

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Rawal, DCJ & V.P; Tunoi; Ojwang; Wanjala and Njoki, SCJJ)

PETITION NO. 19 OF 2014

WAVINYA NDETI..... PETITIONER

-VERSUS-

**1. INDEPENDENT ELECTORAL &
BOUNDARIES COMMISSION (IEBC).....**

**2. ISSAC HASSAN (RETURNING OFFICER
OF THE NATIONAL TALLYING CENTER).....**

**3. THE MACHAKOS COUNTY RETURNING
OFFICER.....**

4. ALFRED MUTUA NGANGA.....

5. BERNARD MUIA TOM KIALA.....

RESPONDENTS

*(Being an Appeal from the Judgment, Decree and/or Order of the Court of
Appeal at Nairobi, in Civil Appeal No. 323 of 2013 (Githinji, Nambuye, & M'noti
JJ.A) dated the 9th day of April 2014)*

RULING

A. INTRODUCTION

[1] The substantive matter before the Court is an appeal against the Judgment of the Court of Appeal sitting in Nairobi, delivered on 9th April, 2014 in ***Civil Appeal No. 323 of 2013***, which struck out both the appeal (with costs to the respondents) and the cross-appeal (with costs to the appellant), on the ground that the appeal filed was incompetent, as it was filed outside the stipulated 30-day period.

[2] The appellant seeks the following reliefs before this Court:

- (i) *the entire Judgment and decree of the Court of Appeal be reversed and vacated, and in lieu thereof a hearing be ordered, of the appeal before a different Bench of that Court;*
- (ii) *costs of the appeal in the Court of Appeal and in the High Court be awarded to the appellant herein;*
- (iii) *such other, or any appropriate relief as this Court shall deem expedient to grant.*

B. BACKGROUND

(a) Proceedings in the High Court

[3] The appellant, Wavinya Ndeti, contested the elective seat of Governor of Machakos County, in the general elections held on 4th March, 2013. Upon the

results being announced, the 4th respondent, Alfred Mutua Nganga, was declared the duly-elected Governor, having received 257,607 votes. The appellant came in second with 92,644 votes.

[4] On 26th March, 2013, the appellant filed a petition, at the High Court in Machakos, seeking the nullification of the elections of the 4th respondent, due to various allegations of malpractice. On 27th September, 2013, *Majanja J.* dismissed the Petition with costs, and declared the 4th respondent validly elected as the Governor of Machakos County. The learned Judge capped costs, as against the 1st 2nd and 3rd respondents, at Kshs. 2,000,000.00, and as against the 4th and 5th respondents at Kshs. 2,500,000.00.

(b) Proceedings in the Court of Appeal

[5] The appellant being dissatisfied with the High Court Judgment appealed to the Court of Appeal in Nairobi, in ***Wavinya Ndeti v. IEBC & 4 Others***, Civil Appeal No. 323 of 2013 on 22nd November, 2013. Subsequently the 4th and 5th respondents filed a notice of cross-appeal against the capping of costs at Kshs. 2,500,000.00.

[6] On 14th January, 2014, the 4th and 5th respondents filed a preliminary objection seeking an Order that the appeal be struck out on grounds that: (i) it had been filed out of time, contrary to the terms of Section 85A (a) of the Elections Act; and (ii) the memorandum of appeal raised matters of fact, in contravention of Section 85A of the Act.

[7] Upon hearing the preliminary objection, the Appellate Court on 9th April, 2014 struck out the appeal together with the cross-appeal on the ground that it

did not have the discretion to entertain an appeal filed out of time, because of the mandatory provisions of Section 85A of the Elections Act.

(c) Proceedings in the Supreme Court

[8] Dissatisfied with the Court of Appeal Judgment, the appellant, on 16th May, 2014 filed Petition No. 19 of 2014 at the Supreme Court, pursuant to Article 163 (4)(a) of the Constitution and Section 3 of the Supreme Court Act, 2011. The appeal raises the following issues:

- (i) the Court of Appeal deprived the appellant of her right to access justice under Article 48 of the Constitution, when it struck out her Record of Appeal;*
- (ii) the Court of Appeal erred and exceeded its jurisdiction in declaring ultra vires Rule 35 of the Parliamentary, County Elections (Practice & Procedure Rules), Legal Notice 54 of 2013;*
- (iii) the Court of Appeal violated the true application of Article 159(1) and (2), thereby sacrificing justice at the altar of technicality;*
- (iv) the Court of Appeal erred when it held that Article 87(2) of the Constitution had placed a time-limit on the filing of election appeals;*
- (v) the appellant's right to a just and fair trial, pursuant to Articles 25(c) and 50(1), was violated;*

(vi) *the appellant's right to be treated fairly and equally before the Court under Article 10(2), and 27(1)(4) and 5 of the Constitution, was violated.*

[9] In response to this petition the 1st 2nd and 3rd respondents as well as the 4th and 5th respondents filed notices of preliminary objection that are virtually identical in the following particulars:

- (a) *the appellant did not seek leave from the Supreme Court in accordance with Section 15(1) of the Supreme Court Act, as a basis for lodging the appeal;*
- (b) *the appellant's appeal is not one that can be filed as of right, in view of the fact that the gist of the preliminary objection raised by the 4th and 5th respondents (dated 14 January, 2014) was not a constitutional issue; the gist was the law on election, specifically Section 85A of the Elections Act, the Election Rules, and the Court of Appeal Rules;*
- (c) *the reasoning and conclusion of the Court of Appeal in the Judgment dated 9th April 2014 did not in any way involve interpretation or application of the Constitution; it was concerned, rather, with the interpretation of Section 85A of the Elections Act, the Election Rules, the Court of Appeal Rules, and the jurisdiction of the Court of Appeal to extend time in matters of election appeal.*

[10] On 17th November, 2014 the *preliminary objections* were canvassed before this Court. The appellants were represented by learned counsel, Mr. Gitonga, while learned counsel, Mr. Muhoro appeared for the 1st, 2nd and 3rd respondent;

and learned counsel, Mr. Mutula Junior, appeared for the 4th and 5th respondents.

C. THE PARTIES' SUBMISSIONS

(i) 4th and 5th Respondents

[11] Learned counsel for the 4th and 5th respondents canvassed his preliminary objection dated 13th August, 2014. He submitted that the appeal does not lie within the ambit of Article 163(4) (a) of the Constitution, nor of Section 15 of the Supreme Court Act which provides:

“(1) Appeals to the Supreme Court shall be heard only with the leave of the Court.

(2) Subsection (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution” [emphasis supplied].

[12] Counsel urged that the appeal is not exempt from the requirement of certification, as it does not fall within the parameters enunciated in **Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others**, Supreme Court Application No.16 of 2014; [2014] eKLR, that: *there is no certification for appeals concerning the interpretation and application of the Constitution*. Counsel urged that there were no constitutional issues involved in the appeal as filed.

[13] Counsel also relied upon the authority of **Peter Gatirau Munya v. Dickson Mwenda Kithinji & 2 Others**, Supreme Court Application No. 5 of 2014; [2014] eKLR, which states:

“a matter involves interpretation and application of the Constitution if, and only if, (1) a constitutional provision can be identified to have formed the gist of the cause at the Court of Appeal; (2) the Court of Appeal’s reasoning and conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.”

[14] It was counsel’s submission that the gist of the Appellate Court’s Ruling was founded on the time within which a Notice of Appeal ought to be filed, and not on issues involving constitutional interpretation. He urged that the correct procedure for lodging this appeal was stipulated under Article 163(4) (b) of the Constitution: the appellant has to seek certification.

[15] To buttress this argument, counsel cited several past decisions: ***Sum Model Industries Ltd. v. Industrial & Commercial Development Corporation***, Supreme Court Civil Application No.1 of 2011; [2011]eKLR; ***Samuel Macharia & Another v. Kenya Commercial Bank Limited & 2 Others***, Supreme Court Civil Application No. 2 of 2011; [2012]eKLR; ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others***, Supreme Court Petition No.2 of 2012;[2012]eKLR; ***Owners of the Motor Vessel Lillian S. v. Caltex Oil Kenya Ltd.*** [1989]KLR 1;and ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd.***, Supreme Court Petition No.3 of 2012;[2012]eKLR. On the basis of this line of decisions, counsel urged this Court to strike out the appeal.

[16] It was learned counsel’s further submission that despite the High Court availing to the parties the text of proceedings on time, the appellant had filed her appeal 67 days after the Judgment, rather than within 30 days as required by

Section 85A of the Elections Act. Counsel referred to the certificate of delay issued, to confirm that the proceedings and Judgment were made available 7 days after the Ruling by the High Court. He submitted that there was no reason for the appellant not to have filed an appeal within the provisions of Section 85A of the Elections Act; and in this regard, counsel distinguished the circumstances of this case with those in an earlier decision of this Court, ***Evans Odhiambo Kidero & 4 Others v. Ferdinand Waititu & 4 Others*** [2014] eKLR. In that case, this Court reversed the Court of Appeal decision on grounds of belated filing, notwithstanding that the High Court had delayed in availing its proceedings. Counsel urged that the same principle should apply *a fortiori* in this case, as the fault of delay fell squarely on the appellant, rather than a third party.

[17] Counsel submitted that time in election matters, is of the essence, on the principle that the constitutionally-prescribed governance objects are not to be defeated. He urged that this principle is clear from past decisions of this Court: ***Raila Odinga v. Independent Elections and Boundaries Commission & Others***, Supreme Court Petition No. 5 of 2013; ***Mary Wambui Munene v. Peter Gichuki Kingara & 2 Others***, Supreme Court Petition No.7 of 2014;[2014]eKLR; ***Evans Odhiambo Kidero & 4 Others v. Ferdinand Waititu & 4 Others*** [2014] eKLR. The same stand, it was urged, had been taken by foreign Courts: ***Costellow v. Somerset*** CC [1993] 1 WLR 256 (at 959C); ***Silverbrand v. County of Los Angeles*** [2009]46 cal.4th 106,113; ***Senator John Akpanudoedehe and 2 Others v. Godwill Obot Okpabio and 3 Others*** [SC.154/2012].

[18] In this context, learned counsel submitted that the central issue at the Court of Appeal was the interpretation of Section 85A of the Elections Act; and

the interpretation or application of the Constitution was by no means the primary question.

[19] Counsel concluded by urging the Court to allow the preliminary objection, and to mulct the appellant in costs.

(ii) 1st 2nd and 3rd Respondents

[20] Learned counsel for the 1st 2nd and 3rd respondents, Mr. Muhoro, concurred with the 4th and 5th respondents' submissions. He urged that the Judgment of the Court of Appeal had centered on the question of timelines as set out in Section 85 A of the Elections Act, and that the appellant ought to have complied with the requirements of Article 163(4) (b), by seeking certification from the Court of Appeal.

[21] Counsel submitted that the Appellate Court's decision leading to this appeal, emanated from an exercise of its discretion on the question whether the appeal filed before it was within time, and was not the determination of the substantive appeal from the High Court.

(iii) Appellant

[22] Learned counsel for the appellant, Mr. Gitonga, submitted that the preliminary objection was a misrepresentation of the facts leading to the Judgment and Order of the Court of Appeal. He urged that the Appellate Court's decision involved the interpretation and application of the Constitution, as contemplated by Article 163(4) (a), and Section 15(2) of the Supreme Court Act.

[23] Counsel cited, in this regard, part of the Appellate Court’s Judgment (page 18):

“Lastly, the question whether a strict interpretation of Section 85A violates the appellant’s constitutional right under Article 48 to access justice and fair hearing under Article 50(1) has to be considered, having regard to the entire Constitution and [the] Elections Act. Section 85A (a) can only be void if it is inconsistent with the Constitution.”

[24] Counsel also cited another passage (page 11) in the Appellate Court’s Judgment:

“It is apparent that the appellant is invoking the provisions of the Constitution, the Elections Act, the Court of Appeal Rules and the Election Rules for the submission that the 30 days’ time limitation in Section 85A (a) of the Act, does not apply at all as it is unconstitutional or that it does not apply in the circumstances of this case.”

[25] Learned counsel urged that despite the gist of the preliminary objection raised by the 4th and 5th respondents at the Court of Appeal not being of a constitutional nature, the essence of the appellant’s case was largely constitutional and, on this account, requiring the Court of Appeal to interpret or apply the Constitution.

[26] Counsel invoked the ***Peter Munya Case***, and urged that the Court of Appeal’s reasoning and determination had revolved around constitutional interpretation. He prayed for dismissal of the objection, with costs.

D. ISSUES FOR DETERMINATION

[27] From the foregoing account, a single issue emerges for determination by this Court, namely:

whether the appeal raises any issue involving the interpretation or application of the Constitution, as contemplated under Article 163(4)(a) of the Constitution.

E. ANALYSIS

[28] It was the respondents' position that the appeal raises no constitutional questions to qualify as an "appeal as of right". Counsel for the appellant however, submitted that the appeal raises issues involving interpretation and application of the Constitution, and that it is premised upon Article 163(4) (a) of the Constitution.

[29] Counsel for the respondents submitted that the gist of the Appellate Court's Ruling turned on the time within which an appeal ought to be filed, as the appellant filed her appeal to that Court 67 days after the trial Court's Judgment, and not within 30 days as required by Section 85A(a) of the Elections Act. He submitted that such, was not an issue involving constitutional interpretation. He urged that the correct procedure for lodging this appeal was as stipulated under Article 163(4) (b) of the Constitution, and consequently, the appellant ought to have sought certification of her cause as one "of general public importance".

[30] In response, the appellant invoked passages in the Appellate Court's Judgment which, in her view, were a clear signal that the instant appeal falls within the ambit of Article 163(4)(a) of the Constitution, and consequently, no

certification of “general public importance” was required. The following passage in the said Judgment (page 18) was cited:

“Lastly, the question whether a strict interpretation of Section 85A, violates the appellant’s constitutional rights under Article 48 to access justice and fair hearing, and under Article 51 has to be considered having regard to the entire Constitution and the Election’s Act, Section 85A can only be void if it is inconsistent with the Constitution.”

[31] Yet another passage in the said Judgment (page 10) was cited:

“On the other hand, Mr. Kinyanjui raised several constitutional and procedural issues and submitted at the outset that the preliminary issue raised a constitutional question falling for determination of the court to which whether a strict construction of Section 85A of the Elections Act 2011 violates an appellant’s rights of access to justice under Article 48 of the Constitution to have an election dispute heard and determined fairly by an appellate Court under Article 25(c) of the Constitution. And is envisaged under Article 51 within the scope of Article 259 (1) of the Constitution, whether Section 85A is to that extent unconstitutional.”

[32] Another passage still, of the said Judgment (page 11) was invoked:

“It is apparent that the appellant is invoking the provisions of the Constitution. The Elections Act, the Appellate Jurisdiction Act, the Court of Appeal Rules and the Election Rules, for the

submission that the 30 days’ time limitation in section 85A of the Act does not apply at all. It is unconstitutional or that it does not apply in the circumstances of this case.”

[33] Does the petition before this Court fall within the ambit of Article 163(4)(a) of the Constitution? Relevant principles of interpretation are found in this Court’s decision in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** S.C. Petition No. 2B of 2014; [2014] eKLR (***Munya 2***) (at paragraph 244):

“In summary, the guiding principles that we have articulated under Article 163(4)(a) are:

- (i) a Court’s jurisdiction is regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent;***
- (ii) the chain of Courts in the constitutional set-up have the professional competence to adjudicate upon disputes; and only cardinal issues of law or jurisprudential moment deserve the further input of the Supreme Court;***
- (iii) the lower Court’s determination of an issue appealed against must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;***

(iv) an appeal within the ambit of Article 163(4)(a) is one founded on cogent issues of constitutional controversy...”

[34] These principles were further restated in ***Evans Odhiambo Kidero & 5 Others v. Ferdinand Ndungu Waititu and Others***, Sup. Ct. Petition No. 18 of 2014 (Consolidated with Petition No. 20 of 2014). The Court not only adverted to the guiding principles in the foregoing paragraph, but specifically stated that:

“(i) with regard to election matters, not every petition-decision by the Court of Appeal is appealable to the Supreme Court; only those appeals arising from the decision of the Court of Appeal in which questions of constitutional interpretation or application were at play, lie to the Supreme Court.”

[35] Now in the matter before us, it is clear that the issue that came up for determination at the Appellate Court was, whether the appeal was incompetent, having been filed *outside the 30 days stipulated by Section 85A(a) of the Elections Act*. Section 85A(a) of the Elections Act provides 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 and shall be—

a) filed within thirty days of the decision of the High Court; and

b) heard and determined within six months of the filing of the appeal.”

[36] At the Court of Appeal, counsel for the 4th and 5th respondents submitted that the appeal was filed 67 days from the date of the Judgment; that there was no provision in the Elections Act which allows for the extension of time for filing an appeal; that election petitions and appeals are exclusively governed by the Elections Act and Rules made thereunder; and that the Section is worded in mandatory terms.

[37] In response to the respondents’ case in the Court of Appeal, Mr. Kinyanjui, learned counsel for the appellant, raised certain constitutional and procedural issues: that the Court must construe Section 85A as against the right of access to just and fair trial; that rights to fair hearing, and of access to justice cannot be limited or abrogated by legislation; that, as the Constitution itself does not prescribe the time-limit for lodging an election-dispute appeal, Article 259(8) of the Constitution would apply, and the appeal may be filed without unreasonable delay; that section 85A of the Act is in conflict with Rules 35 and 82 of the Election Rules; that the administrative mechanisms necessary to avail Court proceedings to the appellant were outside her control, and it was not possible to lodge the appeal within 30 days of the delivery of Judgment, and so the time should be computed pursuant to Rule 82, as from 24th September, 2013—the date certified by the Registrar in the certificate of delay; and lastly, that the Court has discretion to admit an appeal filed outside the 30 days’ limitation-period, and each case should be treated on its own merits.

[38] As a basis for determining the preliminary objection, we have to consider not (as urged by counsel in the Appellate Court) whether the issue of timelines involves constitutional interpretation or application, but *whether at this moment in the electoral jurisprudence, it remains a matter of cogent constitutional controversy, as to require further input by this Court.* It is to be recalled that this Court has already pronounced itself on this question in a number of recent decisions. Indeed, the relevant issues of constitutionality or otherwise of Section 85(A) of the Elections Act, have already been considered by this Court.

[39] In the ***Mary Wambui case***, this Court (at paragraph 87) remarked as follows, as regards the relevance of the time-factor in the electoral process:

“...Time, as a principle, is comprehensively addressed through the attribute of accuracy, and emphasised by Article 87(1) of the Constitution, as well as other provisions of the law. Time, in principle and applicability, is a vital element in the electoral process set by the Constitution.”

[40] In the case of ***Lisamula***, Rawal DCJ in a concurring opinion (paragraph 129) observed that:

“The jurisdiction of the High Court to resolve electoral disputes is to be found in Article 105, read together with Article 87(2) of the Constitution. These two Articles give certain time prerequisites, linked to the High Court’s status as an “Election Court”. In addition, Section 85A of the Elections Act grants the Court of Appeal jurisdiction to hear and determine election appeals, but on the basis of issues of law only. This provision

also gives certain time-signals to the Court of Appeal, as a Court sitting on ‘election appeals’.

[41] In the ***Aramat case*** (paragraph 76), this Court observed that:

“The Court, as a device of sanctification of the people’s electoral determination, is not an unregulated forum, where so critical a dispute can linger for indeterminate periods of time. Thus, the Supreme Court, in asserting the authority of the Constitution, underlines the element of the immanent time-constraint, in the resolution of electoral disputes, throughout the judicial system. The ultimate principle is: while citizens are at liberty to contest electoral outcomes, they will proceed within prescribed timelines, and in this way help to sustain the due functioning of other constitutional processes.”

[42] Similarly in the ***Evans Kidero case***, the Court emphasized the importance of time in election disputes, by holding (paragraph 215) that:

“The aspect of time, when filing an election petition, is couched in mandatory language as the same goes to the jurisdiction of the Court to entertain a claim. The same is also based on a constitutional timeline under Articles 87 and 105...”

[43] The Court of Appeal had itself noted that Section 85(A)(a) of the Elections Act having been sanctioned by the Constitution, could not be inconsistent with

the right of access to justice and fair hearing. That Court's Judgment focused on the interpretation of Section 85A of the Elections Act, the Election Rules, and the Court of Appeal Rules; and on clarifying the jurisdiction of the Court of Appeal to extend time in matters of election petition appeals. The Appellate Court's holding in this regard has been reaffirmed repeatedly in our decisions cited above.

[44] In view of the foregoing, it is clear to us that there is no recurrent issue of cogent constitutional controversy in this petition, such as would support a further appeal to this Court, on the basis of Article 163(4) (a) of the Constitution. We are guided in this regard, by the precept of conscientious deployment of precious and scarce public resources, in this instance, judicial time.

E. ORDERS

[45] The foregoing consideration and analysis of the parties' respective positions leads us to the following Orders:

- (i) The Preliminary Objection dated 13th November, 2014 is hereby allowed, with the consequence that the appellant's appeal is terminated.***
- (ii) The costs of the proceedings in this Court shall be borne by the appellant herein.***

DATED and DELIVERED at NAIROBI this 11th Day of March, 2015.

.....
K. H. RAWAL
DEPUTY CHIEF JUSTICE &
VICE-PRESIDENT
OF THE SUPREME COURT

.....
P. K. TUNOI
JUSTICE OF THE SUPREME COURT

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

.....
S. C. WANJALA
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