



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 207 OF 2016**

**BETWEEN**

**MAINA KIAI.....1<sup>ST</sup> PETITIONER**

**KHELEF KHALIFA.....2<sup>ND</sup> PETITIONER**

**TIROP KITUR.....3<sup>RD</sup> PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**KATIBA INSTITUTE.....*AMICUS CURIAE***

**JUDGMENT**

**Introduction**

1. Kenya is a democratic state with a transformative Constitution that was promulgated in 2010. The Preamble to the Constitution recognizes the aspirations of all Kenyans for a government based on the essential values of human rights, equity, freedom, democracy, social justice and the rule of law; and the exercise by the people of Kenya of their sovereign and inalienable right to determine the form of governance of their country, having participated fully in the making of the Constitution. **Article 1(1)** provides that:

**“All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.”**

It is declared in **Article 1(2)** that the people may exercise their sovereign power either directly or through their democratically elected representatives. Fundamentally, **Article 2(1)** pronounces the supremacy of the Constitution and provides that it shall bind all persons and all State organs at both levels of government. To protect this supremacy, it is provided in **Article 2(4)** that:-

**“Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”**

Lastly, **Article 3(1)** obligates every person to respect, uphold and defend the Constitution.

2. The petitioners Maina Kiai, Khelef Khalifa and Tirop Kitur filed this petition on 23<sup>rd</sup> May 2016 seeking the following orders:-

i. **“A declaratory order that Sections 39(2) and (3) of the Elections Act 2011 are contrary to the provisions of Articles 86 and 138(2) of the Constitution and are therefore null and void;**

ii. **A declaratory order that Regulations 83(2), 84(1) and 87(2)(c) of the Elections (General) Regulations 2012 are unconstitutional and contrary to Articles 86 and 138(2) of the Constitution and are therefore null and void;**

iii. **A declaration that respective constituency returning officers are the persons responsible for the conduct and announcement of constituency presidential elections results;**

iv. **A declaration that constituency presidential elections as declared by the respective constituency returning officers are final results for the purposes of that election;**

v. **A declaration that constituency returning officers possess a fundamental and an inalienable mandate to declare the final results for a presidential election at constituency level and that such declaration is final and not subject to alteration, confirmation or adulteration by any person or authority, other than an election court, pursuant to Articles 86 and 138(2) of the Constitution of Kenya;**

vi. **Costs of this petition;**

vii. **Any further relief that the Honorable Court may deem just and fit to grant.”**

3. The petitioners stated in their petition that they brought this matter in public interest seeking to protect the integrity of the electoral process in securing and protecting the sanctity of votes cast in general elections. They brought the petition to seek declaratory orders:-

**“to the effect that constituency returning officers for each respective constituency are the final determinant of the elections results and once the results have been declared by the constituency returning officers, such results are final and cannot be tampered with or subjected to any further confirmation as purported to be encouraged by the Regulations.”**

The petition was brought under **Article 165(3)(d)** of the Constitution which confers on the High Court the

–

**“jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –**

- i. the question whether any law is inconsistent with or in contravention of this Constitution;
- ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
- iii. any matter relating to constitutional powers of any State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- iv. a question relating to conflict of laws under Article 191.”

The jurisdiction to bring a suit as a matter of public interest is conferred under **Article 258(2)(c)** of the Constitution.

4. The petition was brought against the 1<sup>st</sup> respondent (the Independent Electoral and Boundaries Commission (IEBC)) and the 2<sup>nd</sup> respondent the Attorney General of the Republic of Kenya. The IEBC was sued in its capacity as the body established under **Article 88** and charged with the responsibility of conducting or supervising referenda and elections to any elective body or office established by the Constitution and any other elections as may be prescribed by an **Act** of Parliament. The 2<sup>nd</sup> respondent was joined to the suit pursuant to **Article 156** of the Constitution in his capacity as the principal legal adviser to the Government of the Republic of Kenya; the person authorized by law to represent the national government in Court or in any other legal proceedings to which the national government is a party; the officer of government under a duty to promote, protect and uphold the rule of law, and defender of public interest; and the office responsible for decisions, acts and omissions of the officials of the 1<sup>st</sup> respondent on affairs concerning the subject matter of the petition.

5. On 20<sup>th</sup> July 2016 Katiba Institute sought leave to be admitted in the petition as *Amicus Curiae* and to be granted an opportunity to submit written and oral arguments and where necessary, to provide any other relevant information in the petition. The application was allowed. The petitioners were represented by Mr. Willis Evan Otieno and Prof. Ben Sihanya, the 1<sup>st</sup> respondent by Mr. Kilonzo and Ms. Owang, the 2<sup>nd</sup> respondent by Mr. Githinji and Ms. Wambui and the *Amicus Curiae* by Mr. Waikwa and Ms. Christine Nkonge.

### **The petitioners' case**

6. The petitioners' complaint was that **section 39(2) and (3)** of the **Elections Act** and **regulations 83(2), 84(1) and 87(2)(c)** of the **Elections (General) Regulations 2012** made under the **Elections Act** are contrary to **Articles 86(b) and (c) and 138(2)** of the Constitution in so far as, and to the extent that, they provide that the declaration of results of the presidential election by the returning officer at the constituency level are provisional and subject to confirmation by the 1<sup>st</sup> respondent after a tally of all the votes cast in the election. In the affidavit sworn by the 1<sup>st</sup> petitioner in support of the petition he stated that the 1<sup>st</sup> respondent, in following the impugned section and regulations, has in previous presidential elections treated the results announced and declared at the constituency level by the respective returning officers in fulfillment of **Articles 86 and 138(2)** to be provisional subject to confirmation by some of its Commissioners and staff at the national tallying centre in Nairobi. The act of confirming and varying the constituency results by the 1<sup>st</sup> respondent, the petitioners stated, was not only contrary to **Articles 86 and 138(2)** but also undermined the tenets of a fair election. This is because, under **Articles 86 and 138(2)** the declaration by the constituency returning officer is final for that election in the constituency. Any impression, therefore, that such results are provisional undermines the authority given to the constituency returning officers and exposes the presidential electoral system to abuse, and makes

it prone to electoral malpractice by the 1<sup>st</sup> respondent and its officers. The petitioners stated that:-

**“36. The 1<sup>st</sup> Respondent has, in its recent organization of the previous election and planning of the upcoming elections, omitted, overlooked and/or ignored the provision of conducting elections at the constituency level that makes results declared at the level to be final results for presidential elections as required under Articles 86 and 138 of the Constitution.”**

7. It is the responsibility of the 1<sup>st</sup> respondent to appoint presiding officers and returning officers to conduct elections. The 1<sup>st</sup> respondent has used this power to appoint presiding officers for polling stations, constituency returning officers, county returning officers and its chairperson as the principal returning officer. The county returning officer conducts elections of the governor, senator and woman representative. The principal returning officer is responsible for presidential election. It was the petitioners' case that the appointment of the county returning officer and the principal returning officer has created structures that offend **Articles 86 and 138(2)** of the Constitution and whose intention is to provide an opportunity to those third parties to undermine and interfere with the constituency declared results. In paragraphs 35, 36, 37 and 38 of Maina Kiai's affidavit it was stated as follows:-

**“35. THAT the 1<sup>st</sup> respondent in appointing its chairperson as a returning officer for presidential elections must take cognizance of this provision of the law and bear in mind that a returning officer can only get his figures from the polling stations' presiding officers.**

**36. THAT Article 138(2) provides that presidential elections are to be done at each and every constituency and as such the persons responsible for presidential elections are constituency returning officers duly appointed by the 1<sup>st</sup> respondent.**

**37. THAT in light of the foregoing, there cannot be a single person acting as presidential elections returning officer. It is not possible to have all polling stations presiding officers across the country to deliver their returns to a single returning officer.”**

**38. THAT upon conclusion of results announcements at each and every constituency, it is open to any person to do arithmetic of adding up the publicly announced results by constituency returning officers and determine the final outcome (result) of the presidential elections.”**

8. It was contended that the national tallying of presidential election results at the national tallying centre for each candidate to the extent that it seeks to usurp, confirm, or vary the constituency results as announced by the constituency returning officer is unconstitutional. Further that the act of the 1<sup>st</sup> respondent in appointing its chairperson or any single person to be the presidential elections returning officer in future elections thereby usurping the mandate of the respective constituency returning officers is contrary to **Articles 86 and 138(2)** of the Constitution, and a violation of the right to free, fair and transparent elections as required by **Article 81** of the Constitution. The petitioners' case was that the presidential election is constituency based and that the results should only be announced by the constituency returning officers, and those results so announced should be deemed to be final unless challenged and overturned by the Supreme Court.

### **The 1<sup>st</sup> Respondent's Case**

9. The 1<sup>st</sup> respondent opposed the petition and filed a replying affidavit sworn on 20<sup>th</sup> July 2016 by Mahamud Jabane who is the Director Legal and Public Affairs of the Commission. He raised a preliminary point on the jurisdiction of this court to hear and determine the dispute. Relying on **Articles 87(2), 163(3) (a) and 165(5)(a)** of the Constitution, he stated that the Supreme Court was the court with

exclusive jurisdiction to adjudicate upon all disputes arising from and related to presidential elections. Further, it was the 1<sup>st</sup> respondent's case that while it was settled that the High Court had jurisdiction under **Article 165(3)(d)(i)** to hear and determine the question whether any law was inconsistent with or in contravention of the Constitution, **Article 165(5)(b)** expressly prohibited the High Court from exercising its jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court. It was on the basis of that exclusive jurisdiction, it was deponed, that the Supreme Court (**Presidential Election Petition) Rules 2013** were published. The **Rules** provide for the guidelines on the procedure to be used in dealing with any questions arising with regard to the validity of the election of the president. Reference was made to **Rule 12** of the **Rules**. It was acknowledged in the affidavit that the questions raised in the petition were neither frivolous, vexatious nor scandalous. However, the place to determine them was the Supreme Court, it was added. It was stated that the issues raised in the petition were in the nature of a presidential election petition and thus could only be heard and determined by the Supreme Court. Further, it was the 1<sup>st</sup> respondent's case that, in the petition, there existed a potential dispute incidental to a presidential election other than that which was expressly mentioned in **Article 140** of the Constitution. The reasoning was that a presidential election, much like any other election, was not lodged in a single event, but was in a process set in a plurality of stages. Lastly, on this point, it was the 1<sup>st</sup> respondent's case that the presidential petition was *sui generis* and distinguished by **Articles 87(2)** and **163(3)** of the Constitution from the election petitions of other elective posts. The framers of the Constitution, it was contended, did not intend that the Supreme Court should exercise original jurisdiction only in respect of a specific element or event of the presidential election, namely, disputes arising after the election, while excluding those disputes which might arise during the process of presidential election.

10. The second preliminary point that was raised by the 1<sup>st</sup> respondent was that the issues as canvassed in the petition were *res judicata*; that these were the same issues that were raised in **Raila Odinga & 2 Others –v- IEBC & 3 Others [2013]eKLR** and a determination made thereon. If they were not raised, they ought to have been raised in the case. This was because the question posed as to who was the returning officer for the purpose of the presidential election, and the credible conduct of such election, belonged to that case.

11. On the question of the constitutionality of **Section 39(2)** and **(3)** of the **Elections Act** and **regulations 83(2)**, **84(1)** and **87(2)(c)** of the **Elections (General) Regulations 2012**, the 1<sup>st</sup> respondent's case was that the intention of the Constitution through **Articles 86(b)** and **(c)**, **Article 138(2)(c)**, **Article 138(3)(c)** and the **Elections (General) Regulations 2012** was to provide three levels of election results announcement in a presidential election. This is what Jabane swore:-

**“24. THAT in presidential elections therefore, though the voting unit is in the constituency, the actual voting takes place in the polling stations, after which the results announced by the presiding officer and conveyed to the returning officer who is in charge of tallying and verifying the results received at the constituency level.**

**25. THAT once the returning officer has tallied, verified and announced the presidential results the results received at the constituency level, he transmits the results to the Commission.**

**26. THAT the Chairman of the Commission being the returning officer in presidential elections is constitutionally mandated under Article 86 of the Constitution to collate, verify and announce the results.**

**27. THAT both the Elections Act and the Regulations have been enacted for purposes of operationalising Articles 86(b), (c) and 138(2)(c) of the Constitution which provide for a multi-**

tiered process of declaration of the presidential election results culminating with a final announcement by the Chairman of the Commission.

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31. THAT the final results sent back to the Commission reflecting the number of registered votes, the votes cast and the spoilt votes in a particular station should total up to the amount of election documents sent out by the Commission.

32. THAT the information, verification and collation carried out by the Chairman acts as a control measure to ensure that what has been received from the returning officer at the constituency level provided for under Article 86(b) reflects the election materials that was sent out by the Commission for purposes of conducting the election.

33. THAT therefore the final returning officer being the Commission is tasked with ensuring that all the election documents that were sent out are properly accounted for in the results it has received from the returning officer.

34. THAT the voting process is therefore seen to have internal mechanisms for safeguarding the integrity of the ballot and such it cannot be said that the exercise of verification and confirmation is in any way meant to alter the result of an election.

35. THAT the collation, verification and confirmation of election results is a purely mathematical exercise for the purpose of consolidating the results it receives from each returning officer, in the absence of which the announcement under Article 86(c) of the Constitution would bear no meaning.”

12. In short, the 1<sup>st</sup> respondent’s answer to the petition was that **section 39(2) and (3) of the Elections Act and regulations 83(2), 84(1) and 87(2)(c) of the Elections (General) Regulations 2012** were not contrary to **Articles 86 and 138(2)** of the Constitution.

13. Lastly, the respondent denied that there had been any previous interference with election results and maintained that under **Article 138(10)** of the Constitution, the Chairperson of the Commission had the mandate to declare the presidential results after collating and verifying those results that had been transmitted to the Commission. The 1<sup>st</sup> respondent was of the view that granting the petition would create confusion in the presidential election not contemplated by the Constitution or the **Elections Act**.

### **The 2<sup>nd</sup> respondent’s case**

14. The 2<sup>nd</sup> respondent filed grounds of opposition dated 20<sup>th</sup> July 2016 in which it was contended that the petitioners had not particularized the constitutional provisions allegedly contravened, and how those provisions had been contravened by the **Act and Regulations**. It was the 2<sup>nd</sup> respondent’s case that the petition was misconceived, misconstrued and a misapprehension of the Constitution, the **Elections Act** and the **Regulations**. In his view, the 1<sup>st</sup> respondent was working in accordance with the Constitution and, in particular, with **Article 86**; that there could only be one returning officer of the presidential election. This returning officer was the one contemplated by **Article 138(1)**. It was his case

that a holistic reading of **Articles 83, 86 and 138** left no doubt that the **section and regulations** that the petition impugned were constitutional, and the structures put in place by the 1<sup>st</sup> respondent by virtue of the **section and regulations** were reasonable. Finally, that the presiding and returning officers were agents of the 1<sup>st</sup> respondent who were obliged to produce a coherent and accurate result which could only be achieved if proper and orderly structures were put in place for the collation and verification of the final result of the presidential election.

15. The 2<sup>nd</sup> respondent agreed with the 1<sup>st</sup> respondent that this court did not have jurisdiction to hear and determine the dispute as the court with the jurisdiction was the Supreme Court. Further, there was agreement between the two respondents that the issues in dispute were *res judicata*.

### **Submissions**

16. Counsel to the respective parties and *Amicus Curiae* filed written submissions which they were allowed to highlight. Reference shall be made to them in the course of this judgment. What was notable, however, was that the *Amicus Curiae* took the position that this court had the jurisdiction to hear and determine the issues raised in the petition, and that the matters were not *res judicata*. Mr. Waikwa for the *Amicus Curiae* disagreed with the 1<sup>st</sup> respondent's submissions that in a presidential election there was one national constituency whose returning officer was the chairperson of the Commission. He argued that such an arrangement would offend **Article 138(2)** as it would, among other things, mean that the chairperson would be carrying out the work assigned to returning officers by **regulation 38**. It was further submitted by counsel for the *Amicus Curiae* that presidential elections declared at the constituency were final and only subject to variation by an election court in line with **regulation 83(1) and (3)**. Counsel referred to **regulation 83** to argue that the tallying of votes and public announcement of total votes cast in favour of each candidate proceeded the declaration of election results; that the tallying and announcement designed by **Article 86(b) and (c)** of the Constitution and **section 39** of the **Elections Act** to take place immediately after the close of polls emphasized the promptness with which results ought to be collated, tallied and announced. Lastly, the *Amicus Curiae* submitted that:-

**“To the extent that the 1<sup>st</sup> respondent interprets regulations 83(2), 84(1) and 87(2)(c) to mean that they can vary or alter the results declared by the Constituency returning officer is contrary to the constitution.”**

### **Analysis and determination**

17. After considering the petition, the responses, the submissions and the authorities cited, the following issues for determination emerged:-

- a. whether this court had the jurisdiction to hear and determine the issues raised by the petition;
- b. whether the petition was *res judicata*;
- c. whether presidential election results declared by the constituency returning officer were final or provisional in respect of the constituency; and
- d. whether **regulations 83(2), 84(1) and 87(2)(c)** of the **Elections (General) Regulations 2012** that provide that the results in a presidential election as declared by the constituency returning officer shall be subject to confirmation by the principal returning officer (or indeed the Commission) after tallying all votes cast are contrary to **Articles 86 and 138(2)** of the Constitution.

**Whether this Court has jurisdiction to hear and determine the issues raised in the petition.**

18. The issue of jurisdiction was raised in the 1<sup>st</sup> respondent's response and supported by the 2<sup>nd</sup> respondent. According to them the proper judicial forum for the adjudication of any dispute relating to the election to the office of the president is the Supreme Court, and not the High Court. In the submissions by Mr. Kilonzo for the 1<sup>st</sup> respondent, the Constitution had outlined the functions and jurisdiction of each court. **Article 163(3)(a)** had dictated that the Supreme Court shall have exclusive original jurisdiction to hear and determine disputes relating to the election of the president arising under **Article 140**. In limiting the jurisdiction to hear and determine disputes relating to presidential election, it was argued, the Constitution under **Article 165(5)(a)** had expressly provided that the High Court shall not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court. Informed by **Article 163(9)**, the **Supreme Court Act (Cap.9A)** was enacted to make further provisions with respect to the operation of the Supreme Court as a court of final judicial authority. **Section 12** of the **Act** provides that the Court has jurisdiction to determine disputes arising out of presidential elections, that is disputes to which **Article 163(3)(a)** applies. As provided for under **Article 163(8)** as read with **section 31** of the **Supreme Court Act**, the Supreme Court made the **Supreme Court (Presidential Election Petition) Rules, 2013** which provided for the exercise of its jurisdiction. **Rule 3** provided that the object and purpose of the **Rules** was to enable the court exercise its exclusive original jurisdiction under **Article 163(3)(a)**.

19. Counsel made reference to **Article 140** which gave jurisdiction to the Supreme Court to determine questions as to the validity of presidential election. **Rule 2** of the **Supreme Court Rules** defined the petition contemplated by the Constitution to challenge a presidential election to mean a petition filed in the Supreme Court in relation to presidential election pursuant to **Articles 136, 137, 138 139 and 140**. Counsel then made reference to the Supreme Court Advisory Opinion in **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Advisory Opinion Application No. 2 of 2012[2012]eKLR**, the pronouncements in the **Africa Centre of Open Governance (AFRICOG) –v- Ahmed Issack Hassan and Another [2013]eKLR**, **International Centre for Policy and Conflict & 5 Others –v- A.G. and 5 Others [2013]eKLR** and **John Harun Mwau & 3 Others –v- A.G. & 2 Others [2012]eKLR** in which the respective courts dealt with the question of the exclusive jurisdiction granted to the Supreme Court to deal with disputes arising out of presidential elections. Counsel concluded that the questions asked in the petition (questions that sought declarations on the verification, collation, tallying and subsequent announcement of the presidential election by the Commission) were –

**“so intertwined to the presidential election process that the provisions of Article 163 and 165 of the Constitution take away the jurisdiction of this Honourable Court to interpreting the provisions of the Constitution in respect of the impugned provisions of the Election statutes.”**

20. The petitioners' response was that their matter concerned the interpretation of the Constitution, a matter in which the High Court had exclusive original jurisdiction under **Article 165(3)(d)(i)**. They argued that the petition was challenging the constitutionality of a statute and its regulations, and was not dealing with a dispute relating to the election to the office of president arising from **Article 140**. Reference was made to the case of **Council of Governors & 3 Others –v- Senate & 53 Others [2015]eKLR** in which the High Court held that:-

**“At Article 165(3)(d)(i), this court is given the jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution. The jurisdiction of the Court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of the Constitution, which pronounces its supremacy at Article 2 by proclaiming, at Article 2(4) that**

**“Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid”.**”

21. The submissions by counsel for the *Amicus Curiae* on the question of jurisdiction, and the overall question of the jurisdiction of the Supreme Court vis-à-vis the High Court, were in quite some detail. Counsel asked the court to ask itself whether it was dealing with the question of the validity of presidential election or the question of the inconsistency of a law or action with the Constitution. It was pointed out that there was no on-going presidential electoral process, and therefore when a cause was brought to question the constitutionality of a law that may have a bearing or regulating how a presidential election was conducted, the resolution of that cause belonged to the High Court and not the Supreme Court. It was acknowledged that both the Supreme Court and the High Court had interpretive powers. However, the general rule was that any matter questioning the constitutionality of a law belonged at first instance to the High Court. This is how counsel put it:-

**“However, there are limited circumstances where the Supreme Court may have jurisdiction to resolve a question on the constitutionality of a law in the first instance. That power is limited to circumstances where a case relating to validity of a presidential election is brought and a party raises, as one of the issues to assist resolve the validity of the election, constitutionality of a provision of a law. In other words the overarching subject of the dispute must be resolution of the validity of a presidential election and to the constitutionality of a law. The jurisdiction to pronounce on the law is engaged as a necessity since the resolution on validity is dependent (wholly or to some extent) on the findings on the constitutionality of the impugned law or action. The existence of a dispute in the Supreme Court based on an active electoral process of a president becomes a condition precedent for the court to take jurisdiction to resolve a question on constitutionality of a law or action that may affect the Supreme Court’s findings on the validity of that presidential election dispute.”**

Reference was made to the Supreme Court’s Advisory Opinion in **In Re The Matter of the Interim Independent Electoral Commission [2011]eKLR** where the parties were seeking the interpretation of the Constitution as to the date of the general election (including presidential election). The Court deferred to the High Court whose jurisdiction was entrusted by the Constitution. Counsel concluded that:-

**“....even if the Supreme Court has jurisdiction to determine the subject matter of the petition, that jurisdiction in this regard is shared with the High Court. For IEBC to succeed in its preliminary objection it must therefore show that the matter would not be amenable to expeditious resolution through the regular hierarchical court process starting at the High Court and will have a bearing on the validity of a subsisting presidential electoral process.”**

22. This court recognizes that under **Article 163(7)** of the Constitution -

**“All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.”**

It also acknowledges that the Supreme Court has exclusive (and unshared) original jurisdiction to hear and determine disputes relating to the election of the president arising under **Article 140. Article 140(1)** provides that:-

**“A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.”**

This court takes judicial notice of the fact that the date of the next general election is 8<sup>th</sup> August 2017, and therefore a petition to challenge the presidential election can only be filed after the declaration of results following that general election.

23. The exercise of the Supreme Court's jurisdiction is also prescribed in the Court's own **Rules** made pursuant to **Article 163(8)** that provides that:-

**“The Supreme Court shall make rules for the exercise of its jurisdiction.”**

The applicable provision of the **Rules** regulating the exercise of jurisdiction in respect of presidential election petition is found under **Rule 4** which provides:

**“These Rules may apply to a petition filed in relation to election to the office of president and includes a petition arising –**

- a. upon the declaration by the Independent Electoral and Boundaries Commission of the President-elect;
- b. pursuant to Article 138(1), (2), (3), (4), (5), (6) and (10) and Article 140 of the Constitution;
- c. pursuant to section 39 of the Elections Act; and
- d. in an election other than a general election.”

From the foregoing provisions, it is clear that the Supreme Court has the power to exercise exclusive original jurisdiction when a question arises as to the validity of the presidential election after the declaration of results.

24. In **Isaac Polo Aluochier –v- IEBC & 19 Others, S.C. 2 of 2013**, the Supreme Court considered and applied the provisions of **Rule 12(2)** and held that it had the jurisdiction to hear and determine disputes arising out of the nomination of the candidates to the office of the president. **Rule 12(1)** provides that a person may file a petition challenging –

- a. the validity of the election of the president-elect; or
- b. a declaration by the Commission under Article 138(5).

Under **Rule 12(2)** the grounds upon which a petition under **Rule 12(1)** may be filed include –

- a. the validity of the conduct of a presidential election;
- b. the validity of the qualification of a president-elect;
- c. the commission of an election offence as provided under **Part VI** of the **Elections Act**;
- d. the validity of the nomination of a presidential candidate; or
- e. any other grounds that the court deems sufficient provided such ground shall not be frivolous, vexatious and scandalous.

This court takes the view that the instant petition does not relate to any of the grounds in **Rule 12(2)** of the **Supreme Court (Presidential Election Petition) Rules**. More specifically, the pleadings in the petition do not raise a question as to the validity of the presidential election, a declaration by the Commission under **Article 138(5)**, the validity of the qualification of a president-elect, the commission of an election offence as provided under **Part VI** of the **Elections Act**, or the validity of the nomination of a presidential candidate. The court is alive to the High Court decision in **In the Matter of the International Centre for Policy and Conflict & 5 Others –v- A.G & 4 Others [2013]eKLR** in which the question was whether the 3<sup>rd</sup> and 4<sup>th</sup> respondents in the case were qualified to offer their candidature for the office of the President and Deputy President. The court observed as follows:-

**“We were urged to make a declaration whose ultimate aim would result in the determination of the question, whether the 3<sup>rd</sup> and 4<sup>th</sup> respondents are qualified to offer their candidature for the office of the President and Deputy President respectively. This is an issue which is within the exclusive jurisdiction of the Supreme Court. In the premises therefore, this court lacks jurisdiction to deal with a question relating to the election of a President and Deputy President”**

Again, this court is not dealing with the question whether or not any person is qualified to run for the office of the president.

25. In the **Matter of the Principle of Gender Representation in the National Assembly and the Senate** (above), the Supreme Court expressed itself with regard to how it interpreted its exclusive jurisdiction to deal with disputes arising out of a presidential election. In its Advisory Opinion, it observed as follows:-

**“It is clear to us, in unanimity, that there are potential disputes from presidential elections other than those expressly mentioned in Article 140 of the Constitution. A presidential election, much like other elected – assembly elections, is not lodged in a single event; it is, in effect, a process set in plurality of stages. Article 137 of the Constitution provides for “Qualifications and disqualifications for election as President” – and this touches on the tasks of agencies such as political parties which deal with early stages of nominations; it also touches on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute would still have clear bearing on the conduct of the presidential election**

.....

**A reading of Article 87(2) alongside Article 163(3) suggests, as we perceive it, that the Supreme Court was intended to adjudicate upon all such disputes as would arise from the presidential election. We find no reason to presume that the framers of the Constitution intended that the Supreme Court should exercise original jurisdiction only in respect of a specific element, namely disputes after the election – while excluding those disputes which might arise during the conduct of election.”**

This court fully agrees with the Supreme Court. Where a question arises under **Article 137** of the Constitution as to whether one is qualified or not qualified to be elected as president, that is a matter within the exclusive original jurisdiction of the Supreme Court. Where, either the Commission or the political parties are involved in the nomination of presidential candidates and there is a dispute, that is a matter within the exclusive jurisdiction of the Supreme Court. All these are in, our view, disputes that arise during the early stages of the conduct of a presidential election. In other words, these are critical stages of the presidential electoral process. In the instant case, the process of electing the president has

not commenced. To our mind, a presidential election is activated when, under **section 14** of the **Elections Act**, the Commission publishes a notice of holding of the elections in a Gazette and in electronic and print media. The Supreme Court was alive to this when it stated in **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate** (above) as follows:-

**“It is our unanimous opinion that the validity of the Presidential election is not for determination only after the administrative pronouncement of the final result; at any stage in the critical steps of the electoral process, the Supreme Court should entertain a dispute as to validity.”**

26. In one of its earlier decisions, the Supreme Court restated its jurisdictional limits. This is in the case of **Samwel Kamau Macharia & Another –v- Kenya Commercial Bank Ltd & 2 Others Supreme Court Application No. 2 of 2011**. It was stated as follows:-

**“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. We agree with counsel.....thattheissueastowhetheracourtoflawhasjurisdictiontoentertainamatter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.”**

Further, the court acknowledged its jurisdictional limits in the case of **Peter Oduor Ngoge –v- Francis Ole Kaparo & 5 Others, Supt. Court. Petition No. 2 of 2012** where it stated as follows:-

**“The Supreme Court, as ultimate judicial agency, ought, in our opinion, to exercise its powers strictly within the jurisdictional limits; and ought to safeguard the autonomous exercise of the respective jurisdictions of the other courts and tribunals.”**

The same principle was reiterated in **In the Matter of the Interim Electoral Commission [2011]eKLR** in which the court rendered an Advisory in the following words:-

**“The High Court has been entrusted with the mandate to interpret the Constitution. This empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction; for by the appellate process both the Court of Appeal and the Supreme Court are equally empowered to interpret the Constitution, certainly in matters resolved out at first instance by the High Court .....Only where litigation takes place entailing issues by constitutional interpretation, must the matter come in the first place before the High Court, with effect that the interpretation of the Constitution will have been limited to the appellate stages.”**

27. Once again, the petitioners have through this petition challenged the constitutionality of **section 39(2) and (3) of the Elections Act and regulations 83(2), 84(1) and 87(2)(c) of the Elections (General) Regulations 2012**. They have invoked this court’s powers under **Article 165(3)(d)** which gives the court jurisdiction to hear and determine any question respecting the interpretation of the Constitution, including the determination of the question whether any law is inconsistent with or in contravention of the Constitution. The court cannot run away from this challenge to test the constitutionality of the impugned provisions. We, therefore, hold and find that this court has jurisdiction to hear and determine the petition.

#### **Whether the petition is Res Judicata.**

28. The second preliminary point raised by the 1<sup>st</sup> respondent, and supported by the 2<sup>nd</sup> respondent, was that the petition was *res judicata*; that the issues the petitioners have raised, and seek to canvass, in the

petition –

**“are really factual matters touching on the 2013 Kenya General Elections as evidenced in paragraph 39 of the petition and annexure “MN 2” of Mr. Maina Kiai’s supporting affidavit.”**

It was submitted that if the court were to determine the issue in the petition,

**“it would be akin to this court re-opening Raila Odinga & 2 Others –v- Independent Electoral & Boundaries Commission & Others [2013]eKLR, an act that would be frowned upon by the doctrine of *Res Judicata*.”**

Further that, the question posed by the petitioners on who is the

**“principal returning officer for purposes of Presidential Election results was answered and/or should have been rightly posed in Raila Odinga case supra.”**

Lastly, it was argued that the issues in the present case raise questions that directly relate to the conduct of a free, fair, transparent and credible presidential election together with the process of determining the final tally of votes in the presidential election, which questions were properly before the Supreme Court in the **Raila Odinga case**, and also in the **Africa Centre of Open Governance (AFRICOG) case**. The response by the petitioners was that the whole question of jurisdiction ought to have been raised at the inception of this case; at the time when Judge Lenaola (as he then was) was dealing with the question whether or not the petition raised substantive issues of public interest to be referred to the Chief Justice to set up a bench of more than one judge. The petitioners further pointed out that the Judge, while referring the petition to the Chief Justice, had observed that the petition raised important public interest issues relating to the interpretation of sections of the **Elections Act** that was enacted to give effect to the provisions of the Constitution governing elections, and the role of returning officers in presidential elections as well as their status in the determination of results in presidential elections vis-à-vis the role of the Commission; and whether such results declared by the returning officers could be altered and/or varied. It was the petitioners’ case that it was late to raise the issue of *res judicata* at this stage, and that if the respondents were aggrieved by the finding they ought to have appealed. On this point it is our view that the issue of *res judicata* can be raised at any stage of the case. It was submitted that the petition was not *res judicata*, and neither was it a relitigation of the **Raila Odinga case**. The *Amicus Curiae* submitted that for the court to determine whether or not the petition was *res judicata*, it had to determine the true characterization of the nature of the dispute. This had to be done through an evaluation of the contraventions complained of and the relief sought from the court. In its view, the true nature of the petition was one that was impugning the constitutionality of the stated provisions of the **Elections Act and Regulations** and the acts that would be undertaken on the authority of those impugned provisions. The *Amicus Curiae* concluded as follows:-

**“44. While the petitioners have given particulars of how the impugned sections of the law were applied during the 2013 general elections, K.I. wonders whether those references indicate that the dispute before court is on the validity of 2013 presidential election or are mere illustrations of how the impugned provisions have been previously applied. Where, like here, the petitioners have not asked for any declaration that the 2013 presidential election was invalidly conducted, and the application of the declarations they seek is prospective, our opinion is there is no legal or factual basis to find that the matter before the court is *res judicata*.”**

29. The doctrine of *res judicata* is a principle of law that seeks to ensure there is conclusiveness in litigation. **Section 7 of the Civil Procedure Act (Cap 21)** provides that:-

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

The doctrine refers to the rule that a final judgment or decree on the merits by a court of competent jurisdiction is conclusive of the rights of the parties or their privies in all later suits on all points and matters determined in the former suit. The elements of *res judicata* are as follows:-

- a. the former judgment or order must be final;
- b. the judgment or order must be on merits;
- c. it must have been rendered by a court having jurisdiction over the subject matter and the parties; and
- d. there must be between the first and the second action identity of parties, of subject matter and cause of action.

**(Uhuru Highway Developers Limited –v- Central Bank of Kenya & Others [1999]eKLR).** For *res judicata* to apply, all these four essential elements must exist.

30. It is now accepted that a party ought to litigate in one suit all matters that belong to the subject in controversy (**Okiya Omtata Okioti –v-v Communications Authority & 14 Others [2015]eKLR**). The subject in controversy is the point in issue that the court has to deliberate upon in order to determine the plaintiffs’ right. It is the question that was posed and answered, or that that which the party could have posed and ought to have posed it but he did not.

31. The Court of Appeal addressed itself on the rationale of the doctrine of *res judicata* in the case of **John Florence Maritime Services Limited & Another –v- Cabinet Secretary of Transport and Infrastructure & 3 Others [2015]eKLR** as follows:-

**“The rationale behind *res judicata* is based on public interest that there should be an end to litigation over the same matter. *Res judicata* ensures the economic use of court’s limited resources and timely termination of cases. It provides confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and rule of law ..... In a nutshell, *res judicata* being a principle of law, may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings are constitutional in nature. The general consensus therefore remains that *res judicata* being a general principle of law that relates to jurisdiction of the court, may be raised as a defence to a constitutional claim.....”**

The instant petition is a constitutional claim and therefore the defence of *res judicata* can be raised, as has been raised by the respondents.

32. Applying the above principles to this petition, the question is whether the petition is a re-litigation of the **Raila Odinga** petition. It is not lost to us that the **Raila Odinga** petition was challenging the outcome of the presidential election held on 4<sup>th</sup> March 2013 and followed by the declaration of results on 9<sup>th</sup> March 2013. To be precise, **Raila Odinga** filed the petition under **Articles 2, 6, 10, 38, 73, 82, 86, 259 and 260** of the Constitution, under **sections 4 and 25** of the **IEBC Act, 2011** and **Regulations**

**59(1), 79 and 82** of the **Elections (General) Regulations, 2012** and the **Elections Act**, complaining that the electoral process was so fundamentally flawed that it precluded the possibility of discerning whether the presidential results declared were lawful; that the IEBC did not carry out a valid voter registration because its official tally of registered voters changed several times, which resulted in the final total number of registered voters differing materially from what was in the Principal Register; the IEBC Chairperson failed to carry out a transparent, verifiable, accurate and accountable election as was required by **Articles 81, 83 and 88** of the Constitution; and that the electronic system acquired and adopted by the Chairperson of IEBC were poorly designed and implemented and designed to fail, and failed with the result that he failed to transmit the results of the elections, in contravention of **Regulation 82** of the **Elections (General) Regulations, 2012**.

33. There was another petition filed by **Gladwell Wathomi Otieno** and **Zahid Rajan** on 16<sup>th</sup> March 2013 against the same respondents which claimed that the election was not conducted substantially in accordance with the Constitution, or the **Elections Act** and **Rule 77** of the **Elections (General) Regulations, 2012**; IEBC failed to establish and maintain an accurate voter register that was publicly available, verifiable and credible as required by **Articles 38(3), 81(d) 3(2), 86 and 88(4)** of the Constitution, **sections 3, 4, 5, 6, 7 and 8** of the **Elections Act** and the **Elections (Registration of Voters) Regulations, 2012**; the true number of voters was unknown; the electoral management system that was adopted was complex and had many shortfalls, contrary to the requirement that it be simple, accurate, verifiable, secure and accountable and transparent; tallying and verification did not happen at the polling stations; there was no electronic transmission of the results; and that the award of tender for the electoral management system was against the provisions of the Constitution and the **Public Procurement and Disposal Act, 2005**. These two petitions, and a third one, were consolidated and heard together. The petitions were disallowed after the finding that the president had been validly elected.

34. We went into some detail to outline the nature of the controversy in the **Raila Odinga** petition because of the claim by the 1<sup>st</sup> respondent that the matter in controversy in the instant petition was the same as that in the Supreme Court. It is clear to us that the Supreme Court was not called upon to consider **section 39(2) and (3)** of the **Elections Act**. The Court was not called upon to consider **regulations 83(2), 84(1) or 87(2)** of the **Elections (General) Regulations** of the **Elections Act**. The constitutionality of these provisions was not in issue, and neither was the court called upon to determine that. In our view, the **Raila Odinga** petition was a time bound petition brought under **Article 140** of the Constitution and which was to be determined within 14 days. It dealt with a straightforward question, whether the president had been validly elected.

35. It cannot be reasonably argued that the constitutionality of the impugned provisions ought to have been raised in the **Raila Odinga** petition. In our considered view, such a challenge could only be done before the High Court, as has presently been done, so that the parties can have, at the first instance, the court's interpretation of the matter, before the parties can benefit from further interpretation on appeal, up to the Supreme Court.

36. There was allegation that the present petitioners were related to **Gladwell Wathomi Otieno** and **Zahid Rajan** who were some of the petitioners in the **Raila Odinga** petition. This claim, however, was not substantiated, and neither was it enthusiastically pursued.

37. To conclude on this point, it is clear that the issues raised in the instant petition cannot, by any stretch of imagination, be deemed to be the same as the ones that the Supreme Court dealt with in the **Raila Odinga** petition. We, therefore, find and hold that the present petition is not *res judicata*.

**Whether section 39(2) and (3) of the Elections Act together with Regulations 83(2), 84(1) and 87(2)(c) of the Elections (General) Regulations 2012 are contrary to the provisions of Articles 86 and 138(2) of the Constitution.**

38. The petitioners seek to have this court declare that **section 39(2) and (3) of the Elections Act and regulations 83(2), 84(1) and 87(2) of the Elections (General) Regulations 2012** contravene **Articles 86 and 138(2)** of the Constitution. The contention by the petitioners that there is friction between **Articles 86 and 138(2)** of the Constitution and **section 39(2) and (3) of the Elections Act and regulations 83(2), 84(1) and 87(2)(c)** brings to bear three important issues for determination:-

a. the functions of the constituency returning officer in the presidential election and whether the results he declares or announces are final, or provisional and subject to confirmation by the principal returning officer;

b. whether the finality of the presidential election process from voting, counting, tallying and declaration of results ends up with the announcement by the constituency returning officer, or with the announcement by the principal returning officer; and

c. whether in a presidential election Kenya is one national constituency with the one returning officer (the principal returning officer) or it is divided into 290 constituencies with each constituency having a returning officer.

As far as it is possible, these issues will be considered together as they are clearly interlinked.

39. In the case of **Olum and Another –v- the Attorney General [2002]2EA** the Constitutional Court of Uganda was dealing with the question of the constitutionality of a statute when it observed as follows:

**“To determine the constitutionality of a section of a statute or Act of Parliament, court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional.”**

40. Further, in the Canadian case of the **Queen –v- Big M. Drugmart Ltd (Others intervening) [1986]LRC (Const)332** it was stated that:-

**“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in ascertaining the legislation’s object and thus validity.”**

41. These two decisions have been applied in Kenya in several cases, including **Murang’a Bar Operators & Another –v- Minister for State for Provincial Administration and Internal Security & 2 Others [2011]eKLR** and **Law Society of Kenya –v- Attorney General & 3 Others [2016]eKLR**.

42. Lastly, there is always a rebuttable presumption that legislation is constitutional; that the legislature

understands and appreciates the needs of the people, and that the laws it enacts are directed to problems which are made manifest by experience, and therefore such laws enacted are reasonable and fit for the purposes of the enactment (**Nairobi Metropolitan PSV Saccos Union Limited & 25 Others –v- County of Nairobi Government & 3 Others [2013]eKLR**). The onus is on the person who challenges the statute to show that it is unconstitutional.

43. The Constitution of Kenya Review Commission in its final report at page 164 stated that:-

**“The cornerstone of participatory governance is to hold free, fair and periodic elections. Elections serve not only to choose people’s representatives, but also to elect or determine government election or appointment. They demonstrate the people’s sovereignty and accountability by politicians. They lend legitimacy to governments.”**

When the Constitution was promulgated in 2010 in it was the promise in **Article 38(2)** that, from then on, elections would be free, fair and regular, based on universal suffrage and the free expression of the will of the people. In **Article 81(e)** elections were commanded to be by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner. **Article 88(1)** established the Independent Electoral and Boundaries Commission (IEBC) which was charged with ensuring that the electoral system was simple, accurate, verifiable, secure, accountable and transparent (**Article 86(a)**). **Article 86(b)** and **(c)** demanded that there must be promptness in announcing of election results. Lastly, **Article 88(4)(h)** provided that there must be facilitation of the observation, monitoring and evaluation of elections. It is against this standard that we shall consider the impugned provisions.

44. **Section 39(2)** and **(3)** of the **Elections Act** provide as follows:-

**“(2) Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.**

**(3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed.”**

This provision has to be looked at against the backdrop of **section 39(1)** which states that the Commission shall determine, declare and publish the results of an election immediately after close of polling.

45. **Regulation 83(2)** of the **Elections (General) Regulations 2012** provides as follows:

**“The results of the presidential election in a constituency shown in Form 34 shall be subject to confirmation by the Commission after a tally of all the votes cast in the election.”**

The preceding provision (**Regulation 83(1)**) provides as follows:

**“1. Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates, or agents and observers, if present –**

**a. tally the results from the polling stations in respect of each candidate, without recounting the ballots that were not in dispute and where the returning officer finds the total valid votes in a**

**polling station exceeds the number of registered voters in that polling station, the returning officer shall disregard the votes of the count of that polling station in the announcement of the election results and make a statement to that effect;**

**b. in the case of an election, publicly announce to persons present the total number of valid votes cast for each candidate in respect of each election in the order provided in regulation 75(2);**

**c. complete Form 34 and 35 set out in the Schedule in which the returning officer shall declare, as the case may be:-**

**i. name of the respective electoral area;**

**ii. total number of registered voters;**

**iii. votes cast for each candidate or referendum side in each polling station;**

**iv. number of rejected votes for each candidate in each polling station;**

**v. aggregate number of votes cast in the respective electoral area; and**

**vi. aggregate number of rejected votes; and**

**d. sign and date the form and –**

**i. give to any candidate or agent present a copy of the form; and**

**ii. deliver to the Commission the original of Form 34 and 35 together with Form 36 and Form 37 as the case may be.”**

To appreciate the complaint by the petitioners one has to look at **regulations 75(2) and 83(3)**. **Regulation 75(2)** states that:

**“(2) The presiding officer shall carry out the counting of votes for the respective elective posts in the following order –**

**a. president;**

**b. member of the National Assembly;**

**c. member of the County Assembly;**

**d. senator;**

**e. county woman representative in the National Assembly; and**

**f. county governor.”**

**Regulation 83(3)** provides that –

**“3. The decisions of the returning officer on the validity or otherwise of a ballot paper or vote under this regulation shall be final except in an election petition.”**

46. Under **regulation 79** the presiding officer, after the count and after he has dealt with any disputes regarding the inclusion of a ballot paper or rejection of a ballot paper, shall immediately announce the results after preparation of the declaration. He will then communicate the results to the constituency returning officer.

47. The second impugned regulation is **regulation 84(1)** which provides that:-

**“(1) A final tallying of results for the respective elective positions shall be at a venue to be gazetted by the Commission for that purpose.”**

48. Lastly, there is **regulation 87(2)(c)** that states that:-

**“the returning officer shall after tallying of votes at the constituency level –**

a. ....

b. ....

**c. electronically transmit the provisional results to the Commission.”**

Again, one can only better understand the import of this provision by looking at the preceding provisions, that is, **regulation 87(1)(a)** and **(2) (a)** and **(b)** which state that –

**“(1) The returning officer shall, as soon as practicable, forward to the county returning officer, in the case of –**

**a. a presidential election, a certificate in Form 37 showing the total number of votes cast for each candidate;**

**b. a member of National Assembly, county woman representative, senate, county assembly, county governor or county assembly election, a certificate in Form 38 set out in the Schedule showing the total number of votes cast for each candidate.**

**(2) The returning officer shall after tallying of votes at the constituency level –**

**a. announce the results cast for all candidates;**

**b. issue certificate to persons elected in the National Assembly and County Assembly election in Form 38 set out in the Schedule .....**”

49. These impugned provisions have to be tested against **Articles 86** and **138(2)** of the Constitution. To our mind they have also to be tested against the rest of the provisions under the **Elections Act and Regulations**. **Article 86** states that:-

**“86. 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.”

50. And **Articles 138(2)** states that –

**“138(2) If two or more candidates for President are nominated, the election shall be held in each constituency.”**

51. In **Article 89(1)**, the Constitution established 290 constituencies. The petitioners’ case was that a presidential election is held in each of these 290 constituencies, each having a constituency returning officer to return the result of the election. The argument by the respondents was that, for the purposes of a presidential election, Kenya becomes one national constituency whose returning officer is the principal returning officer. This argument, of course, is not supported by the clear provisions of **Article 138(2)**, which provides that the presidential election shall be held in each constituency.

52. It is also clear that under **Article 138(3)(c)** and **section 39(1)** of the **Elections Act** the actual voting shall be conducted at a polling station. At the close of polling, there will be the counting of the votes where tallying, verification and declaration of results shall be done.

53. Under the **Elections (General) Regulations 2012** the Commission (1<sup>st</sup> respondent) has the mandate to appoint a presiding officer for each polling station and a returning officer for each constituency. The 1<sup>st</sup> respondent has used the power of appointment to appoint a county returning officer to be responsible for elections for the post of governor, county woman representative, and senator, and a principal returning officer to be responsible for presidential elections. The petitioners were opposed to the appointment of county returning officers and principal returning officer because they were not known in the Constitution. The **Elections Act** defines “**election**” to mean presidential, parliamentary, or county election and includes a by-election. The Constitution makes reference to a “**returning officer**”, and the **Act** defines such officer to mean a person appointed by the Commission for the purpose of conducting an election or a referendum. The Commission is charged with the management of elections and referenda, and it is its responsibility to put together offices and officers to manage elections and referenda. It is under this power that the Commission has appointed county returning officers to manage county elections and principal returning officer to manage the presidential election. It is our view that, in appointing either county returning officers or the principal returning officer, the Commission is exercising powers conferred by the Constitution and the **Act**. However, the Constitution acknowledges that it is at the polling station (managed by the presiding officer) where the actual votes are cast, counted, and tallied, and the results declared. If there is any dispute regarding the inclusion of a ballot paper or rejection of a ballot paper, the presiding officer shall deal with it and make a determination. These results are then transmitted to the returning officer who shall proceed as shown in **regulation 83(1)** of the **Elections (General) Regulations 2012**.

54. We have considered **regulations 83(2)** and **83(3)** of the **Elections (General) Regulations**

**2012.** There is clear tension between them. While **regulation 83(3)** states that the decisions of the returning officer on the validity or otherwise of a ballot paper or a vote shall be final except in an election petition, **regulation 83(2)** states that the decision by the returning officer in respect of the declaration of the results for a presidential election is not final but that it is subject to confirmation by the Commission. The respondents' argument was that, the confirmation was by the principal returning officer at the national tallying centre.

55. The word "**confirmation**" used in **regulation 83(2)** is defined in **Black's Law Dictionary 9<sup>th</sup> Edition** to mean –

**"the act of giving formal approval or the act of verifying or corroborating a statement"**

While "**confirm**" means –

**"to give formal approval or to verify or corroborate."**

From this definition, the meaning of the phrase –

**"subject to confirmation"**

under **regulation 83(2)** is that, once the constituency returning officer has tallied, verified and declared the results of a presidential election, the said results are subject to a further verification, approval, disapproval, or declaration by the Commission. To that extent, **regulation 83(2)** is in direct conflict with **regulation 83(3)** which states that the declaration by the constituency returning officer is final and can only be challenged by way of an election petition.

56. The same controversy is created by **regulation 87(2)(c)** that talks of the electronic transmission of –

**"provisional results to the Commission."**

The provision states that the results that the constituency returning officer transmits are provisional. **Black's Law Dictionary 9<sup>th</sup> Edition** defines "**provisional**" to mean -

**"temporary, or conditional."**

The critical question is that, how can the election results which have been tallied, verified and declared to be final under **regulation 83(3)** be said to be provisional, temporary or conditional under **regulation 87(2)(c)**" Why, and for what reason, would a returning officer be transmitting "**provisional**" results to the Commission when he has already declared the winner and issued a certificate"

57. We have considered that under **regulation 93(1)** of the **Elections (General) Regulations 2012** the constituency returning officer is required to retain in safe custody, for a period of three years after the results of the elections, all documents relating to the election. So that, even as **regulations 83(2)** and **87(2)(c)** suggest that the Commission shall be engaged in the exercise of confirming the results sent by the constituency returning officer, it will not have

**"all the documents relating to an election."**

58. The principle that once a declaration is made by the returning officer and a certificate issued, the results are final and that any alteration, change or challenge can only be by way of an election petition

was discussed by the Supreme Court in the case of **George Mike Wanjohi –v- Steven Kariuki & 2 Others, S.C. Petition No. 217 of 2014**. In the case, the results were declared by the constituency returning officer and a certificate in the Form 38 which was erroneously issued to the 1<sup>st</sup> respondent was cancelled, and the correct Form 38 with the corrected results was issued to the appellant. The question before the Supreme Court was whether the returning officer had the capacity to reverse a Form 38 after issuance of the certificate to a candidate. The court held as follows:-

**“111. In the instant case, the Returning officer could not have, after issuing the Certificate of Results in favour of the 1<sup>st</sup> respondent, subsequently cancelled it and issued a fresh Form 38 to the appellant. The Returning Officer having declared the 1<sup>st</sup> respondent as the winning candidate, and duly issued the Form 38, became *functus officio*. There is neither scope for Returning Officer to withdraw a declaration of the election result once made, and to cancel the certificate issued in favour of the winning candidate, nor is there a mandate to rectify the form 38. Once the votes are polled, counted and results declared, it would be perilous to allow the Returning officer to nullify the result, purportedly in rectification of some error. This would not only affect the very sanctity of the election process, but also encroach on the powers of the election court.**

**112. The foregoing point is fundamental, in terms of legal principle. Apart from the priority attaching to the political and constitutional scheme for the election of representatives of governance agencies, the weight of the people’s franchise - interest is far too substantial to permit one official, or a couple of them, including the Returning officer, unilaterally to undo the voters’ verdict, without having the matter resolved according to law, by the judicial organ of State. It is manifest to this court that an error regarding the electors’ final choice, if indeed there is one, raises vital issues of justice such as can only be resolved before the courts of law.”**

59. This same principle had earlier been considered in the case of **Hassan Ali Joho –v- Suleiman Said Shabhal, S.C Petition No. 10 of 2013**, in which it was held that once the election results have been declared, any dispute that has to do with the electoral process shifts from the electoral body (the 1<sup>st</sup> respondent) to the judiciary. In the case, the Court perceived the requirements of **regulation 87** as the “final step” of declaration of results, which follows the tallying of votes by the returning officer at the constituency level. The court stated that –

**“a declaration of results and the subsequent issuance of a Form 38 to a candidate, effectively extinguishes any power of the IEBC whether administrative or otherwise, and precludes it from reversing or otherwise interfering with the certificate.”**

60. So that, when **section 39(2)** and **(3)** talks of “**provisional**” results in reference to results that have been declared by the constituency returning officer, that would go against what the Supreme Court held in the foregoing decisions.

61. Do the impugned provisions of the **Elections Act** and the **Elections (General) Regulations 2012** meet the constitutional standards set in **Articles 81, 86** and **138** on the place and manner of declaration of results of a presidential election" We reiterate that **Article 86** prescribes in mandatory terms the principle for the ascertainment of free and fair elections provided for under **Article 81** of the Constitution. Under **Article 86(c)** –

**“the results from the polling stations are openly and accurately collated and promptly announced by the returning officer.”**

And under **Article 138(3)(c)** –

**“after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.”**

When read with **regulation 87(1)** of the **Election (General) Regulations 2012** that provides that the returning officer shall, in case of a presidential election, provide a certificate in Form 37 showing the total number of votes cast for each candidate, it is clear to us that under **Article 86(b)** and **(c)** and **Article 138(2)** and **(3)(c)**, the process leading to the declaration of presidential election results starts with the casting of votes at the polling station. The votes are then counted, tabulated and the results announced promptly by the presiding officer at the polling station. The presiding officer then completes Form 34 by indicating the votes cast in favour of the various presidential candidates. The results from the polling stations in Form 34 are thereafter transferred to the constituency tallying centre where they are openly and accurately collated and promptly announced by the constituency returning officer, who thereafter issues a certificate in Form 37 showing the results of the declaration as provided for under **regulation 87(1)**. The declaration and issuance of a certificate by the constituency returning officer means that, the results certified by the returning officer for each presidential candidate in respect of that constituency are final, and can only be challenged in the Supreme Court in an election petition. What is left is for the Commission, by itself or through the principal returning officer, to collate and tally the results from the 290 constituency returning officers and make a declaration as to who, from the calculation of the total number of votes as shown by the returning officers, is the winner of the presidential election.

62. The Commission, by itself or through any of its officers, cannot, at the national tallying centre or elsewhere, engage in any exercise of confirmation of the results declared by the constituency returning officers. Like was said by the Supreme Court in the decisions above, the Commission (1<sup>st</sup> respondent) cannot purport to cancel the results or rectify whatever error that may appear in the certificates issued by the returning officers. To do so would be perilous, and would affect and undo the voters' verdict, and also encroach on the powers of the election court.

63. It was stated in the replying affidavit by the 1<sup>st</sup> respondent as follows:-

**“53. THAT in the forgoing, it is imperative that this Honourable Court appreciates that in order to achieve accurate results of the presidential election, there is need to audit the transmitted results.**

**54. THAT such audits, which also act as checks and balances, should be conducted before the results are finalized to eradicate any discrepancies that may be found in order to capture the precise results that reflect the true will of the people in electing their leaders.**

**55. THAT in response to paragraphs 16, 17 and 18 of the petitioners' supporting affidavit, the Commission contends that contrary to the allegation made by the petitioners on the finality of presidential election results at the constituency level, the Commission is mandated under Article 86(d) of the Constitution to employ appropriate structures and mechanisms to eliminate electoral malpractice in addition to provisions of Article 138(3)(c) of the Constitution to tally and verify the votes before declaring the results.”**

64. It is clear to us that the 1<sup>st</sup> respondent does not accept that the presidential election results declared by the returning officers for their respective constituencies are final results. To its mind, it has to check whether or not the results are accurate, and to verify them. It has to audit them before declaring them. That means that the Commission believes that it has the mandate and responsibility to rectify or alter

them, if they are not accurate. The Commission believes it has the power to confirm, which means it may approve or disapprove the results. This is why it considers that the results declared by the constituency returning officers are provisional, until confirmed at the national tallying centre.

65. Quite unfortunately, that is not the case. The Commission has no power to verify or confirm the results declared by the constituency returning officer. This is what the Supreme Court stated in **Joho –v- Shabhal case** when considering **regulation 83** of the **Elections (General) Regulations 2012**, **section 39** of the **Elections Act** and **Articles 86(b)** and **(c)** of the Constitution:-

**“Once the returning officer makes a decision regarding the validity of a ballot or a vote, this decision becomes final, and only challengeable in an election petition. The mandate of the returning officer, according to regulation 83(3), terminates upon the return of the persons – elect to the Commission. The issuance of the certificate in Form 38 to the persons elected indicates the termination of the returning officer’s mandate, thus shifting any issue of validity, to the election court.”**

### **Conclusion and Disposal**

66. At the end of the day, we find that the presidential election results declared by the returning officer are final as far as that constituency is concerned and are only subject to question by the elections court. To the extent that **section 39(2)** and **(3)** of the **Elections Act** provides that the results declared by the returning officer are provisional, that is contrary to **Articles 86** and **138(2)** of the Constitution. To the extent that **regulation 83(2)** of the **Elections (General) Regulations 2012** provides that the results of the returning officer are subject to confirmation by the Commission, that is contrary to **Articles 86** and **138(2)** of the Constitution. To the extent that **regulation 87(2)(c)** of the **Elections (General) Regulations 2012** provides that the results that the returning officer shall transmit electronically to the Commission are provisional, that is contrary to **Articles 86** and **138(2)** of the Constitution.

67. We consequently make the following orders:-

a. it is declared that to the extent that **section 39(2)** and **(3)** of the **Elections Act** provides that the presidential election results declared by the constituency returning officer are provisional is contrary to **Articles 86** and **138(2)** of the Constitution and is therefore null and void;

b. it is declared that to the extent that **regulation 87(2)(c)** of the **Elections (General) Regulations 2012** provides that presidential election results declared by the constituency returning officer are provisional is contrary to **Articles 86** and **138(2)** of the Constitution and is therefore null and void;

c. it is declared that to the extent that **regulation 83(2)** of the **Elections (General) Regulations 2012** provides that presidential election results declared by the constituency returning officers are subject to confirmation by the Commission is contrary to **Articles 86** and **138(2)** of the Constitution and is therefore null and void;

d. it is declared that the presidential election results declared by the constituency returning officer are final in respect of the constituency, and can only be questioned by the election court; and

e. it is declared that to the extent that the 1<sup>st</sup> respondent interprets **section 39(2)** and **(3)** of the **Elections Act** and **regulations 83(2)** and **87(2)(c)** to mean that it can confirm, alter, vary and/or verify the presidential election results declared by the constituency returning officer in the particular constituency is contrary to **Articles 86** and **138(2)** of the Constitution and is therefore null and void.

68. Regarding costs, we consider that this is a public interest suit filed by the petitioners to protect the right to have a free and fair presidential election. The petitioners have succeeded in helping clarify the law on this important issue of governance. Costs usually follow the event, but in the particular circumstances of this petition we order that each side shall bear their own costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 7<sup>TH</sup> day of APRIL 2017.**

**A.O. MUCHELULE**

**JUDGE**

**W. KORIR**

**JUDGE**

**E.C. MWITA**

**JUDGE**

**The presidential election results declared by constituency returning officers were final and subject to challenge only via an election petition**

**Maina Kiai & 2 others v Independent Electoral and Boundaries Commission & 3 others**

**Petition No 207 of 2016**

**High Court at Nairobi**

**Milimani Law Courts**

**Constitutional and Human Rights Division**

**A O Muchelule, W Korir & E C Mwita, JJ**

**April 7, 2017**

**Reported by Beryl A Ikamari**

***Constitutional Law***-conduct of presidential elections-whether the results declared by the constituency returning officers were final and subject to challenge only via an election petition and whether the results declared by the constituency returning officers were subject to confirmation and verification by the IEBC and its principal returning officer-Constitution of Kenya 2010, articles 138(2) & 86; Elections Act, No 24 of 2011, section 39 & Elections (General) Regulations 2012, regulations 83(2), 84(1) and 87(2)(c).

***Jurisdiction***-jurisdiction of the High Court-whether the High Court had jurisdiction to entertain a

*matter which was a challenge to the constitutionality of statutory provisions which touched on the conduct of presidential elections-Constitution of Kenya 2010, articles 140 & 165(3)(d); Supreme Court (Presidential Election Petition) Rules, 2013, rules 4 & 12(2).*

**Civil Practice and Procedure**-*res judicata-whether a suit which dealt with an issue that could have been raised in another suit was res judicata-Civil Procedure Act (Cap 21), section 7.*

## **Brief facts**

The Petitioners stated that section 39(2) and (3) of the Elections Act and regulations 83(2), 84(1) and 87(2)(c) of the Elections (General) Regulations 2012 made under the Elections Act were contrary to articles 86(b) and (c) and 138(2) of the Constitution, in so far as they provided that the declaration of results for the presidential elections by the returning officer at the constituency level, were provisional and subject to confirmation by the IEBC after a tally of all votes cast in the election.

Articles 86 and 138(2) provided that the declaration by the constituency returning officer was final for the election in that particular constituency. The Petitioners stated that any impression that the results were provisional undermined the constitutional authority given to constituency returning officers and exposed the presidential election to abuse and made it prone to malpractice by the IEBC and its officers.

The IEBC had powers to appoint presiding officers and returning officers to conduct elections. Consequently, the IEBC appointed presiding officers for polling stations, constituency returning officers, county returning officers and its chairperson as the principal returning officer. The county returning officer was responsible for the elections of governor, senator and woman representative while the principal returning officer was responsible for the presidential election. The Petitioners stated that the appointment of the county returning officer and the principal returning officer created structures which offended articles 86 and 138(2) of the Constitution and provided opportunities to third parties to interfere with the declared constituency results.

The Petitioners stated that presidential elections were conducted at all polling stations and the persons responsible for the declaration of the results were the constituency returning officers and a single person, the principal returning officer could not be the returning officer for presidential elections. It was contended that the national tallying of presidential results at the national tallying centre for each candidate to the extent that it sought to usurp, confirm, or vary the constituency results as announced by the constituency returning officer was unconstitutional.

According to the IEBC, the High Court lacked jurisdiction to entertain the matter as it was the Supreme Court that had exclusive jurisdiction over disputes related to presidential elections. In asserting that point, the IEBC cited articles 87(2), 163(3) (a) and 165(5)(a) of the Constitution. The IEBC also stated that the issues raised in the petition were *res judicata* as they were the same as the issues raised and determined in *Raila Odinga & 2 others v IEBC & 3 others* [2013] eKLR. Additionally the IEBC said that section 39(2) and (3) of the Elections Act and regulations 83(2), 84(1) and 87(2)(c) of the Elections (General) Regulations 2012 were not contrary to articles 86 and 138(2) of the Constitution.

The 2<sup>nd</sup> Respondent agreed with the IEBC on the issues of jurisdiction and *res judicata*. The 2<sup>nd</sup> Respondent went further and stated that the Petitioners had not particularized the constitutional provisions which had allegedly been contravened and how those provisions had been contravened by the Elections Act and the Elections (General) Regulations 2012.

According to the 2<sup>nd</sup> Respondent they could only be one returning officer for the presidential election and that returning officer was the one contemplated under article 138(1) of the Constitution. The 2<sup>nd</sup> Respondent elaborated that the IEBC was obliged to produce a coherent and accurate result which could only be achieved if proper and orderly structures were put in place for the collation and verification of the final result of the presidential election.

## Issues

1. Whether the High Court had jurisdiction over a matter in which the constitutionality of statutory provisions which touched on the conduct of presidential elections was being challenged.
2. Whether the instant petition was *res judicata* and the issues in it were similar to the issues raised in *Raila Odinga & 2 others v IEBC & 3 others* [2013] eKLR.
3. Whether section 39(2) and (3) of the Elections Act and regulations 83(2), 84(1) and 87(2)(c) of the Elections (General) Regulations 2012 made under the Elections Act were contrary to articles 86(b) and 86(c) and 138(2) of the Constitution, in so far as they provided that the declaration of results for the presidential elections by the constituency returning officer, were provisional and subject to confirmation by the IEBC after a tally of all votes cast in the election.

## Relevant provisions of the law

**Constitution of Kenya 2010, article 81(e), 86, 88(1), 88(4)(h), 138(2), 140, 165(3)(d);**

### **Article 81(e);**

81. The electoral system shall comply with the following principles—

...

(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.

### **Article 86;**

86. 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.

**Article 88(1);**

88. (1) There is established the Independent Electoral and Boundaries Commission.

**Article 88(4)(h);**

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

...

(h) the facilitation of the observation, monitoring and evaluation of elections;

**Article 138(2);**

(2) If two or more candidates for President are nominated, an election shall be held in each constituency.

**Article 140;**

140. (1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.

**Article 165(3)(d);**

(3) Subject to clause (5), the High Court shall have—

...

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191;

**Civil Procedure Act (Cap 21), section 7;**

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

**Elections Act, No 24 of 2011, section 39;**

39. (1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.

(2) Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.

(3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed.

**Elections (General) Regulations 2012, regulations 83(2), 84(1) and 87(2)(c);**

**Regulation 83(1), 83(2) & 83(3);**

83. Tallying and announcement of election results

(1) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present—

(a) tally the results from the polling stations in respect of each candidate, without recounting the ballots that were not in dispute and where the returning officer finds the total valid votes in a polling station exceeds the number of registered voters in that polling station, the returning officer shall disregard the results of the count of that polling station in the announcement of the election results and make a statement to that effect;

(b) in the case of an election, publicly announce to persons present the total number of valid votes cast for each candidate in respect of each election in the order provided in regulation 75(2);

(c) complete Form 34 and 35 set out in the Schedule in which the returning officer shall declare, as the case may be, the—

(i) name of the respective electoral area;

(ii) total number of registered voters;

(iii) votes cast for each candidate or referendum side in each polling station;

(iv) number of rejected votes for each candidate in each polling station;

(v) aggregate number of votes cast in the respective electoral area; and

(vi) aggregate number of rejected votes; and

(d) sign and date the form and—

(i) give to any candidate, or agent present a copy of the form; and

(ii) deliver to the Commission the original of Form 34 and 35 together with Form 36 and Form 37 as the case may be.

(2) The results of the presidential election in a constituency shown in Form 34 shall be subject to confirmation by the Commission after a tally of all the votes cast in the election.

(3) The decisions of the returning officer on the validity or otherwise of a ballot paper or a vote under this regulation shall be final except in an election petition.

#### **Regulation 84(1);**

84. Venue of final tallying

(1) A final tallying of results for the respective elective posts shall be at a venue gazetted by the Commission for that purpose.

#### **Regulation 87(2)(c);**

(2) The returning officer shall after tallying of votes at the constituency level—

(a) announce the results cast for all candidates;

(b) issue certificates to persons elected in the National Assembly and county assembly elections in Form 38 set out in the Schedule; and

(c) electronically transmit the provisional results to the Commission.

### **Supreme Court (Presidential Election Petition) Rules, 2013**

#### **Rule 4;**

“These Rules may apply to a petition filed in relation to election to the office of president and includes a petition arising –

a. upon the declaration by the Independent Electoral and Boundaries Commission of the President-elect;

b. pursuant to Article 138(1), (2), (3), (4), (5), (6) and (10) and Article 140 of the Constitution;

- c. pursuant to section 39 of the Elections Act; and
- d. in an election other than a general election.”

**Rules 12(2);**

(2) The grounds upon which a petition under sub-rule (1) may be filed include—

- a. the validity of the conduct of a presidential election;
- b. the validity of the qualification of a president-elect;
- c. the commission of an election offence as provided under Part VI of the Elections Act;
- d. the validity of the nomination of a presidential candidate; or
- e. any other grounds that the court deems sufficient provided such ground shall not be frivolous, vexatious and scandalous.

**Held**

1. The Supreme Court had exclusive original jurisdiction to hear and determine disputes relating to the election of the president under article 140 of the Constitution. Article 140 of the Constitution stated that a petition to challenge the election of the President-elect was to be filed at the Supreme Court within 7 days after the date of the declaration of the results of the presidential election. August 8, 2017 was the date of the next general election and a petition to challenge a presidential election could only be filed after the declaration of results subsequent to that general election.
2. The Supreme Court (Presidential Election Petition) Rules, 2013 were made pursuant to the provisions of article 163(8) of the Constitution. Under rule 4 of the Supreme Court (Presidential Election Petition) Rules, 2013, the Supreme Court had power to exercise exclusive original jurisdiction when a question arose as to the validity of the presidential election after the declaration of the results. Rule 12(2) of the Supreme Court (Presidential Election Petition) Rules, 2013, provided for the grounds upon which the Supreme Court petition would be filed. Those grounds included the validity of the conduct of the presidential election, the validity of the qualifications of a President-elect, the validity the nomination of a president elect and the commission of an election offence and any other ground that the Court deemed sufficient provided that it was not frivolous, vexatious and scandalous.
3. The instant petition was not based on any of the grounds recognized in rule 12(2) of the Supreme Court (Presidential Election Petition) Rules, 2013. The Petitioners challenged the constitutionality of section 39(2) and 39(3) of the Elections Act and regulations 83(2), 84(1) and 87(2)(c) of the Elections (General) Regulations 2012. Under article 165(3)(d) the Court had jurisdiction to hear and determine the question as to whether any law was inconsistent with or in contravention of the Constitution.
4. *Res judicata*, a principle of law that seeks to ensure that there is conclusiveness in litigation is recognized in section 7 of the Civil Procedure Act. The elements of *res judicata* are that: -
  - a. the former judgment or order must be final;

- b. the judgment or order must be on merits;
  - c. it must have been rendered by a court having jurisdiction over the subject matter and the parties;  
and
  - d. there must be between the first and the second action identity of parties, of subject matter and cause of action.
5. In the *Raila Odinga* petition, the matter at issue was not the constitutionality of section 39(2) and (3) of the Elections Act and regulations 83(2), 84(1) or 87(2) of the Elections (General) Regulations. It was the validity of the outcome of the presidential election held on March 4, 2013. The *Raila Odinga* petition was brought under article 140 of the Constitution. It could not be argued that the issues of constitutionality raised in the instant petition ought to have been raised in the *Raila Odinga* petition.
  6. The issues raised in the instant petition were not the same as the issues raised in the *Raila Odinga* petition. Therefore, the instant petition was not *res judicata*.
  7. The purpose and effect of a statute were recognized in case law as considerations when determining the constitutionality of a statute. Where the purpose or effect of a statute was to infringe on a fundamental right or freedom, that statute was unconstitutional.
  8. The rebuttable presumption that legislation was constitutional was applicable to the interpretation of statutes. That rebuttable presumption of constitutionality of statutes was to the effect that the legislature understood and appreciated the needs of the people, and that the laws it enacted were directed at problems which were made manifest by experience and therefore the enacted laws were reasonable and fit for the purposes of the enactment.
  9. The Constitution of Kenya 2010 was promulgated with the promise in article 38(2) that elections would be free, fair and regular, based on universal suffrage and the free expression of the will of the people. Article 81(e) of the Constitution provided that elections were to be by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner. Article 88(1) of the Constitution established the Independent Electoral and Boundaries Commission (IEBC) which was charged with ensuring that the electoral system was simple, accurate, verifiable, secure, accountable and transparent. Promptness in announcing election results was a requirement under articles 86(a), 86(b) and 86(c) of the Constitution. Lastly, article 88(4)(h) of the Constitution provided for facilitation of the observation, monitoring and evaluation of elections. The standards provided for under those provisions of the Constitution were the standards against which the impugned provisions were to be assessed.
  10. Under the Elections (General) Regulations 2012 the IEBC had the mandate to appoint a presiding officer for each polling station and a returning officer for each constituency. Under those provisions the IEBC appointed county returning officers to manage county elections and a principal returning officer to manage the presidential election. Those appointments amounted to an exercise of power provided for by the Constitution and statute.
  11. Under the Constitution, it was acknowledged that it was at the polling station that the actual votes were to be cast, counted and tallied and the results declared. If there was any dispute regarding the inclusion of a ballot paper or rejection of a ballot paper, the presiding officer would deal with it and make a determination. Those results were to be transmitted to the returning officer who would proceed as per the terms of regulation 83(1) of the Elections (General) Regulations 2012.
  12. There was tension between regulations 83(2) and 83(3) of the Elections (General) Regulations 2012. Regulation 83(3) stated that the returning officer's decision on the validity or otherwise of a ballot paper or vote was final except in an election petition while regulation 83(2) stated that the returning officer's decision with respect to the declaration of the results of a presidential election was not final but was subject to confirmation by the IEBC. That confirmation was to be done by the principal returning officer at the national tallying centre.

13. In Black's Law Dictionary 9<sup>th</sup> Edition, the word confirmation as used in regulation 83(2) meant the act of giving formal approval or the act of verifying or corroborating a statement and the word confirm meant to give formal approval or to verify or corroborate. From the given definition, the meaning of the phrase subject to confirmation under regulation 83(2) was that once the constituency returning officer tallied, verified and declared the results of a presidential election, the results were subject to further verification, approval, disapproval, or declaration by the IEBC. To that extent regulation 83(2) was in direct conflict with regulation 83(3) which stated that the declaration by the constituency returning officer was final and could only be challenged by way of an election petition. The same controversy was created in regulation 87(2)(c) which concerned electronic transmission of provisional results to the Commission (IEBC.) In Black's Law Dictionary 9<sup>th</sup> Edition, the term provisional meant temporary or conditional.
14. Under articles 86(b), 86(c), 138(2) and 138(3)(c) of the Constitution, the process leading to the declaration of presidential results started at the polling stations with the casting of votes. The votes would then be counted and tabulated and the results announced promptly by the presiding officer at the polling station. The presiding officer would then complete Form 34 by indicating the votes cast in favour of presidential candidates. The results in Form 34 would then be transferred to the constituency tallying centre.
15. At the constituency tally centre, the results would be openly and accurately collated and promptly announced by the constituency returning officer, who would then issue a certificate in Form 37. Form 37 would show the result of the declaration by the constituency returning officer as provided for under regulation 87(1).
16. The declaration and issuance of a certificate by the constituency returning officer meant that the results certified by the returning officer for each presidential candidate with regard to that constituency were final and could only be challenged in the Supreme Court in an election petition. What was left was for the IEBC, by itself or through the principal returning officer, to collate and tally the results from the 290 constituency returning officers and make a declaration as to who, from the calculation of the total number of votes as shown by the returning officers, was the winner of the presidential election.
17. The Commission, by itself or through any of its officers, could not, at the national tallying centre or elsewhere, engage in any exercise of confirmation of the results declared by the constituency returning officers. The IEBC could not purport to cancel the results or rectify whatever error appeared in the certificates issued by the returning officers. To do so would be perilous, and would affect and undo the voters' verdict, and also encroach on the powers of the election Court.
18. The presidential election results declared by constituency returning officers were not provisional or subject to confirmation at the national tallying centre. The IEBC had no power to verify or confirm the results declared by the constituency returning officer. Those results were only subject to question by the election court. To the extent that section 39(2) and (3) of the Elections Act provided that the results declared by the returning officer were provisional, that provision was contrary to articles 86 and 138(2) of the Constitution.

*Petition allowed.*



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