officials for the respective areas. Any differing category of election results will be inadmissible as evidence, before this Court.

### *(ii) The Question of Jurisdiction*

**[86]** Counsel for the appellant urged that the Court of Appeal erred by making conclusions of fact, and acted in excess of its jurisdiction under Section 85A as read together with Article 87(1) of the Constitution. In response, counsel for the 1st respondent argued that the Court of Appeal acted within its jurisdiction, since it is empowered by Rule 20 of the *Court of Appeal Rules* to re-appraise the evidence on record and draw inferences from it.

**[87]** Article 87(1) states that *"Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes."* Pursuant to this, Parliament has enacted the Elections Act, which provides in Section 85A, that:

> ***"An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only...."***

**[88]** This Court stated in ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and 2 Others,*** S.C. Civil Application No. 2 of 2011, that:

> ***"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."***

**[89]** This Court has already pronounced itself on the extent of jurisdiction exercisable by the Court of Appeal, as set out in Section 85A of the Elections Act, in ***Peter Gatirau Munya v. IEBC & 2 Others,*** Supreme Court Petition No.2B of 2014. This Court, in that matter, framed the questions that it had to answer in order for it to make a determination on the question of jurisdiction. At paragraph 61 it stated that:

> ***"To be able to determine the issue before us, a number of pertinent questions need to be answered. Specifically:***
>
> ***(i) What is the meaning of the instructive words 'an appeal shall lie to the Court of Appeal on matters of law only?' When is an appeal said to lie on matters of law only, as opposed to 'matters of fact', or 'matters of mixed law and fact'?***
>
> ***(ii) What was the intention of Parliament in enacting Section 85A of the Elections Act, confining election petitions to the Court of Appeal to 'matters of law' only? What is the constitutional basis of Section 85A of the Elections Act?***
>
> ***(iii) Did the Court of Appeal act in excess of jurisdiction by delving into issues of fact, to arrive at its conclusions and ultimate decision?"***

**[90]** In answer to these questions, the Court observed that Article 87(1) of the Constitution empowers Parliament to enact legislation to ensure the timely resolution of electoral disputes. It held, at paragraph 62, that:

> ***"This provision must be viewed against the country's electoral history. Fresh in the memories of the electorate are those times of the past, when election***

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

**[91]** Having signalled that in determining electoral disputes, time is of the essence, the Court observed that Section 85A of the Elections Act ensures that the election appeals preferred in the Court of Appeal are limited to *matters of law*. This ensures that there is efficient, effective and prudent utilization of judicial resources. The Court held that Section 83 *"restricts the number, length and costs of petitions and, by so doing, meets the constitutional command in Article 87, for timely resolution of electoral disputes."*

**[92]** In distinguishing between an "issue of law" and an "issue of fact", this Court took a comparative view of the jurisprudence developed in Courts of law in other parts of the world. The Court considered ***Canadian National Railways Company v.The Bell Telephone Company of Canada and Montreal L.H & P. Cons* (1939) SCR, 308** in which the Supreme Court of Canada held (*per* Duff CJ), that the phrase "question of law," as used in the statute in question, was a technical one which:

***"would include ... questions touching the scope, effect or application of a rule of law which the courts apply in***

***determining the rights of parties; and by long usage, the term 'question of law' has come to be applied to questions which, when arising at a trial by a judge and jury, would fall exclusively to the judge for determination…."***

**[93]** The Court, also considered ***Bracegirdle v. Oxley* (2) [1947] 1 All E.R. 126,** in which the late Lord Denning remarked that in determining whether an issue was on a point of law or of fact:

***"[T]here is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law… The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts…"***

**[94]** As a further clarification on the distinction between a point of law and a point of fact, this Court cited ***Meenakshi Mills, Madurai v. The Commissioner of Income Tax, Madras*** (1957) AIR 49, (1956) SCR 691 in which the Supreme Court of India faulted the decisions of English Courts which indicated "*that it is a question of law what inference is to be drawn from facts;"* in the words of that Court:

***"The fallacy underlying this contention is that it fails to take into account the distinction which exists between a pure question of fact and a mixed question of law and fact, and that the observations relied on have reference to the latter and not to the former..."***

**[95]** This Court deduced from the said Indian case that, questions of law would arise essentially in three instances:

*(a) the construction of a statute or document of title;*
*(b) the legal effect of the facts found where the point for determination is a mixed question of law and fact;*
*(c) a finding of fact unsupported by evidence, or that is unreasonable or perverse in nature.*

**[96]** Further, the South African decision in ***Magmoed v. Janse Van Rensbura and Others*** 1993 (1) SA 777 (A) held that a question of law:

***"...means a question which a Court is bound to answer in accordance with a rule of law.... The general rule is that questions of law in both the aforegoing senses are for the judge, but that questions of fact (that is to say, all other questions) are for the trier of fact."***

**[97]** The decision of the Supreme Court of the Philippines in ***Republic v. Malabanan,*** G.R. No. 169067, October 632 SCRA 338, 345 which had in turn cited with approval the case of ***Leoncio v. De Vera,*** G.R. No. 176842, 546 SCRA 180, 184 is also instructive; the Court observed that:

*"A question of law arises when there is doubt as to what the law is on a certain state of facts, while there is a question of fact when the doubt arises as to the truth or falsity of the alleged facts.* ***For a question to be one of law, the same must not involve an examination of the probative value of the***

***evidence presented by the litigants or any of them. The resolution of the issue must rest solely on what the law provides on the given set of circumstances. Once it is clear that the issue invites a review of the evidence presented, the question posed is one of fact.*** *Thus, the test of whether a question is one of law or of fact is not the appellation given to such question by the party raising the same; rather,* ***it is whether the appellate court can determine the issue raised without reviewing or evaluating the evidence, in which case, it is a question of law; otherwise it is a question of fact"*** [Emphasis added].

**[98]** Another relevant decision of the Supreme Court of the Philippines is ***New Rural Bank of Guimba v. Fermina S Abad and Rafael Susan*****;** G.R No. 161818 (2008) in which the applicable law limited the contents of the petition to "questions of law." In dismissing the petition before it, that Court held that:

***"The Petitioner would have us delve into the veracity of the documentary evidence and truthfulness of the testimonial evidence presented during the trial of the case at bar…We reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole***

***evidence considering mainly the credibility of the witness, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation. This Court cannot adjudicate which party told the truth... by reviewing and revising the evidence adduced at the trial court. Neither verbal sophistry, nor artful misinterpretations of supposed facts can compel this Court to re-examine findings of fact which were made by the trial court.... absent any showing that there are significant issues involving questions of law."***

**[99]** This Court also found the case of ***Director of Investigation and Research v. Southam Inc.,****(1997) 1 S.C.R. 748,* from Canada, to be relevant. In the ***Peter Munya*** case, we observed (paragraph 35) that the subject statute contemplated "*a tripartite classification of questions before the Tribunal into questions of law, questions of fact, and questions of mixed law and fact;"* we held that:

***"Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests."***

**[100]** This Court considered the decision in ***M'Iriungu v. R*** **[1983] KLR 455** in which the Court of Appeal deliberated upon the meaning of the phrase "question of law", as employed to prescribe the limits of the appellate jurisdiction. The Court held, (page 466):

*"In conclusion, we would agree with the views expressed in the English case of* ***Martin v. Glyneed Distributors Ltd*** *that where a right of appeal is confined to questions of law only, an appellate Court has loyalty to* ***accept the findings of fact of the lower courts*** *and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law…unless it is apparent that,* ***on the evidence, no reasonable tribunal could have reached that conclusion,*** *which would be the same as holding the decision is bad in law"* [Emphasis added].

**[101]** In the ***Peter Munya*** case (paragraph 80), this Court, in the light of the comparative jurisprudence, thus observed:

***"[we] would characterize the three elements of the phrase 'matters of law' as follows:***

***(a)*** *the technical element:* ***involving the interpretation of a constitutional or statutory provision;***

***(b)*** *the practical element:* ***involving the application of the Constitution and the law to a set of facts or evidence on record;***

***(c)*** *the evidentiary element:* ***involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."***

**[102]** And in more elaborate terms, this Court held (in the ***Munya*** case, paragraphs 81 and 82) as follows:

***"… with specific reference to Section 85A of the Elections Act, it emerges that the phrase 'matters of law only', means a question or an issue involving:***

***(a) the interpretation, or construction of a provision of the Constitution, an Act of Parliament,***

***Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;***

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

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

*****

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

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

**[103]** We affirm the guiding principles as set out in the case of ***Peter Munya,*** and we shall apply the same guidelines in this appeal, to determine whether the appellate Court exceeded its jurisdiction, by delving into questions of fact, as alleged by learned counsel for the appellant, and by the 2nd and 3rd respondents.

**[104]** Counsel for the appellant contended that the Court of Appeal delved into questions of fact by relying on the report of the Deputy Registrar prepared after the re-tally, to find that *"it was difficult... [outright] [to] determine the victor."* He urged that the appellate Court wrongly nullified the gubernatorial election for Migori County, after making conclusions from disputed facts *raised for the first time* by the Judges themselves, in their Judgement.

**[105]** Counsel for the 3rd and 4th respondents supported the appeal, and expressed similar views to those of counsel for the appellant, on the contention that the Court of Appeal had overstepped its mandate, and delved into questions of fact.

**[106]** The Court of Appeal, upon considering the pleadings and the submissions of counsel, summarised the issues that emerged for determination (page 12) as follows:

(i) *that the learned Judge contravened Rule 17 of the Elections (Parliamentary and County Election) Petition Rules, 2013 on the framing of contested and uncontested issues in the petition;*

(ii) *that the learned Judge erred in her finding regarding the vote-tallying, and in failing to order for full scrutiny after receiving evidence of errors in vote-tallying;*

(iii) *that the learned Judge's interpretation of the relevant law, and her application of the evidence, were erroneous;*

(iv) *that, in the exercise of her judicial authority, the learned Judge exceeded her jurisdiction by treating the Deputy Registrar's report as conclusive on the issue of tallying; and*

(v) *that the learned Judge erred in capping the costs that could be taxed and awarded by the taxing officer at Kshs. 1 million, thus interfering with the judicial discretion of the taxing officer.*

**[107]** This Court's decision in the ***Peter Munya*** case is a reference-point, in determining whether a Court has made a finding on a *point of fact*, or a *point of law*. We had thus held (paragraph 90):

> ***"The critical question is whether the Court of Appeal in making such an inquiry, exceeded its powers to review only matters of law, under Section 85A of the Elections Act. Was the Court cautious enough to limit itself to issues regarding the interpretation and application of the law by the trial Judge, in relation to the petition at the High Court? Did the Judges of Appeal limit themselves to evaluating the conclusions of the trial Judge on the basis of the evidence on record; and to determining whether such conclusions were not supported by the evidence; or to ascertaining that the conclusions were not so perverse that no reasonable tribunal could arrive at the same?"***

**[108]** The Court of Appeal observed that the issues summarised for determination were *issues of law*. The Court restated the findings of the High Court on the evidence adduced before it, and took note of the content of the report of the Deputy Registrar on the re-tally conducted pursuant to the order of the trial Judge. The Court of Appeal, however (pages 45-46 of its Judgement), came to make the observation that the election *"was conducted in a manner that [made it] difficult to determine the winner [outright]...."*

**[109]** The Court of Appeal reinforced the foregoing statement by its observation that the irregularities vitiated the election:

> ***"[D]ue to widespread errors of tallying, transposition and entry of data ... in many instances, votes in Form 35 were different from those in Form 36; votes of candidates were interchanged in some cases, while votes were either understated or overstated. ... figures publicly announced were recorded into separate Form 36 as distinct figures; ... there were differences between the manually tabulated figures and those generated electronically; original votes record in respect of three polling stations (Kosodo, Siala and Marera Primary Schools) were altered by hand in such a way that the original recorded votes could not be ascertained; ... although Nyamaharaga ACK Nursery School had only one stream an additional non-existent stream II was created and votes which the candidates did not deserve awarded to them; ... the examination and re-tallying by the Deputy Registrar revealed irregularities and mistakes in all the eight constituencies in Migori County and some 5,226 votes questioned..."***.

**[110]** In making these observations, as we find, the appellate Court exceeded its mandate, by its conclusions of fact, thus contravening Section 85A of the Elections Act. The Court of Appeal accorded no deference to the High Court's *findings on facts*; and the claims made by the petitioner were on the *accuracy of the tallying of the results*, rather than on *what occurred at the polling station,* with the exception of two polling stations, namely, Kengariso Primary School, and Ombo Primary School. On this matter, the findings of the trial Court are clearly recorded, as follows:

> ***"The pleadings and evidence only pointed out to problems in those 2 stations. Issues arising in other polling stations were only raised in the submission and the Respondents were not therefore in a position to call evidence on those. Many of the issues raised touched on tallying of results, not what transpired at the polling stations. If the Petitioner wanted he could have asked for a scrutiny and recount of all the votes. ...The scrutiny and recount ordered by this Court was never intended to be a fishing expedition and any effort to treat it as such must be resisted."***

**[111]** The Court of Appeal overlooked these vital observations of the trial Court, and *made findings of fact* regarding the Kosodo, Siala and Marera Primary School polling stations, as well as Nyamaharaga ACK Nursery School which *had not been pleaded as an item of dispute*. The Court of Appeal, as we hold, ought not to have overstepped the evidentiary bounds marked out by the trial Court, whether on the basis of pleaded or unpleaded issues. By making findings regarding *irregularities* in those polling stations, which the trial Judge discounted on the ground that the petitioner had not pleaded them – and thus denying the respondents the right of reply – the Court of Appeal made *plain findings of fact*, and in this way misdirected itself. Parties, as is well recognised, are bound by their pleadings. The Court of Appeal also erred,

with much respect, by failing to restrict their observations to the limit of the findings of fact by the High Court; the appellate Court extended the scope of such observations – avowing that the irregularities appeared to have been widespread, and of a greater magnitude than was observed by the High Court.

**[112]** The position is well illustrated in the appellate Court's avowal that *"figures publicly announced were recorded in two separate Form 36 as distinct figures".* This creates the impression that the irregularity in question was rampant, during the entire election process; yet the High Court found that such anomaly only related to Rongo Constituency – one of the eight Constituencies of the County. The Court of Appeal, relying on the report of the Deputy Registrar, deduced a figure of 5,226 votes, which it apprehended came into question after re-tally was conducted. This, with respect, would be a *determination of primary fact by the Court of Appeal,* in contravention of Section 85A of the Elections Act. The Court of Appeal misdirected itself, in basing its decision to annul the election upon its own findings of fact.

**[113]** We find the decision of this Court in ***Peter Munya*** relevant, with regard of the parameters to be maintained when scrutiny and recount is conducted, and a report made on the results, thereafter. This Court cited with approval the decision of *Odunga J.,* in ***Gideon Mwangangi Wambua & Another v. IEBC & 2 Others*****,** (paragraph 26):

> "***The aim of conducting scrutiny and recount is not to enable the Court [to] unearth new evidence on the basis of which the petition could be sustained. Its aim is to assist the court to verify the allegations made by the parties to the petition which allegations themselves must be hinged on pleadings. In other words a party should not expect the Court to make an order for scrutiny simply because he has sought such an order in the petition. The petition ought to set out his case with sufficient clarity and particularity and adduce sufficient evidence in support thereof in order***

***to justify the court to feel that there is a need to verify not only the facts pleaded but the evidence adduced by the petitioner in support of his pleaded facts. Where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on the documents filed pursuant to Rule 21 of the Rules, the Court would be justified in forming the view that the petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition."***

**[114]** Similarly, in the appeal before us we find that the trial Judge properly held that the polling stations that the petitioner had not indicated in his petition to be disputed, could not later become the basis of their final submissions, urging that the election was not free and fair. The Court of Appeal, with respect, erred by making a *different conclusion of fact on the polling stations that had not been disputed by the petitioner at the trial Court,* hence arriving at a wrong determination.

***(iii)*** *Stare decisis,* ***and Precedents set by the Supreme Court***

**[115]** Counsel for the appellant urged this Court to overturn the decision of the Court of Appeal, on the ground that the Court had lowered the standard of proof that must be met, in order for a Court to annul an election. His claim rested on the fact that the appellate Court described the standard applicable as "higher" than the balance of probabilities. Such a depiction, counsel urged, departed from the standard set by this Court in the ***Raila Odinga*** case. Counsel for the 2nd and 3rd respondents similarly faulted the decision of the appellate Court, on the ground that it applied a different standard from the one set out in the ***Raila Odinga*** case.

**[116]** Counsel for the 1st respondent, however, maintained that the Court of Appeal did not deviate from the standard of proof set in the ***Raila Odinga***

case. He urged that the standard applicable in electoral disputes is already set out in Section 83 of the Elections Act, and that the appellate Court had been duly guided by that provision. He submitted that the appellate Court had annulled the elections for non-compliance with the law, which governed election results.

**[117]** This Court, in the ***Raila Odinga*** case, held as follows (paragraph 203), as regards burden of proof:

> ***"...a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question."***

**[118]** This Court further held in the same case, that, where a party alleges non-conformity with the electoral law, it is incumbent upon that party to not only prove that there was non-compliance, but that the *non-compliance affected the validity of the election*. These are the legal principles that counsel for the appellant and 2nd and 3rd respondents urge to have been departed from, by the Court of Appeal in its Judgement.

**[119]** The appellate Court in its Judgment, analysed the relevant issues and held that:

> ***"The cumulative effect of all we have said is that there were many breaches of the Constitution itself, the law and regulation; the breaches seriously affected the validity, legality and credibility of the results ..."***

**[120]** Article 163(7) of the Constitution provides that *all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.* This Court in ***Peter Munya,*** held (paragraph 196) that:

> ***"Article 163 (7) of the Constitution is the embodiment of the time-hallowed common law doctrine of*** *stare decisis.* ***It holds that the precedents set by this Court are binding on all other Courts in the land. The application, utility and purpose of this constitutional imperative are matters already considered in several decisions of this Court:*** *Jasbir Singh Rai v. Tarlochan Singh Rai & Others,* ***and quite recently,*** *in George Mike Wanjohi v. Steven Kariuki & Others Petition* ***No. 2A of 2014.***

**[121]** This Court, while adopting the persuasive precedent in *Housen v. Nikoaisen* **(2002) 2 SCR,** held that:

> ***"It is fundamental to the administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence, the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced ...should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationships between the courts."***

**[122]** We affirm the observations of this Court in ***Peter Munya,*** that the doctrine of *stare decisis* is a critical element of our legal system, providing

certainty and predictability in the law. In a concurring opinion, Mutunga CJ observed (paragraph 228) that:

> ***"Under Article 163(7) of the Constitution, all Courts, other than the Supreme Court, are bound by the decisions of the Supreme Court. Thus, the adopted theory of interpretation of the Constitution will bind all Courts, other than the Supreme Court. It will also undergird various streams and strands of our jurisprudence, that represent the holistic interpretation of the Constitution."***

**[123]** We find, with respect, that the Court of Appeal had misapplied Article 163(7), by failing to take guidance in a binding decision of this Court, and consequently arriving at a wrong determination. While Article 163(7), by no means ousts other constitutional provisions (such as Article 2 on the supremacy of the Constitution), it does not countenance disregard for binding precedent, in the course of application of constitutional provisions. The Constitution should be interpreted holistically, and in a manner that fuses with the rational and progressive common law principles governing the judicial process.

**[124]** As this Court held in the ***Munya*** case, a holistic interpretation of the Constitution entails construing the Constitution in context, reading its provisions in the context of one another, so as to arrive at a rational meaning, having in view the historical and social context, and the crucial issues in dispute. This Court further observed that "*such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.*"

**[125]** Counsel for the appellant and for the 2nd and 3rd respondents asked us to find that the appellate Court erred by holding that the standard of proof

applicable is "higher" than the balance of probabilities, as opposed to using the term "above" the balance of probabilities, which this Court applied in the ***Raila Odinga*** case. In our opinion, the use of the word *'higher,'* nstead of '*above',* does not in itself signal that the appellate Court has disregarded the standard of proof set by this Court. The use of the word "higher," or "above," in this context, does not change the import of the standard of proof applicable in election matters – this being, less than 'beyond reasonable doubt', and more than 'the balance of probabilities'.

**[126]** However, we are of the opinion, with respect, that the appellate Court misdirected itself in failing to follow the binding precedent set by this Court in the ***Raila Odinga*** Case, which enjoins that *a Court is to consider the effect of the alleged irregularities on the election result, before nullifying an election. It is only upon a finding that the irregularities proven affected the declared election results, that a Court will nullify an election.*

### *(iv) Did the Gubernatorial Elections in Migori County comply with the Constitution's Terms (Articles 81 and 86)?*

**[127]** Both counsel for the appellant and for the 2nd and 3rd respondents urged us to find that the gubernatorial election for Migori County was free and fair, and was conducted in compliance with the principles laid down in the Constitution; and that though there indeed were irregularities, the election was in substantial compliance with the constitutional and statutory requirements, and the irregularities did not affect the outcome. Affirming their viewpoint, counsel remarked the fact that the re-tally of votes conducted only confirmed the appellant as a winner, with a higher margin still. Counsel for the 1st respondent, by contrast, urged us to affirm the decision of the appellate Court, and find that the election was marred by irregularities, and thus, failed to comply with the constitutional and statutory requirements. He urged that the declared election results be nullified.

**[128]** Article 81 of the Constitution sets out the general principles to guide the electoral system. It thus provides:

> ***"The electoral system shall comply with the following Principles –***
>
> ***(a) freedom of citizens to exercise their political rights under Article 38;***
>
> ***...***
>
> ***(d) universal suffrage based on the aspiration for fair representation and equality of vote; and***
>
> ***(e) free and fair elections, which are—***
>
> ***(i) by secret ballot;***
>
> ***(ii) free from violence, intimidation, improper influence or corruption;***
>
> ***(iii) conducted by an independent body;***
>
> ***(iv) transparent; and***
>
> ***(v) administered in an impartial, neutral, efficient, accurate and accountable manner.***

**[129]** Article 38(2) of the Constitution provides that:

> ***"Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors...."***

**[130]** Article 87 imposes an obligation on the Independent Electoral and Boundaries Commission to ensure that the stipulated conditions are met, in any election process conducted in the country. The Article thus provides:

> ***"At every election, the Independent Electoral and Boundaries Commission shall ensure that—***
>
> ***(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and***

***transparent;***

***(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;***

***(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and***

***(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials."***

**[131]** It is certainly the case, that the principles set out in the Constitution are to guide the electoral body when conducting an election. It is incumbent upon every State organ, institution, or person exercising a public duty, to maintain fidelity to the Constitution, and to apply the national values and principles of governance, ordained in Article 10 of the Constitution. This is to ensure that there is good, efficient and effective governance in all spheres of public life.

**[132]** The Elections Act provides in Section 83 that:

***"No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in the written law, or that the non-compliance did not affect the result of the election."***

**[133]** We are thus called upon to evaluate the interplays among Articles 81, and 86 of the Constitution, and Section 83 of the Elections Act. This is an issue already addressed in this Court's decision in the ***Peter Munya*** case. In that decision we held as follows:

***"[216] … an election should be conducted substantially in accordance with the principles of the Constitution, as set out in Article 81 (e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.***

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

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

***"[219] By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial Court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election. Examples***

***of irregularities of a magnitude such as to affect the result of an election, are not however, closed."***

**[134]** These excerpts from the ***Munya*** Case signal the manner in which Articles 81(e) and 86 of the Constitution are to be applied in determining whether an election was in compliance with the prescriptions of the Constitution, and in view of the application of Section 83 of the Elections Act.

**[135]** The relevant paragraph [211] in the Judgment in ***Munya*** provides a fuller picture on the issue at hand:

***"In*** *Morgan v. Simpson* ***(1975) 1 Q.B 151, Lord Denning summarized the essence of Section 37 of Britain's Representation of the People Act, 1949 [which is couched in similar language to Section 83 of Kenya's Elections Act] in three propositions:***

***(a) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.***

***(b) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls–provided that it did not affect the results of the election.***

***(c) But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls– and it did affect the result–then the election is vitiated."***

**[136]** This Court found a valuable line of persuasion in the decision in the ***Opitz*** case, in which the Supreme Court of Canada held as follows:

> ***"At issue in this appeal are the principles to be applied when a federal election is to be challenged on the basis of 'irregularities'. We are dealing here with a challenge based on administrative errors. There is no allegation of any fraud, corruption or illegal practices. Nor is there any suggestion of wrong-doing by any candidate or political party. Given the complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the-job experience, and the short time-frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can easily be annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election."***

**[137]** In the ***Peter Munya*** Case (paragraph 213), this Court considered the above test from the Supreme Court of Canada, and held that:

> ***"... the practical realities of election administration are such that imperfections in the electoral process are inevitable; and on this account, elections should not be lightly overturned, especially where neither a candidate nor the voters have engaged in any wrongdoing."***

**[138]** This Court had an earlier opportunity to pronounce itself on the effect of proven irregularities, in an election petition. In the ***Raila Odinga*** case, we held (paragraph 203) as follows:

> ***"Judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise...[Where] a party alleges non-conformity with the electoral law, the petitioner must not only prove that there was non-compliance with the law, but that such failure of compliance did affect the validity of elections."***

**[139]** Although the Court of Appeal cited the decision of this Court in the ***Raila Odinga*** case, it did not apply the principle that a Court should consider the *effect of the irregularity on the contested results*. This principle holds that irregularities in the conduct of an election should not lead to annulment, where *the election substantially complied with the applicable law, and the results of the election are unaffected.*

**[140]** The error in the appellate Court's Judgment, as to the legal effect of irregularities on the validity of an election, emerges clearly from the pronouncement made by the learned Judges:

> ***"... how [could] the learned Judge, having come to a categorical conclusion that the overall results were not accurate; ... and in view of the uncertainties in figures ... make a 360º degree turn to find that the election was free and fair and that those irregularities did not affect the result, when the election turned on such a small margin?"***

With respect, they asked themselves the wrong question. The right question should have been:

***"Did these errors/discrepancies affect the result and/or the integrity of the election? If so, in what particulars?"***

By answering the wrong question, the appellate Court erred, and arrived at a determination inconsistent with the law.

**[141]** It is clear that the trial Court, having evaluated the evidence before it, and the report of the Deputy Registrar on the vote re-tally, was satisfied that the election, though tainted with irregularities, was essentially free and fair; and the re-tally showed that the declared Governor-elect for Migori County had retained his lead – indeed, with an enhanced vote. We find, therefore, that *the irregularities complained of did not affect the outcome of the election*. The appellate Court, by not applying the binding precedent, had contravened Article 163(7) of the Constitution.

### *(v) Supremacy of the Constitution: Has the Appellate Court Complied?*

**[142]** The foregoing principle is spelt out in clear prescriptions of the Constitution, which the appellate Court could not very well sidestep by invoking the broader and more immanent principle of "the supremacy of the Constitution." It was, in our opinion, inapposite for the appellate Court to annul the gubernatorial election through such a recourse to general principle, while clawing back on specific terms of the Constitution and the law.

### *(vi) The Constitution, Article 180(4): Meaning of "Winning Vote" in an Election*

**[143]** The appellant asked us to interpret Article 180(4) of the Constitution, and consider the relevance of the *vote-margin* in ascertaining the outcome in

a contested election, such as that of Governor of Migori County. Article 180(4) of the Constitution thus provides:

> ***"If two or more candidates are nominated, an election shall be held in the county and the candidate who receives the greatest number of votes shall be declared elected."***

**[144]** This very question had featured prominently in our decision in the ***Peter Munya*** case; and we held as follows (paragraphs 201-203):

> ***"[201] It is clear that the Constitution requires that for one to be declared a winner in a gubernatorial election, he or she needs to garner a majority of the votes. This is the logical meaning to be attributed to the words 'greatest number of votes'. It matters not how wide or small the margin of victory is. Indeed, this is the requirement in all the elections other than a Presidential election, where specific percentages are prescribed by the Constitution.***
>
> ***"[202] The issue of margins in an election other than a Presidential election, can bear only transient relevance and only where it is alleged that there were counting, and tallying errors or other irregularities that affected the final result. A narrow margin between the declared winner and the runner-up beckons as a red flag where the results are contested on allegations of counting and tallying errors at specified polling stations. Where a re-count, re-tally or scrutiny does not change the final result as to the gaining of votes by candidates, the percentage or margin of victory however narrow, is immaterial as a factor in the proper election-outcome.***

***To nullify an election in such a context would fly in the face of Article 180 (4) of the Constitution.***

***"[203] In the circumstances, the mere description of a percentage or margin as "small" or "wide" is of no legal import, unless it is inextricably linked to a definite uncertainty, an unresolved doubt, as to who won an election."***

**[145]** This Court further held, as a principle of electoral law, that "an election is not to be annulled except on cogent and ascertained factual premises". It is by this principle, that the Constitution protects the voter's enfranchisement under Article 38(1).

**[146]** The Constitution requires that a candidate in a gubernatorial election who gets the *majority vote* is declared the winner. It is immaterial that the margin of the votes, as between candidates, is narrow. Indeed, even a margin of one vote will entitle the candidate who has the majority to be declared as the elected Governor.

**[147]** Consequently, and with respect, the Court of Appeal misdirected itself by paying regard to the margin of votes between the winning candidate and the runner-up. The appellate Court, in stating that the trial Court ought to have annulled the election, made inapposite observations, to the effect that the irregularities that occurred vitiated the election, in view of the margin of votes as between the two leading candidates.

### *(vii) Unpleaded Facts: Their Place on Appeal, and the Right to Fair Hearing*

**[148]** Learned counsel for the appellant submitted that the Court of Appeal had made its determination on the basis of issues that were not pleaded at the

trial Court, and that this gave the groundwork for an injustice, as the appellant had no opportunity to proffer a reply. But counsel for 1st respondent urged that such a situation had occasioned no prejudice, as the said unpleaded matters were already lodged within the Deputy Registrar's report which was part of the documentation in Court.

**[149]** The phrase "unpleaded issues" was used by learned counsel for the appellant and the 2nd and 3rd respondents to mean issues that the 1st respondent had not included in his pleadings. Counsel's concerns were that the 1st respondent, during his final submissions at the trial Court, had introduced novel questions, that had not been signalled in his pleadings as disputed matters. The trial Court in its Judgment disallowed the introduction of such new issues for the first time during the final submissions, on the ground the rest of the parties would not have an opportunity to respond to them.

**[150]** The appellate Court in its Judgment relied on the Deputy Registrar's report, and made observations on matters that had not been indicated as "disputed," in the trial Court. A reading of the record shows that the Deputy Registrar, after re-tally, found that the winning margin of the returned candidate, had increased. Such is a factor which the Court of Appeal ought to have taken into account, rather than just highlighting the irregularities, oblivious to their lack of effect upon the declared results – which lack of effect the Deputy Registrar's report had illuminated. Besides, the trial Judge is not to be faulted for upholding the appellant's right to fair trial, by disallowing surprise "new pleadings" by 1st respondent at the stage of final submissions.

**[151]** In our opinion, the trial Judge rightly refused to consider any issues that had not been canvassed fairly, such as the introduction of new matters which had not been disputed by the petitioner. The appellate Court, we would hold, made an error by overruling the finding of the trial Court, and making

findings on previously-undisputed matters. It is worthy of note that *the trial Judge, after deciding as he did, considered the effect of the irregularities on the election results, and found that these irregularities did not affect the declared result, the declared winner was still in the lead, and the candidate falling in the second position (1st respondent herein) retained that position*. In these circumstances, there was no basis for the appellate Court overturning the trial Judge's decision to disallow the 1st respondent introducing fresh matters which had not been the subject of dispute in the pleadings.

**[152]** The Court of Appeal, as already noted, grounded its decision on the record of the Deputy Registrar, and the trial Judge's dispatch of the issue on previously-undisputed matters. The trial Judge's position, especially as regards the Deputy Registrar's report, and the question of vote re-tally, was in our opinion, clearly meritorious. The process of scrutiny, recount or re-tally is not to be used as a fishing expedition, enabling a petitioner to secure evidence in support of impromptu claims. This Court, in the ***Peter Munya*** Case, cited with approval the decision of *Odunga J.* in ***Gideon Mwangangi Wambua & Another v. IEBC & 2 Others***, Mombasa Election Petition No. 4 of 2013 (consolidated with Election Petition Cause No. 9 of 2013), bearing the following passage (paragraph 26):

> "*The aim of conducting scrutiny and recount is not to enable the Court [to] unearth new evidence on the basis of which the petition could be sustained. Its aim is to assist the Court to verify the allegations made by the parties to the petition, which allegations themselves must be hinged on pleadings. … Where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on the documents filed pursuant to Rule 21 of the Rules,* ***the Court would be justified in forming the view that the petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition."***

**[153]** We hold it to be improper that, when re-tally is conducted, a party should take this as an opportunity to introduce *new spheres of disputes*, which had not been signalled in his or her original pleadings. It is vital, in election disputes, that the respondent should know the case that faces him or her. Hence the petitioner ought to have indicated in his or her pleadings the disputed matters, with clarity and specificity, as a basis for being allowed to urge that there were irregularities in those spheres, after re-tally has been conducted. However, where a trial Court exercises its discretion and, *suo motu*, orders a scrutiny, recount or re-tally, revealing irregularities other than those that were pleaded, then there is a proper basis for any party to pose questions upon such *new* findings; and the Court then will *make findings on the effect of those irregularities on the declared results*.

## F. ORDERS

**[154]** Learned counsel have laid their clients' cases before this Court in detail, with the relevant facts and submissions. Within that framework, we have benefited from case-precedent, both local and comparative. Upon such a foundation, we have made findings and determinations, which culminate in the following Orders:

***(a) The Judgment of the Court of Appeal sitting at Kisumu, dated 28th March, 2014 annulling the election of Zackaria Okoth Obado as Governor of Migori County, is hereby set aside.***

***(b) The Petition of Appeal dated 3rd April, 2014, is allowed.***

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

***(d) The 1st Respondent shall bear the Appellant's costs of the suit at the High Court, the Court of Appeal and before this Court.***

***(e) The 2nd and 3rd respondents shall bear their own costs at the High Court, the Court of Appeal and the Supreme Court.***

***Orders accordingly.***

**DATED** and **DELIVERED** at **NAIROBI** this **17th** day of **July, 2014.**

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

.....

**N.S. NDUNGU**
**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR**
**SUPREME COURT OF KENYA**