REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO, KIAGE, M'INOTI & MURGOR, JJ. A)

CIVIL APPEAL NO. 105 OF 2017

BETWEEN

THE INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION……….......…....….........APPELLANT

AND

MAINA KIAI…………...…………………………......1ST RESPONDENT

KHELEF KHALIFA……………………………..........2ND RESPONDENT

TIROP KITUR…………………….....……..................3RD RESPONDENT

THE ATTORNEY-GENERAL…………….…...........4TH RESPONDENT

KATIBA INSTITUTE………………….....………......5TH RESPONDENT

COALITION FOR REFORMS

& DEMOCRACY…...6TH RESPONDENT

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**Muchelule, Korir & Mwita, JJ.**) dated 7th April 2017*

in

Constitutional Petition No. 207 of 2016

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JUDGMENT OF THE COURT

When the people of Kenya adopted, enacted, and gifted themselves and their future generations the

2010 Constitution, it was not an ordinary, common- place act. Nor was it an empty ritual. Rather, it was an epochal moment, pregnant with meaning and significance, and speaking to the indomitable will of the people to take charge of their destiny and bend the arc of history to align with their most cherished aspirations and ideals as to how they wished to be governed, and to organize their affairs. Theirs was doubtless the most momentous act of sovereignty and self-determination since Independence, and in the Constitution, they declared the birth of a new dispensation founded on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. And it is no accident that Chapter One of the Constitution proclaims the **sovereignty of the people, the supremacy of the Constitution** and imposes on every person a solemn obligation **to respect and defend the Constitution**.

The Constitution goes on to declare our Republic to be a multi party democratic State founded on the national values and principles of governance captured in Article 10. These values are not mere suggestions or aspirations to be attained at some future date, by generations yet unborn. They are directive and obligatory principles that are immediately and presently binding on all State organs, State officers, public officers and all persons whenever any of them apply, or interpret the Constitution; enact, apply or interpret any law; or make or implement public policy decisions. They are broad and all inclusive in their reach, sweeping in their sway and peremptory in their command. They include, but are not limited to;

"10(1) (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.

(b) …

(c) good governance, integrity, transparency and accountability. …"

The people of Kenya arrived at those principles out of a studious consideration and appreciation of the travails and trials of our nationhood and the struggles and sacrifices that they, and their heroic compatriots, had made to bring freedom and justice to our land. They were also keenly aware that the ties that bind them in united nationhood are periodically stretched and strained at election time and so sought to insulate the electoral process from the deleterious perils and malaise of opacity, corruption, crime and malpractice. The antidote they prescribed was an electoral system founded on, and infused with, clearly defined core principles including, in particular, ***free and fair elections*** that are conducted by an independent body, are transparent in character and administered in an impartial, neutral, efficient, accurate and accountable manner.

This appeal, as were the proceedings giving rise to it, are a call to the Judiciary to authoritatively pronounce on whether those constitutional principles are upheld and given effect to, or are violated and infringed, by certain provisions of the Elections Act (the Act) and the Regulations made thereunder, in so far as they relate to the results of presidential elections. It is a question of first importance that implicates this Court's understanding of electoral accountability, the sanctity of the vote, the giving effect to the will of the people in the matter of elections and its overall constitutional philosophy.

The appeal arises from the judgment and decree of a three-judge bench of the High Court (***Muchelule, Korir,*** and ***Mwita JJ.****)* delivered on 7th April 2017. The judgment was rendered in a constitutional petition filed by ***Maina Kiai, Khelef Khalifa*****,** and ***Tirop Kitur****,* the 1st, 2nd and 3rd respondents, respectively, against the ***Independent Electoral & Boundaries Commission***, the

appellant, and ***the Attorney-General***, the 4th respondent.

The petition was filed pursuant to Article 165(3) (d) of the Constitution and sought declarations regarding the constitutionality of provisions of the Act and the Elections (General) Regulations, 2012, (the Regulations), which are specified below. The petition was brought against the appellant as the body charged under Article 88 of the Constitution with the responsibility of conducting and supervising free and fair elections in Kenya. For his part, the 4th respondent was sued in his capacity as the principal legal adviser to the Government, who is also responsible for representing it in legal proceedings, and, for promoting, protecting, and upholding the rule of law and defending the public interest.

The 1st, 2nd and 3rd respondents prayed for the following reliefs in their petition: -

"a. 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;

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

c. A declaration that respective constituency returning officers are the persons responsible for the conduct and declaration of constituency presidential election results;

d. A declaration that constituency presidential elections results once declared and announced by respective constituency returning officers are final results for the purposes of that election;

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

The appellant and the 4th respondent opposed the petition on the grounds that the High Court did not have jurisdiction to hear and determine the matter because the questions raised therein related to presidential elections which were exclusively reserved by the Constitution for the Supreme Court; that the issues raised in the petition were *res judicata*, having been raised and determined in ***Raila Odinga & 2 Others v. IEBC & 3 Others, SC. Pet. No. 5 of 2013 ([2013] eKLR)***; and that in any event the impugned provisions of the Act and the Regulations were not unconstitutional. Before the hearing of the petition, the 5th respondent, Katiba Institute, a legal Non-Governmental Organisation focusing on the implementation of the Constitution of Kenya applied and was admitted in the petition as *amicus curiae* and permitted to make written and oral submissions on the dispute. The petition was subsequently determined on the basis of the pleadings on record as well as written and oral submissions.

Upon hearing the parties, the High Court held that it had jurisdiction to hear and determine the petition; that the issues raised in the petition were not *res judicata* and allowed the petition in the following terms:

"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 (it) 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 (it) 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 (it) 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;

e. it is declared that to the extent that the 1st 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 (it) is contrary to* ***Articles 86*** *and* ***138(2)*** *of the Constitution and is therefore null and void."*

The appellant was aggrieved by the judgment and decree of the High Court and lodged in this Court an appeal founded on 23 grounds, which ultimately they condensed into four broad grounds contending that the High Court erred by:

a) misapprehending the law regarding the constitutional and statutory requirements for declaration of the result of the presidential elections;

b) declaring section 39(2) and (3) of the Act and regulations 83(2) and 87 (2) unconstitutional, null and void;

c) holding that it had jurisdiction to hear and determine the petition; and

d) holding that the dispute was not res judicata.

Arguing the first ground, the appellant's learned counsel ***Mr. Nyamodi***, ***Mr. Kilonzo*** and ***Ms. Ewang*** raised the following three issues, namely, the difference between announcement and declaration of election results; the person responsible for declaration of the result in a presidential election, and the purpose and effect of section 39(2) and (3) of the Act.

On the first issue counsel submitted that to appreciate the meaning of, and the difference between "announcement" and "declaration" of election results, the context in which the two terms are used in the Constitution and Act must be appreciated. They contended that "announcement of the election results" as used in Article 86 (c) of the Constitution and in the Act and Regulations means making the results of an election publicly known. On the other hand "declaration" as defined in ***Black's Law Dictionary***, ***9th edition,*** means "*a formal statement, a proclamation or announcement especially one embodied in an instrument*". Relying on the judgment of the Supreme Court in ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, [2014] eKLR***, the appellant submitted that a declaration is a formal

pronouncement in the electoral process by a person authorized either by the Constitution or the law to make the declaration, which pronouncement brings the electoral process to an end. Accordingly, it was contended that the appellant's chairperson, who is usually appointed vide a Gazette Notice to act as the returning officer in a presidential election, is responsible for declaring the results of that election. In the appellant's view, an announcement of election results merely publicizes, without finality, the result of a particular election but declaration of results has the effect of determining the outcome of an election and bringing the electoral process to an end.

On the second issue, the appellant submitted that the Act empowers it to appoint returning officers to supervise the conduct of elections for various offices. The appellant further submitted that under regulation 3(1), the constituency returning officer is appointed to supervise the conduct of elections for members of the National Assembly and County Assemblies, while the county returning officer is appointed under regulation 3(4) to supervise elections of Governor, Senator and Woman Representative. The appellant therefore contended that the returning officer referred to in Article 86 (c) is any returning officer appointed by it for purposes of supervising the conduct of an election while for purposes of the presidential election, the returning officer is its chairperson. Referring to Article 138(3) (c) and (10) it was urged that the same vests the duty to declare the results of the presidential elections in the appellant and its chairperson. In the appellant's view, a correct reading of those provisions demonstrates that the constituency returning officer has no mandate to declare results of a presidential election. The appellant relied on ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*** (supra) in support of the contention that it is only its chairperson who has the mandate to declare the result of the presidential election. Accordingly, in the appellant's view, the conclusion by the High Court that the results of the presidential election announced by the returning officer in the constituency are final amounts to extinguishing the constitutional mandate of the appellant and its chairperson.

Turning to the third issue, the appellant urged that the ***Independent Review Commission (the Krieglar Commission),*** appointed to investigate all aspects of the 2007 presidential election in Kenya recommended that election results be declared final only after proper scrutiny and verification. It submitted further that Article 138(3) (c) as read with Article 138(10) emanated from that recommendation and that sections 39(2) and (3) of the Act and regulation 83(2) were intended to give effect to those constitutional provisions. It was the appellant's further contention that the High Court erred by failing to consider and appreciate the purpose and effect of sections 39(2) and (3) of the Act before holding that those provisions were unconstitutional.

As regards the presidential election, it was the appellant's view that Article 138 is self-contained and that there was no need to look at any other provision of the Constitution. That Article, it was submitted, does not apply to elections of any other office save the office of president, a distinction that the High Court failed to appreciate. Regarding Article 86, the appellant submitted that its purpose is to set out the constitutional principle that election results should be announced promptly and that Article 138 (2) does not provide for the manner of declaration of presidential results. The appellant maintained that in a presidential election, the only act that takes place at the polling station is counting and announcing of the results, with the verification and tallying being escalated upwards.

Lastly, the appellant submitted that the constituency returning officer is not mandated to declare the results of the presidential election; that the High Court assigned to him a role not contemplated by the Constitution; and that upholding the High Court judgment would mean that in a presidential election, there would be 290 returning officers, 290 declared results, and possibly 290 election petitions and 290

respondents, which would be impracticable and an absurdity.

Moving on to the second ground, the appellant submitted that Article 138 (3) (c) requires it to verify the count before declaring the result of the presidential election and for that purpose its chairperson is required to tally and verify the count from all polling stations before declaring the result. In its view, the legal definition of the phrase "to verify" is "***to prove to be true; to confirm or establish the truth or to authenticate***" and not to alter and/or vary results as was interpreted by the High Court. It was the appellant's contention that ballot papers are election materials, which must be accounted for and that the confirmation, verification and collation carried out by its chairperson is a control measure to ensure that what is received from the returning officer at the constituency tallying centre as provided under Article 86(b) is consistent with the election materials that were issued for purposes of conducting the election. According to the appellant therefore, the collation, tallying, verification and confirmation of presidential results is a purely mathematical exercise for the purpose of consolidating the results received from each returning officer and that it is on that basis the results are referred to as provisional. As regards the constituency returning officer, the appellant maintained that his role is to collate and publicly announce the results from each polling station in the constituency in a presidential election in line with Article 138 (2) and to deliver to its chairperson the collated results which he in turn tallies and verifies in line with Article 138(3) (c), before declaring the result in accordance with Article 138(10).

On the penultimate ground, the appellant submitted that under Article 163(3) (a), the Supreme Court has exclusive original jurisdiction to hear and determine disputes relating to the election of the president. That jurisdiction, it was contended, was not shared with the High Court and the High Court therefore erred in arrogating itself a jurisdiction that it did not have. In support of that submission the appellant relied on the decisions of the Supreme Court in ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Advisory Opinion No. 2 of 2012, [2012] eKLR; Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others, CA. No. 2 0f 2011;*** and ***In the Matter of the Interim Independent Electoral Commission, Const. App. No. 2 of 2011*** and added that a presidential election involves a series of events and is not a one-off event. In its view, disputes relating to elections to the office of president are not only those that arise after the presidential results have been declared, but include those disputes which might arise before, during and after the conduct of elections. The appellant also added that the High Court assumed jurisdiction over the matter because it erroneously found that the process of election of the President had not commenced, yet on 17th March, 2017 by Gazette Notice No. 2692 the appellant's chairperson had gazetted the commencement of the presidential election.

On the last ground, the appellant urged that the issues raised in the petition were directly related to the issue which was raised, heard and determined by the Supreme Court in ***Raila Odinga & 2 Others v. IEBC & 3 Others*** (supra). The appellant further contended that ***Africa Centre for Open Governance (Africog)*** in which the 1st respondent is a director, was a party to the petition. The appellant cited ***Okiya Omtatah Okoiti v. Communications Authority of Kenya & 14 Others ([2015] eKLR)***, and submitted that a party ought to litigate in one suit all matters that belong to the subject in controversy and that what the 1st, 2nd and 3rd respondents were doing was litigating by installment. The appellant therefore urged us to find that the High Court erred by entertaining issues that were barred by *res judicata*.

The 4th respondent, ***Prof. Githu Muigai, SC***, appeared in person assisted by **Mr. Mutinda** and supported the appeal, though he elected not to address the issue of jurisdiction and *res judicata*, opting instead to adopt the submissions made by the appellant. The Attorney-General began by submitting that the High Court erred by holding that Section 39 (2) and (3) of the Act and the Regulations contravened Articles 86 and 138, and were therefore unconstitutional. Focusing first on interpretation of the Constitution, he submitted that the local jurisprudence on interpretation of the Constitution had become

uncertain because courts tended to make their determinations on the judicial philosophy of *"… the best political outcome".* The Attorney-General argued that such an approach was not a proper basis for constitutional interpretation; that a legitimate interpretation demanded fidelity to the Constitution; and that an illegitimate interpretation results in an illegitimate amendment of the Constitution. Citing ***Interpreting Constitutions: A Comparative Study, Oxford University Press, 2006*** by Prof Jeffrey Goldsworthy, the Attorney-General argued that judges, unlike other political actors, should be constrained by the laws of interpretation.

In his view, whilst both the literal meaning of the provision and the spirit of the Constitution ought to be considered, where the provision is clear and unambiguous, it was unnecessary to invoke the spirit of the Constitution. As far as he was concerned, there were no inconsistencies between Articles 86 and 138 and sections 39 (2) and (3). It was urged that in interpreting the Constitution, the correct tools and techniques must be employed, based on an honest, transparent and rational reading of the constitutional text. On the authority of ***In the Matter of Zuma & 2 Others v The State*, *Case No. CCT/5/94***; ***Attorney-General (CTH) ex rel. Mckinlay v. The Commonwealth*** and a scholarly text by Aharon Barak titled, ***Purposive Interpretation in Law, Princeton University Press, 2005,*** it was submitted that the language of the text of the Constitution must be respected and were it to be ignored, the result would be divination rather than interpretation. Also cited was the case of ***Theophanous v The Herald and Weekly Times Ltd & Another* (1994) 182 CLR 104** to drive the point that it is not legitimate for the court to construe the Constitution by reference to political principles or theories not supported by the constitutional text. Furthermore, that a broad purposive or normative interpretation should be limited to cases concerning human and family rights so that, in all other cases the court is called upon to do no more than to construe the text of the concerned provision.

In the Attorney-General's view, the language of Article 138 (3) (c) was plain that in a presidential election, after the counting of the votes at the polling station, only the appellant was empowered to tally and verify the count and declare the result. We were urged to err on the side of caution by finding that the chairperson of the appellant is the person authorized to conduct the presidential election, to verify the count and to declare the final result, and that the High Court erred by holding that there was conflict and inconsistency between the constitutional and the statutory provisions in question, when that was not the case. At best, he asserted, the alleged inconsistencies were illusory and that, had the High Court employed the proper and literal interpretation of both Articles 86 and 138, it would have concluded that there was no inconsistency between them and section 39 (2) and (3) of the Act. Those provisions, he maintained, address sequential steps that explain a chain of events and are not unrelated episodic events and further, that whilst voting in all elections is regulated by Article 86, announcement or declaration of the result of the presidential election is regulated by Article 138 and the Act.

While admitting that there may be situations when context is important in interpreting a statutory or a constitutional text, he nevertheless maintained that the underlying intent of the provision in question is what is important and that there must be a good reason why there is a clear distinction between presidential and other elections, although they are held on the same day. In his view, in a presidential election, the whole country becomes one national constituency and the returning officer for that purpose is the appellant's chairperson.

Next, the Attorney-General submitted that based on a harmonized reading of Article 86 and Article 138(3) (c), the Constitution prescribes systematic steps which must be accurate, verifiable, secure, accountable, and transparent culminating in the declaration of final results of a presidential election by the appellant's chairperson. He added that Article 138(3) (c) empowers the appellant, after the counting of votes in the polling stations, to tally, verify the count, and declare the results.

Relying on ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*** (supra) the Attorney-General submitted that declaration of presidential results involves a plurality of election officers who are obligated to give returns of the results in prescribed forms, culminating in the issuance of a certificate by the chairperson of the appellant. He added that Form 38 is the instrument of final declaration in all the other elective positions, which is issued to the successful candidate pursuant to the results announced by the returning officer. Regarding the successful candidate in the presidential election, the Attorney-General contended that the certificate issued by the appellant's chairperson was the instrument of final declaration and that it is only after issuance of the certificate that the computation of time for the filing of an election petition would start to run. Accordingly, contrary to the judgment of the High Court, the declaration by the returning officers at the constituency cannot be final as regards presidential elections.

The Attorney-General submitted further that to give effect to Article 86 which requires transparency and prompt announcement of election results, Parliament set up a mechanism under section 39(2) and (3) of the Act for the announcement of results from polling stations, constituency tallying centres, county tallying centres and the national tallying centre. He added that results declared by the constituency returning officer for the Governor, Senator, Woman Representative and President are provisional but final as regards the Member of the National Assembly and Member of County Assembly. Similarly, in his view, results declared by the county returning officer are final in respect of Governor, Senator and Woman Representative, but provisional in respect of the election for the President.

As far as he was concerned, there was no tension between regulation 83(2) and (3) as was held by the High Court. He submitted that regulation 83(3) concerns the decision of the returning officer on the validity or otherwise of a ballot paper or vote, whereas regulation 83(2) concerns the results of the presidential election as shown in Form 34 which are subject to confirmation by the appellant in terms of Article 138 (3) (c). He concluded that the confirmation envisaged by section 39(2)(3) of the Act and regulation 83(2) and 87(2) (c) is intended to give full effect to Articles 86 and 138(3) (c) and is therefore constitutional, contrary to the holding by the High Court

Opposing the appeal, the 1st, 2nd and 3rd respondents, who were represented by ***Mr. Otieno, Prof. Sihanya*** and ***Mr. Oginga***, learned counsel, submitted that in interpreting the Constitution, the courts must pay due regard to its values and adopt an interpretation that is both substantive and purposive, while bearing in mind the mischief that the Constitution sought to cure. While accepting that there were provisions of the Constitution best suited for literal interpretation, the said respondents contended that the provisions in issue were not of that kind because they were informed by the desire to ensure transparency at the lowest electoral units. On the authority of the advisory opinion of the Supreme Court in ***In the Matter of the Interim Independent Electoral Commission*** (supra), the trio submitted that the spirit and tenor of the Constitution must inform the process of interpretation bearing in mind the ills that the Constitution set out to cure.

Turning to the question of declaration of results, these respondents submitted that the results of a presidential election announced at the constituency were final and not subject to any changes or alteration, except by the election court. In their view, by dint of Article 138(2), voting in the presidential election takes place at the constituency level where each constituency is required to conduct and hold presidential elections. Under Article 86(b), they further urged, polling takes place at the polling stations in the constituency after which, the results are counted, tabulated and promptly announced by the presiding officer. Once announced, they contended, such results are final as regards the polling station to which they relate and are thereafter transmitted from the polling station to the returning officer. Article 86(c) then requires the results from different polling stations to be openly and accurately collated and promptly announced by the returning officers.

In the view of these respondents, elections are held in each constituency, and in accordance with Article 89 of the Constitution, Kenya is divided into 290 constituencies. According to them, there is no distinction between presidential and other elections. The polling station is manned by a presiding officer who at the end of the day counts the votes cast and announces the results, which are then passed on to the returning officer. Once this is done, the appellant is obliged to tally the results, which can only be done by the returning officer, who is part and parcel of the appellant. They further submitted that the appellant as a body corporate operates through its officers called returning officers and donates to them power to conduct elections. They added that the locality where the elections are held infuses transparency and accountability to the electoral process as required by Article 85 of the Constitution, and that at the constituency level once the results are declared, candidates are obliged to sign declaration forms. Having made such declarations, they submitted, it was not open to any other entity, elsewhere, to alter those results. To do so, they contended would not only be an absurdity but would undermine the transparency and integrity of the electoral process.

Regarding Article 138(10), these respondents contended that there is a difference between “results” and “result” and that the Article provides for declaration of “the result” of the presidential election, which they interpreted to mean a final outcome, regarding which it is the function of the appellant’s chairperson to declare. In declaring the result under that Article, they urged, the appellant’s chairperson does not give the number of votes obtained by the various presidential candidates. On the other hand, they contended, “results” means the total aggregate votes received by each candidate, whose announcement is made by the returning officers and precedes the declaration of the election result.

Making out their case why the chairperson of the appellant has no mandate to alter the announced results, the three respondents argued that the election materials containing the returns of the elections are retained at the constituency level and none is delivered to the appellant’s headquarters so as to form the basis of comparison and confirmation of the results announced by the constituency returning officer. In the view of these respondents, to the extent that counting and tabulation of the votes takes place at the polling station, confirmation of the results can only take place at that level because no recount or re-tallying can take place at the national level in the absence of the necessary election materials. To purport to recount and verify all votes cast in all polling stations at the appellant’s national tallying centre would, in the view of the three respondents, be impractical, slow and in utter violation of Article 86, which obliges the appellant to ensure that whatever voting method is adopted is simple, accurate, verifiable, secure, accountable and transparent and also in violation of the constitutional value and principle of prompt announcement of results.

To the three respondents, finalizing the results at the polling centres and the constituency is consistent with the constitutional principle of devolution under Article 10 and that it is transparent, constitutional, and in the public interest to finalize results at the polling station and the constituency. If it was the intention of the Constitution that the appellant should at the national tallying centre confirm or alter the announced results, they maintained, it would have provided so in express terms.

Turning to the jurisdiction of the High Court to hear and determine the petition, the three respondents submitted that the High Court properly exercised its jurisdiction under Article 165(3) (d) (i) of the Constitution which confers on it jurisdiction to hear any question on the interpretation of the Constitution, including determination of whether any law is inconsistent with the Constitution. It was their position that the petition did not challenge the election of a president-elect and therefore could not to have been filed in the Supreme Court.

Lastly, on whether the petition was *res judicata,* the three respondents submitted that issues raised in the petition had never been litigated and determined by a court of competent jurisdiction and that they,

as parties, had not previously litigated upon the matter before any other court. It was their submission that the High Court was moved for the very first time in the petition to pronounce itself on the constitutionality or otherwise of the impugned provisions of the Act and the Regulations, and that ***Raila Odinga & 2 Others v. IEBC & 3 Others*** (supra), did not raise the same issues as the petition and the parties therein were different from those in the petition. Accordingly, we were urged to find that *res judicata* could not be raised against the petition.

Taking their turn, learned counsel for the *amicus curiae*, ***Ms. Nkonge*** and ***Mr. Waikwa*** urged that the appellant's concerns regarding reconciliation of electoral materials at the constituency and national levels were taken care of by the provisions of the law because once the votes are ascertained at the constituency level, the chairperson of the appellant will declare the result and issue a certificate thereby bringing the presidential election to an end. Central to the petition, they contended, was the integrity of the electoral process. In the view of the *amicus curiae*, the real issue was not about reconciliation of electoral materials at the constituency and national levels, but the certainty of votes cast. They maintained that in the event of errors, it was not the province of the appellant's chairperson to make corrections but rather of the election court. For good measure they added that the law provided sufficient safeguards against human errors in the electoral system.

The *amicus curiae* shared the view of the 1st, 2nd and 3rd respondents that the appellant's chairperson or its officers cannot, under the guise of confirming, alter at the national tallying centre, the results declared at the constituency by the returning officer. Relying on ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*** (supra) and ***George Mike Wanjohi v. Stephen Kariuki & 2 Others [2014] eKLR*** the *amicus curiae* submitted that Articles 86 and 138 (2) were clear and unequivocal and that they did not render themselves to any other interpretation except literal.

Turning to jurisdiction, the *amicus curiae* submitted that the questions presented in the petition and the reliefs sought therein directly engaged the jurisdiction of the High Court under Article 165 (3) (d) (i) and (ii). It was further contended that the subject matter of the petition was not the validity of a presidential election, but the consistency of a law or regulations with the Constitution. In the view of this party, the jurisdiction of the High Court to determine the consistency of a law with the Constitution was original, and unfettered and could only be exercised by the Supreme Court at first instance, where, in the course of determining the validity of a presidential election, a question of constitutionality of a law was introduced and required determination of the Supreme Court to comprehensively dispose of the question of validity of presidential election.

It was further contended that even if the Supreme Court had jurisdiction to resolve the issue, that jurisdiction was shared with the High Court and judicial prudence dictated that the High Court should be accorded the first chance to determine the questions presented in the petition. Lastly, on this issue, the *amicus curiae* submitted that jurisdiction arises at the time of the institution of the suit, and is not lost because of subsequent intervening events, such as the declaration of commencement of election of the president. As regards *res judicata*, the *amicus curiae* submitted that the petition was a matter of public interest, which should not be defeated by the principle of *res judicata*.

Finally, we heard ***Mr. Orengo, SC, Dr. Otiende*** and ***Mr. Mwangi***, for the 6th respondent. It bears pointing out that this respondent did not participate in the petition before the High Court but instead applied and joined the proceedings in this Court with the consent of all the other parties. The 6th respondent took the view that to the extent that the appellant claimed that section 39(2) and (3) of the Act and regulations 83(2) and 87(2) (c) empowered it to confirm, alter, vary or verify the presidential election results declared by the constituency returning officer, those provisions were inconsistent with Article 86 and 138(2) of the Constitution. It was further submitted that under Article 86 (b), it was the duty

of the presiding officer to count ballots, verify and announce results at the polling stations whereas under Article 86(c), it is the duty of the returning officer to verify, tally and announce the results at the constituency level. The mandate of the appellant's chairperson, it was urged, is to collate results received from returning officers country-wide and declare the same, as required by Article 183(3). The 6th respondent therefore concluded that verification takes place only at the polling stations; that verification of results cannot be conducted by any other person; and that the only verification that the appellant's chairperson can undertake is that provided by Article 138(4).

The 6th respondent disagreed with the Attorney-General that Article 138 of the Constitution is self-contained, contending that the election of the President, just like any other election, must comply with the general principles set out in Article 81 and be conducted generally in accordance with the Constitution.

On jurisdiction, the 6th respondent submitted that there was no election, the validity of which was under challenge in terms of Article 140 of the Constitution. It contended that the petition before the High Court did not raise any question relating to the validity of the election of the President held in 2013 and that at the time it was filed, there was no president-elect as contemplated by Article 140. It was further urged that the restriction of the High Court's jurisdiction under Article 165(5)(a) must be understood within the confines of an election whose validity is challenged in terms of Article 140. In the opinion of the 6th respondent, not every dispute in a presidential election is a dispute about the election of the President.

Lastly, on *res judicata,* the 6th respondent submitted that issues in the petition before the High Court and those in ***Raila Odinga & 2 Others v. IEBC & 3 Others*** (supra) were distinct and separate and that the Supreme Court did not deliver any judgment on merit on the issues raised by the 1st, 2nd and 3rd respondents in the petition. In addition, the 6th respondent added, the parties litigating in the petitions and before the Supreme Court were not litigating or suing under the same name or title.

Having carefully considered the record, the respective submissions by learned counsel and the authorities cited, we are of the view that three issues arise for our determination in this appeal, namely:-

a) whether the High Court had jurisdiction to hear and determine the petition;

b) whether the matters raised in the petition were *res judicata*; and

c) whether sections 39(2) and (3) of the Act and regulations 83(2) and 87(2) (c) are unconstitutional, null and void to the extent of the inconsistency.

We remind ourselves that this is a first appeal where our duty as spelt out in rule 29 of the Court of Appeal Rules, 2010 is to re-evaluate or re-analyse the evidence exhaustively and to draw our own inferences and make our own independent conclusions. As we do so, we pay due respect to the findings and conclusions of the first instance court, but will not hesitate to depart therefrom if they are based on no evidence, or are founded on a misapprehension of the law or evidence or are plainly wrong. Our latitude to depart is even greater where, as here, the petition in the High Court proceeded by way of affidavit evidence and the court below did not have the added advantage of hearing and seeing the live witnesses in testimony.

The first broad ground of appeal is that the High Court did not have jurisdiction to entertain the petition before it. The gist of the appellant's argument is that the issue before the High Court was a dispute relating to elections to the office of president and therefore by dint of ***Article 163(3)(a)***, the Constitution exclusively reserves the matter for determination by the Supreme Court and further ***Article 165(a)*** expressly prohibits the High Court from exercising jurisdiction over matters reserved for the exclusive

jurisdiction of the Supreme Court.

While conceding that the dispute before the High Court did not involve a challenge of the election of a president-elect, the appellant nevertheless contended, on the authority of the judgment of the Supreme Court in ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate,*** (supra) that the exclusive jurisdiction of the Supreme Court is not limited to disputes that arise after the conclusion of the presidential election, but also extends to disputes that may arise before and during the conduct of the presidential election. To the extent that the High Court declared the statutory provisions and regulations that were impugned before it unconstitutional, the appellant contended that the effect was to alter the process of declaration of the results in a presidential election, which has a direct bearing on the conduct of a presidential election. Accordingly, in the appellant's view, the matter was exclusively reserved for the Supreme Court and the High Court erred by assuming jurisdiction over it.

A corollary challenge is that the High Court assumed jurisdiction over the petition because it erroneously assumed that the process leading to the election of the President had not commenced. In this submission, the appellant contended that the High Court appreciated that the dispute was reserved by the Constitution exclusively for the Supreme Court but erroneously assumed jurisdiction on the basis that the process for the election of the President had not commenced. The appellant submitted that contrary to the conclusion by the High Court, the appellant's chairperson had on 17th March 2017 published ***Gazette Notice No. 2692*** setting in motion the process of election of the President to be held on 8th August 2017. The appellant urged us to find that had the High Court properly apprehended the factual situation, it could not have assumed jurisdiction.

The position of all the respondents, save the 4th respondent who, as we have noted, did not address the issues raised by the appellant on jurisdiction and *res judicata,* is that the High Court did not err by assuming jurisdiction over the petition. They submitted that the issue raised in the petition was whether the impugned provisions of the Act and the Regulations made thereunder were inconsistent with the Constitution. To that extent, the respondents contended that the High Court had jurisdiction by dint of ***Article 165(3)(d)(i)*** and ***(ii)***, which empower it to hear and determine any question whether any law is inconsistent with or in contravention of the Constitution or whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution. In their view, the petition before the High Court did not challenge the election of a president-elect as contemplated by Article 140 of the Constitution, and therefore there was no basis for the submission by the appellant that the matter was exclusively reserved for the Supreme Court.

The *amicus curiae* added that even if it were taken that the Supreme Court had jurisdiction over the matter, it was a shared jurisdiction with the High Court and that judicial precedence demanded that the petition be heard and determined first by the High Court. It also disputed the appellant's assertion that the High Court assumed jurisdiction on the basis that the process for the election of the President had not commenced. In its view, that was not the basis upon which the High Court assumed jurisdiction. Lastly, the *amicus curiae* invited us to find that the High Court had jurisdiction when the petition was filed in May 2016; that the jurisdiction was engaged as of that date; and that it could not be taken away by the subsequent commencement of the process for the election of the president.

We would agree with the appellant that the conclusion of the High Court on the question of jurisdiction is somewhat contradictory. The court first found that the petition did not involve a dispute relating to the elections of the office of the President within the meaning of Article 140. This is how the court expressed itself:

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

The court also found that the petition before it did not raise other issues connected with the election for the office of the President as would entitle the

Supreme Court to assume jurisdiction under rule 12(1) of the Supreme Court (Presidential Election Petition) Rules. The court identified those issues as the validity of the presidential election, declaration of a run-off, qualification of a president-elect, commission of an election offence, or validity of the nomination of a presidential candidate. The court concluded thus:

"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."

Later in the judgment the court veered from the position it had taken that the dispute before it did not relate to the elections of the office of the President and stated:

"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."

This begs the question whether, had the court found that the process of electing the President had commenced, as the appellant submitted it had, would the court have concluded that it had no jurisdiction to entertain the petition" In our view, having concluded that the petition did not involve a dispute relating to the election to the office of president and having found that it did not involve any of the matters set out in rule 12(2) over which the Supreme Court has exclusive jurisdiction, the plunge into the question whether the process of electing the president had commenced added nothing to the judgment but sheer confusion. It gives the impression, as the appellant correctly submitted, that had the court found that the process of electing the President had commenced, it would not have assumed jurisdiction, which is really not in sync with its first conclusion that the dispute did not involve election of the president or any issue under rule 12(2).

That lack of clarity notwithstanding, we are not hamstrung from determining the issue on its merit. The gist of the 1st, 2nd and 3rd respondents' complaint was laid out in paragraph 4 of the petition, which reads as follows:

"4. The petitioners brings (sic) this suit as a matter of public interest seeking relief for declaratory orders that regulations 83(2) and 84 of the Elections (General) Regulations are in contravention of the provisions of Articles 86(b), (c) and 138 (2) of the Constitution of Kenya 2010; and that the act of the 1st respondent appointing its chairperson to be the returning officer for presidential elections is contrary to the provisions of Articles 86 (b) (c) and 138 (2) of the Constitution of Kenya, 2010."

Prior to that, the said respondents had succinctly identified in the petition the jurisdiction of the High Court that they were invoking, in the following terms:

“***The petitioners bring this suit under Article 165 (2) (d) of the Constitution which grants this Honourable Court the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of- (i) the question whether any law is inconsistent with or in contravention of the Constitution; and (ii) the question whether anything said to be done under the authority of the Constitution or any other law is inconsistent with, or in contravention of the Constitution.”***

Paragraphs 37 to 41 of the petition set out in detail the manner in which the impugned regulations and section 39 (1), (2) and (3) of the Elections Act 2011 are, in the said respondents’ view, inconsistent with the Constitution. They concluded by praying for the seven reliefs, which we have already set out in this judgment, whose crux were declarations that the impugned provisions of the Act and of the Regulations were inconsistent with the Constitution, null and void.

From the foregoing, we harbour no doubt in our minds that the 1st, 2nd and 3rd respondents’ petition was first and foremost seeking determination by the High Court of whether the specified provisions of the Elections Act 2011 and the regulations made thereunder were inconsistent with or in contravention of the Constitution. The other prayers were consequential upon the court finding that the impugned provisions and regulations were indeed inconsistent with, or in contravention of the Constitution.

Does the High Court have jurisdiction under the Constitution to entertain such a petition" In our view, the answer is in the affirmative and lies squarely in Article 165(3) (d) of the Constitution which provides as follows:

“165 (3) Subject to clause (5), the High Court shall have –

(a)...

(b)...

(c)...

(d) jurisdiction to hear any question respecting the Interpretation of this Constitution including 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.”

Clause 5, to which the provision is subject, stipulates that the High Court shall not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court and those falling within the jurisdiction of the Employment and Labour Relations Court and the Environment and Land Court.

The question placed before this Court is whether the High Court determined issues that are exclusively reserved for the Supreme Court. Article 140 of the Constitution provides as follows on the jurisdiction of the Supreme Court regarding disputes as to validity of a presidential election:

“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.

(2) Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.

(3) If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination."

While a plain reading of the above provision leaves no doubt that the jurisdiction reserved exclusively for the Supreme Court is the determination of whether the President-elect has been validly elected as happened in ***Raila Odinga & 2 Others v. IEBC & 3 Others*** (supra), the Supreme Court has stated that a dispute relating to the elections to the office of president may arise even before the president-elect is declared pursuant to Article 138(10).

In its advisory opinion ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate,*** (supra), the Supreme Court noted that a dispute regarding the election of a president can arise in scenarios other than what is contemplated in Article 140. These will include a situation where there is no president-elect, as in the case where no candidate is declared to have been duly elected under Article 138(4), or where there is a dispute arising in the process of ascertaining the two candidates with the most votes for the purposes of a run-off. The Court concluded thus:

"[100] 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 a 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 nomination; it touches also 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.

[101] Does the entire question concerning Presidential elections belong to the Supreme Court's jurisdiction" Or is the Supreme Court's power limited by the express language of Article 140 of the Constitution...

[102] Besides, 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 arising after the election–while excluding those disputes, which might arise during the conduct of election."

We respect the opinion of the Supreme Court that there will be disputes relating to the elections to the office of President that arise even before the election of the president-elect has been announced. The Supreme Court (Presidential Petition Rules), 2013, and in particular rule 12 sets out some of the issues that may arise outside the strict confines of Article 140 of the Constitution, such as the validity of the nomination of a presidential candidate or commission of an election offence by such candidate.

What, in our view is engaged in this appeal, is the relationship between the exclusive jurisdiction of the Supreme Court and the jurisdiction of the High Court to interpret the Constitution. There is precedent from the Supreme Courts stating that, the fact that a matter is reserved for the Supreme Court does not

take away the jurisdiction of the High Court to interpret the Constitution and in appropriate cases, the Supreme Court will not consider the issue on first instance, but will consider the same in the context of its appellate jurisdiction.

In, ***In Re the Matter of the Interim Independent Electoral Commission*** (supra), the petitioner sought the advisory opinion of the Supreme Court as to the date of the first general election under the Constitution of Kenya, 2010. Under Article 163(6) of the Constitution the jurisdiction to give advisory opinions on any matter concerning county governments is vested exclusively in the Supreme Court. The Supreme Court found that the petition before it had properly engaged its exclusive jurisdiction to give advisory opinion. This is how the Court expressed itself on the issue:

"Now on the facts of the instant case, we would hold that election date is a question so central to county governments as to lie within the jurisdiction of this Court, in relation to the request for an advisory opinion."

Even after finding that the issue before it was properly within its exclusive jurisdiction to render an advisory opinion, the Supreme Court did not take the view that the jurisdiction of the High Court to interpret the Constitution as regards the date of the first general election was ousted. The Court found that the dispute before it also involved interpretation of the Constitution, which by dint of Article 165(3) is vested in the High Court. The Court was of the firm view that where litigation entails issues of constitutional interpretation, the matter must come in the first place before the High Court, with the effect that interpretation of the Constitution by both the Court of Appeal and the Supreme Court will have been limited to the appellate stages. It bears to quote in full the Court's conclusion:

"[45] In this instance similar questions, entailing constitutional interpretation, have been brought simultaneously before the High Court and the Supreme Court; and, as already noted, such a move by parties is apt to precipitate contretemps in resolving the question of jurisdiction. In principle, the Supreme Court commits itself to order and efficacy in the administration of justice, and to that end it may require that the process of litigation commenced in the High Court, and entailing constitutional interpretation, be exhausted and, if need be, followed by appellate procedures. In such circumstances, this Court will be cautious in considering a request for an opinion, to ensure the two jurisdictions do not come into conflict; and each case will be carefully considered on its merits.

[46] Although the applicant, in this instance, avowedly seeks an Advisory Opinion, the application amounts to a request for an interpretation of Articles 101(1), 136(2)(a), 177 (1)(a) and 180(1) of the Constitution, and clause 9 of the Sixth Schedule to the Constitution. As the applicant apprehends conflict in the said provisions, it is to be taken to be seeking the "correct" interpretation of the said provisions: it is not seeking a plain opinion-statement on the date of the next election. We find, therefore, that the question placed before us is not a normal one, within the Advisory-Opinion jurisdiction as envisaged under Article 163(6) of the Constitution.

[47] The application is still more inappropriate in the light of the several petitions pending before the High Court...The two cases seek the interpretation of the Constitution, with the object of determining the date of the next elections. Those petitions raise substantive issues that require a full hearing of the parties; and those matters are properly lodged, and the parties involved have filed their pleadings and made claims to be resolved by the High Court. To allow the application now before us, would constitute an interference with due process, and with the rights of parties to be heard before a Court duly vested with jurisdiction; allowing such an application would also constitute an impediment to the prospect of any appeal from the High Court up to the Supreme

Court. This is a situation in which this Court must protect the jurisdiction entrusted to the High Court."

Ultimately, the Supreme Court declined to exercise its exclusive jurisdiction, which it found properly engaged, and allowed the High Court to first exercise its jurisdiction to interpret the Constitution and the matter, in the event of any party being dissatisfied by the decision of the High Court, to end up before the Supreme Court through the appellate process.

In view of the foregoing, we conclude that the High Court had jurisdiction to determine the constitutionality of the impugned provisions of the Elections Act and the regulations made thereunder, and the fact that the 1st, 2nd and 3rd respondents could arguably have raised the issues before the Supreme Court under its rules, did not deprive the High Court of the jurisdiction vested by Article 165(3)(d). Accordingly, we are not persuaded that the High Court committed any error or assumed a jurisdiction that it did not have.

Turning now to the second broad ground of appeal, namely *res judicata*, the appellant criticizes the learned Judges as having "*erred in law and fact in holding that the matters before them did not run afoul (of) the doctrine of res judicata*." We have perused the record and note that the issue first arose in the appellant's replying affidavit in opposition to the petition before the High Court.

In its first formulation of *res judicata* as an issue for the High Court's determination, the appellant submitted that the issues the 1st, 2nd and 3rd respondents intended to canvas "***if looked at properly***" touched on the 2013 Kenya General Election and that to determine them would be akin to the High Court re-opening ***Raila Odinga & 2 Others v. IEBC & 3 Others,*** (supra). It submitted further that "the question posed by the 1st, 2nd and 3rd respondents on who is the principal returning officer for purposes of presidential election results was answered and/or should have been rightly posed" in that case. It contended that the issue of tallying in the presidential election was considered in ***Africa Centre for Open Governance (AFRICOG) v. Ahmed Issack Hassan & Another [2013]* eKLR**. It contended further that the petition was an attempt to bring the same cause of action as previously decided by the Supreme Court, albeit with **"*a few cosmetic changes.*"**

The learned Judges grappled with the subject, which they styled "the second preliminary issue," at some length before arriving at this conclusion;

"34... It is clear to us that the Supreme Court was not called upon to consider section 39(2) and (3) of the Election 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 Gladwel 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."

That finding has caused the appellant grief as expressed in its ground of appeal under consideration. Is the grief justified" We think not. *Res judicata* is a matter properly to be addressed *in limine* as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from **Section 7** of the Civil Procedure Act, 2010;

"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 the 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."

Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

The learned Judges were fully aware and applied their minds to these elements when, applying this Court's decision in ***Uhuru Highway Development Ltd v Central Bank of Kenya*** **[1999] eKLR** they rendered the elements as;

"(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."

The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest

of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.

There is no dearth of learning or authority surrounding this issue, and this Court has expressed itself on it endless times. In one recent decision, ***William Koross v. Hezekiah Kiptoo Komen & 4 Others [2015] eKLR****,* it was stated;

"***The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.***

Speaking for the bench on the principles that underlie res judicata, Y.V. Chandrachud J in the Indian Supreme Court case of Lal Chand v Radha Kishan, AIR 1977 SC 789 stated, and we agree;

'The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue."

The practical effect of the ***res judicata*** doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit. That much was stated by this Court in ***Ngugi v. Kinyanjui & 3 Others [1989] KLR 146*** when it held (at p147) that;

"3*. Section 7 was a mandatory bar from (sic) any fresh trial of a concluded issue and a Judge cannot competently get round that bar by obtaining the consent of the parties to an arbitration of a concluded issue."*

The simple question before us then is whether the learned Judges erred in their categorical finding that the Petition before them was not *res judicata,* and the answer to the question is a straight no. We have already noted that the appellant in its written submissions did not locate its *res judicata* objection within the four or five **Section 7** of the Civil Procedure Act elements that constitute it. Indeed, its submission at paragraph 88, was that *"...the issues that were raised in the High Court were* ***directly related*** *to the issues that were properly before the Supreme Court in* **Raila Odinga & 2 Others v. IEBC & 3 Others,** *(supra)"* (Our emphasis). With respect, that is not what *res judicata* entails.

The issue is not meant to be ***related***, (whatever that may mean) to issues in a previous suit. The requirement is that the issue ***be directly and substantially in issue***. It behoved the appellant to demonstrate each of those elements in **Section 7** of the **Civil Procedure Act**, which we have enumerated herein. It signally failed to do so. In fact, it made no effort to. We find no substance, with respect, in Mr. Kilonzo's submission before us that in so far as the petition that was before the High Court made several references to "previous elections," it was concerned with the Presidential election of 2013, and therefore all issues raised in the said Petition were *res judicata* as they ought to have been raised in ***Raila Odinga & 2 Others v. IEBC & 3 Others,*** (supra). We do not think that mere reference to that past election brings the matter within the purview of *res judicata*. The requirement is that the issue

raised in the later litigation should have been directly and substantially in issue in the former. They were not. It is a stretching of the facts a wee bit too far to describe the petition that was before the High Court as an attempt to re-litigate the Supreme Court verdict on the 2013 Presidential poll.

We are quite clear in our mind that the central issue in the ***Raila Odinga & 2 Others v. IEBC & 3 Others,*** (supra), namely the validity of the 2013 Presidential election, is not before us in this appeal. We are equally certain that the direct and substantial issue before us, namely the constitutionality of **Sections 39(2**) and **(3)** of the Elections Act, was not raised before, and determined by the Supreme Court in ***Raila Odinga & 2 Others v. IEBC & 3 Others,*** (supra). On that score alone, the plea of *res judicata* was for rejection.

The non-commonality of issues apart, the plea of *res judicata* was bound to fail on the basis that the parties between the two sets of proceedings are not the same, or those claiming under the same parties and litigating under the same title. This is the only other aspect of the *res judicata* requirements that Mr. Kilonzo addressed and we recorded him as contending that the commonality of parties is supplied by ***"the fact that Maina Kiai, the 1st respondent is a director of Africog, which participated in the 2013 Presidential Election Petition before the Supreme Court."*** He went on to assert that the 1st respondent ought to have raised all the issues now before us in those proceedings at the Supreme Court instead of litigating by installments.

With respect to Mr. Kilonzo, the reference to the 1st respondent herein as a party in ***Raila Odinga & 2 Others v. IEBC & 3 Others,*** (supra) is untenable. First, the 1st respondent is separate and distinct from Africog, even were we to accept that he is a director thereof. Further, and more fundamentally, Africog was not a party to any of the petitions consolidated and decided by the Supreme Court in ***Raila Odinga & 2 Others v. IEBC & 3 Others,*** (supra). One Gladwell Wathoni Otieno who is associated with Africog was a party in Petition No. 4, but, mere association, as a basis for mounting a *res judicata* challenge to a suit, would be an absurd extrapolation.

Given those plain facts, the *res judicata* objection stood absolutely no chance of succeeding and its rejection by the High Court was inevitable. The challenge to the learned Judges' sound and solid finding and holding on the same is doomed to suffer the same fate, and we dismiss it.

Before we consider whether the High Court erred by declaring the impugned provisions of the Act and the Regulations unconstitutional, we should address the issue of interpretation of the Constitution generally because that declaration was premised on the interpretation of Articles 86 and 138. Interpretation of a Constitution entails an enquiry into the intention of the drafters to discern the meaning of its provisions. In enunciating the fundamentals, a delicate balancing act requires to be undertaken, of the textual, the contextual, the intent and purport, as well as the spirit of the Constitution.

To begin with, the text is construed to establish the meaning of the words, and the language, care being taken to ensure that a literal or rigid interpretation is eschewed. This should be placed in context — that is, the objectives of the enactment. The Supreme Court of India aptly considered text and context in interpretation in ***Reserve Bank of India v. Peerless General Finance & Investment Co. Ltd & Others [1987] 1 SCC 424*** when it stated that;

"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."

In contemplating the provisions, the intent and purport of the Constitution, the objectives and aspirations, as well as the mischief to be remedied, are also brought into focus.

Yet another imperative is the principle of harmonious interpretation. This was considered in the United States Supreme Court case of ***South Dakota v. North Carolina*** ***(192 US 268) (1940) L ED,*** when it was observed that;

"It is an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all the others to be considered alone, but all provisions bearing on a particular subject are to be brought into view and to be interpreted as to effectuate the general purpose of the instrument".

The above outlined principles were appropriately summarized by the Constitutional Court of Uganda in ***Kigula & Others v. Attorney-General*** ***[2005] 1 E.A. 132*** **at** ***page 133*** in the following terms: -

"The principles applicable in the interpretation of the Constitution include the widest construction possible in its context, should be given according to the ordinary meaning of the words used, the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other, all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument, the Constitution should be given a generous and purposive interpretation to realize the full benefit of the guaranteed rights, the Constitution of Uganda enjoins Courts in the country to exercise judicial power in conformity with law and with the values, norms and aspirations of the people."

See also ***Olum & Another v. Attorney-General*** ***[2002] 2 EA 508.***

From this summation it is evident that, what is required is a purposive interpretation that brings into focus the principles, purposes, and peculiarities of the enactment, as well as the historical context and extrinsic materials that form an integral part of the constitution's existence.

A purposive approach was adopted in the interpretation of the Hong Kong Basic Law in the case of ***Ng Ka Ling & Another v The Director of Immigration*** ***(1999)*** **1 HKLRD 315.** The Hong Kong Supreme Court outlined the approach thus;

"It is generally accepted that in the interpretation of a Constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because the Constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the Constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument."

Constructively speaking, a correlation can be established between the principles of interpretation under discussion, and the prescriptive manner in which the Constitution in Article 259 directs that the Constitution be interpreted. It stipulates;

"259(1) This Constitution shall be interpreted in the manner that:

a) Promotes its purposes, values and principles;

b) Advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights;

c) Permits the development of the law; and

d) Contributes to good governance.

(2) …

(3) …

Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking…"

In adherence to these stipulations, the Supreme Court in the case of ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*** ***[2014] eKLR,*** prescribed a purposive approach whenever the Constitution is to be interpreted. At paragraph 167 the Court held thus;

"In Pepper v. Hart [1992] 3 WLR, Lord Griffiths observed that the 'purposive approach to legislative interpretation' has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

'The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation, which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.' "

In conjunction with the purposive approach, the Supreme Court has also advocated for the application of a holistic interpretation as seen ***In the Matter of Kenya National Human Rights Commission, Supreme Court Advisory Opinion Ref. No.1 of 2012*** where it stated:

"But what is meant by a holistic interpretation of the Constitution" It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions in each other, so as to arrive at a desired result."

But that is not all. In pursuance of constitutional interpretation, yet another dynamic is constantly at play and requires consideration: the spirit of the Constitution.

The Supreme Court, **In** ***Re The Matter of the Interim Independent Electoral Commission*** (supra) **at para. 51 cited Mohamed A J in the Namibian case of** ***State v. Acheson 1991*** ***(20 SA 805, 813)*** where in reference to the spirit of the constitution the judge observed that;

"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship of government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and ... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion."

(*Emphasis supplied****)***

See also William Hard, **The Spirit of the Constitution** at page 11.

We dare say that in the context of the Constitution, there is an ever-present spirit that relentlessly pervades its provisions. As a consequence, that spirit which *"… is always speaking…"* must be discerned as an integral part of interpreting the provisions of the Constitution.

Also envisaged as a component of the spirit, are the distinct political undertones that are interwoven into the fabric of various provisions. This was appreciated by the majority of the Supreme Court ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, *(*supra) at paragraph 54 where the court asserted that;

"Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different constitutions shows that they are often written in different styles and modes of expression. Same constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm." (*Emphasis supplied*)

Finally, in ***Center for Rights Education and Awareness & Another v. John Harun Mwau & 6 Others*** **[2012] eKLR,** ***Githinji, JA,*** with whom we respectfully agree, outlined other important principles of interpretation of the Constitution and stated that;

"***There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against***

anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise."

Ultimately, we are clear in our minds that, owing to the prescriptive requirements of Article 259, and the various pronouncements by the courts that we have adverted to, we are compelled to adopt a purposive approach when interpreting the Constitution, having regard to the intent and purpose, the historical socio-political context, the values, aspirations and the spirit of the Constitution. We do not agree with the appellant or the Attorney-General that in this appeal interpretation should be formalistic or restricted to the legal text alone and the literal meaning of the provisions, and neither do we subscribe to the proposition that a purposive or normative interpretation is strictly limited to the Bill of Rights only. The criticism directed at the High Court in this regard is not justified.

The last ground, which is the gravamen of this appeal, is the constitutionality of the impugned provisions of the Act and the regulations made thereunder. We reiterate that the court below was invited to consider whether section 39(2) and (3) of the Act and regulations 83(2) and 87(2)(c) are inconsistent with Articles 86 and 138(3) of the Constitution and to issue the appropriate declarations. In granting the petition the High Court found, in part, that there was tension between regulation 83(2) and (3); that under the latter the decision of the constituency returning officer on the validity or otherwise of a ballot paper or a vote is final except in an election petition, while the former regulation on the other hand makes the results for a presidential election declared by the returning officer subject to confirmation by the appellant. Borrowing the meaning of the word "confirm" from **Black's Law Dictionary, 9th Edition,** the learned Judges understood the phrase "subject to confirmation" as used in regulation 83(2) to mean that, once the constituency returning officer has tallied, verified and declared the results of a presidential election, those results would be subject to a further verification, approval, disapproval, or declaration by the appellant or its chairperson at the national tallying centre. To that extent, they found the two sub-regulations to be in direct conflict.

The learned Judges found further controversy in regulation 87(2)(c) in which it is declared that the results electronically transmitted to the appellant are only "provisional". They asked:

"…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""

In addition, they noted that since 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, there can be no basis for the appellant to purport to engage in any exercise of confirming the results.

Finding a parallel in the Supreme Court decision of ***George Mike Wanjohi v. Steven Kariuki & 2 Others,*** (supra) the learned Judges concluded on this point that, once the constituency returning officer has declared the results, those results are final and only a court of competent jurisdiction can interfere with them. In the cited case it was noted that;

"112. … 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."

They also made reference to **Hassan Ali Joho & Another v. Suleiman Said Shabhal & 2 Others** *(supra),* and reached a determination that, to the extent that section 39(2) and (3) treats results announced by the constituency returning officer as "provisional", the two sub-sections are inconsistent with and contrary to Articles 86 and 138(2) of the Constitution and therefore void; that the appellant has no power to verify or confirm the results announced by the constituency returning officer. In the end, the learned Judges granted the petition by declaring that;

"…..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".(*Emphasis supplied*)

The highlighted phrase "*subject to confirmation*" and the word "provisional" were the main cause of discomfort prompting the 1st, 2nd and 3rd respondents to petition the High Court for relief. It is the construction of those very words by the three learned Judges that has now aggrieved the appellant to come to this Court.

As we now turn to the heart of this appeal, it is apposite for the clear appreciation of the long, windy and sometimes turbulent journey this Nation has traveled to get to where we are today, that we retrace our electoral history. Because elections determine political winners and losers, electoral processes, from voter registration through to declaration of results, have long been targeted for manipulation and are the foremost cause of electoral conflicts. Such manipulation or, sometimes even the mere threat of it weakens public confidence in democratic processes, in the courts, security agencies, in the legislature and in the end can erode the legitimacy of governance institutions. Lack of trust among the political parties and players and suspicions of electoral fraud have in the past catalyzed polarization and triggered bloody ethnic conflicts in nearly every election cycle. The reforms to electoral processes that have been initiated in Kenya have been triggered by, among other factors, failure to deliver credible and acceptable elections. Pressure from the public has also been instrumental in the introduction of some of the electoral reforms that have been witnessed, as was the case in 1997 when, under the auspices of the Inter-Parties Parliamentary Group (IPPG) far reaching constitutional changes were introduced. Global and regional obligations for transparent and accurate electoral administration have played an equally important role in setting the yardsticks by which the electoral processes and administration are to be assessed in future. But even with these many strides, the fear of manipulation of the election results and interference with the integrity of the electoral process generally persists.

Nothing demonstrates this fear, mistrust and weak processes better than the following passages from **the Kriegler Report**; how over the years the country has done the same thing over and over again with the same obvious result: failure. Because of its bearing on our determination of this appeal and historical underpinning, we quote those passages *in extenso.*

"6.7...Concerns about the counting, tallying, transmission and announcement of results are not new in Kenya. In 1992, on the occasion of the first multiparty elections, an International Republican Institute (IRI) pre-election report noted that:

'... the electoral law does not stipulate the mechanism for transmittal of constituency results to the ECK in Nairobi [and] urges that this information be transmitted in ... a timely way' (p. 23).

The Report of the Commonwealth Observer Group was more drastic in its evaluation:

'…given...the poor communication between the ECK and the returning officers and between returning officers and presiding officers, the lack of co- ordination and inconsistencies in dealing with clear-cut problems, we can only conclude that neither the polling day arrangements nor ... the counting processes were adequately designed or carried out to meet the specific situations and needs which the Kenyan electoral environment required' (p. 38)."

The situation had not much improved by the 1997 general elections. A joint report of the Institute for Education in Democracy (IED), Catholic Justice and Peace Commission and the National Council of Churches in Kenya recommended that:

'... it is vital to have a speedy counting exercise, with results verified by all parties and announced immediately after the count is completed. This is the only way in which public confidence in the result can be ensured. Unfortunately, this was not the case in 1997 (p. 82).'

According to the report the situation was not different in 2002. It was noted that initial results to the public were first released through the media as ECK was not fast enough to release the results due to what was attributed to poor network in some of the polling stations".

The violence that convulsed Kenya after the disputed 2007 presidential election is a scar etched in our history and engraved in our hearts and souls forever. Regarding its causation, the Kriegler Report came to the irrefutable conclusion that;

"……. the ECK was not able to manage the counting, tallying and results announcement processes in such a way that it secured the integrity of the electoral process at either the presidential or the parliamentary level…… If one – be it a voter, a candidate, a media representative, a party leader, an election observer – cannot trust the accuracy of the election results published by an EMB, [Electoral Management Body***] then nothing is left and the political system loses credibility as well as legitimacy*".**

Because of their relevance we, once more herebelow reproduce three of the four recommendations made in Kriegler Report regarding the need for integrity in the counting, tallying of votes and the ultimate announcement of results.

" • IREC recommends that the ECK integrate the various descriptions of the entire counting and tallying procedure into <u>one document – and one document only</u> – which will then be the principal description and must be adhered to. The need for such descriptive regulations does not depend on possible changes in the counting and tallying system.

- ***IREC recommends that, without delay ECK start having developed an integrated and secure tallying and data transmission system<u>, which will allow computerized data entry and tallying at constituencies, secure simultaneous transmission (of individual polling</u>***

station level data too) to the national tallying centre, and the integration of this results-handling system in a progressive election result announcement system.

- ***……….***
- ***IREC recommends that ample time be allowed for verifying provisional results, so that they are declared final/official only once there is no risk that errors may still be found or non-frivolous objections raised. Most countries allow one to two weeks for this – there must be sufficient time to check the provisional results, which are given status as final results only when all objections have been considered, all checks and rechecks conducted and the final verdict issued by the proper authorities. Given a clear explanation of what a provisional result is, there is no problem in making voters understand that election results are so important that they can be declared final only once they have been properly scrutinized and checked".*** *(Emphasis supplied).*

Finally on the history of elections in Kenya and talking specifically about the last elections of 2013, the recent **Report of the Joint Parliamentary Select Committee on the Matters Relating to the IEBC (16th August, 2016) (the Kiraitu/Orengo Report**), observed;

"452. There were challenges experienced with the electronic transmission of the results including that only 17,000 of the 33,000 polling stations managed to transmit results before it was overwhelmed by some technical hitches. This alternative method of getting results had to be discontinued when it became too slow and although the problem was identified and fixed, a number of officials had abandoned the transmission as they took hard copies of the same to tallying centres. There were also network failures and suspicions of system hacking which necessitated a reversion to physical submission of the results".

In paragraphs 454 to 460 the report sets forth and considers the provisions of Articles 86 and 138, section 39 of the Act and the Regulations, which are the subject of this appeal. It notes that several stakeholders were concerned about the venue, manner and process of declaration of final and conclusive elections results.

There was near unanimity in opinion that, since the first level of declaration of results is at the polling station, those results should be final and should only be challenged in a court of law; that the form filled out for the declaration of results at the polling station should be the primary election form and all other forms can only be tallies of the final results rather than confirmation forms; that, for those reasons the stakeholders recommended to the Committee that regulations 76, 77 and 78 be amended to provide for conclusive determination of ballots at polling stations, and amend the relevant electoral forms to align them with this recommendation; and that further, the Elections Act be amended to provide that the results announced at the polling station be final and definite. These recommendations were informed, according to the report, by concerns based on past experience where some returning officers would annul results that had been announced at polling stations, causing uncertainty and tension in the electorate. In the Committee's view, it was that mischief that informed the enactment of Article 138(3)(c) of the Constitution, which requires that;

"138(3) In a presidential election—

……….

(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".

In the end, taking into account the very many views presented, the Committee recommended that the Elections Act be amended to provide for the electronic transmission of the tabulated results of election for the President from a polling station to the constituency tallying centres and ultimately to the national tallying centre.

This invaluable background enables us to now consider the conjoined twin question; whether section 39(2) and (3) of the Act and regulations 83(2) and 87(2)(c) are inconsistent with Articles 86 and 138(2). And the point at which to start that consideration is Article 2(1) and (4) where the Constitution declares itself the supreme law that binds all persons and all State organs, and therefore;

"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".

The power of the court to review acts of the legislative and executive arms of Government which can be demonstrated as affecting constitutional rights and fundamental freedoms of the citizen is, from this authoritative provision, axiomatic. Yet the exercise of this power by the courts, though constitutionally sanctioned, has been a source of endless misunderstanding and friction. Whenever it is exercised the executive and the legislative branches of Government have many a time accused the Judicial arm of overreaching itself. This notwithstanding, the Judiciary must always be true to the Constitution whose edicts it must declare without fear or favour and accept that it may not always receive accolades for doing so.

Generally speaking, legislation is presumed to be constitutional because it is assumed that, in enacting it, the Legislature does so, on behalf of the populace with a view to addressing their needs and problems. The people's representatives are expected to enact only laws that they consider to be reasonable for the purpose for which they are enacted. See ***Hambarda Wakhana v. Union of India, AIR (1960) AIR 554***.

But this is a rebuttable presumption. As such the power to question the constitutionality of a statute is circumscribed by many conditions. For example it was stated in the Canadian case of ***The Queen v. Big M. Drugmart Ltd (1986) LRC (Const.) 332,*** which has been applied in many decisions in this country 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."

Similarly the oft-cited judgment of the Constitutional Court of Uganda in ***Olum & Another v. The Attorney-General*** (supra) restated this principle thus;

"To determine the constitutionality of a section of a statute or Act of Parliament, the 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."

(See also Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v. County of Nairobi Government & 3 Others, CA. No. 42 of 2014 [2014] eKLR.

The question before the High Court and indeed in this appeal is, whether the purpose for which section 39(2) and (3) of the Act and regulations 83(2) and 87(2)(c) were promulgated, or the effect of their implementation, infringes any provisions of the Constitution. The burden was on the 1st, 2nd and 3rd respondents to demonstrate that the impugned provisions were enacted or made for an unconstitutional purpose or that in their operation and application, they have an unconstitutional effect. We start by testing those provisions against Articles 86(c) and 138(3)(c), the general constitutional principles and the general principles of the electoral system in Article 81. On the general principles of the electoral system, Article 81 provides that;

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

(a) freedom of citizens to exercise their political rights under Article 38;

……….

(e) free and fair elections, which are— …….

(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".*(Emphasis supplied).*

Article 82 enjoins Parliament to enact legislation on election that will ensure that;

"……voting at every election is—

(a) simple;

(b) transparent…."

Regarding the voting method, Article 86 commands 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. *(Emphasis supplied).*

Article 138(3)(c) on the other hand stipulates that;

"(3) In a presidential election—

……….

(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."

How are section 39(2) of the Act and regulations 83(2) and 87(2)(c) said to be inconsistent with the foregoing provisions and principles" Section 39(2) and (3) state that;

"(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." *(Emphasis supplied)*

We also reproduce herebelow regulations 83(2) and 87(2)(c):

"83(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 …….

87(2) The returning officer shall after tallying of votes at the constituency level—

(a) announce the results cast *(sic)* ***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". (*Emphasis supplied****)**

The 1st, 2nd and 3rd respondents were concerned that whereas Articles 86 and 138 make no reference or mention of the results from the constituency being provisional or subject to any confirmation, the terms of the impugned provisions suggest that those results can be interfered with at the national tallying centre by the chairperson of the appellant, who it designates the returning officer for the presidential election, yet the results announced at the constituency tallying centre are final.

Giving his views before the Kiraitu/Orengo Committee, the then chairperson of the appellant, ***Ahmed Issack Hassan*** explained the mischief and reason why those results were considered provisional and

subject to confirmation. He is recorded in the report as having said the following;

"485. The chairperson further submitted that the results received under the system were provisional results under the Elections Act and the Election (General) Regulations <u>because</u> <u>every returning officer had to bring the physical form to the county returning officer,</u>

'...So, <u>they do not replace the official legal announcement</u> <u>of the results by the Returning Officer and the paperwork on forms 36, 37 and 38</u>. These are forms in the Elections Act, they are prescribed and form part of the laws.'

486. With regard to the current transmission and declaration of results, the chairperson of the Independent Electoral and Boundaries Commission stated that-

'... a presiding officer is the first point of call for results. He opens the ballot box, counts the ballot papers first for President and declares the results there'." (*Emphasis supplied* ***)***

The then chairperson further gave a road map of how the results of the 2013 elections were transmitted from the constituency to the county tallying centres and finally to the national tallying centre; that at the constituency tallying centre the final results of Member of Parliament (MP) for the constituency and also the Member of County Assembly (MCA) were "declared". However, the results of each presidential, gubernatorial, senatorial and woman representative candidates in that constituency were only "announced" for the reason that they were provisional and subject to confirmation. Thereafter, the results for the Governor, Senator, Woman Representative and President were taken by the constituency returning officer to the county returning officer who "*declared*" the winners for the seats of Governor, Senator, and Woman Representative but only "*announced*" the presidential results as received in the county before being brought to Nairobi. He concluded his presentation saying;

"Ultimately, all the 290 Returning Officers from each constituency came to Nairobi with the presidential results which they had announced at their constituency. The 47 County Returning Officers also brought their results from each county. These results were published online on the Commission's website. Even as the Commissioners were reading the results as given to them by the officers, the officers were seated in the auditorium".

Being of the view that the procedure enumerated above was not only cumbersome but also susceptible to serious risks of manipulation the Committee recommended;

"489. ….that the Elections Act be amended to provide for the <u>electronic transmission of the tabulated results of an election for the President from a polling station to the constituency centres and to the national tallying centre</u>". (*Emphasis supplied* ***)***

Following that and other recommendation, the Act was extensively amended by the Election Laws (Amendment) Act No. 36 of 13th September, 2016. For our purposes, to section 39 was introduced subsection (1C) to specifically provide for the transmission of presidential results. It reads;

"39(1C) For purposes of a presidential election the Commission shall —

(a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre

(b) tally and verify the results received at the national tallying centre; and

(c) publish the polling result forms on an online public portal maintained by the Commission".

Pursuant to the constitutional principles of transparency, impartiality, neutrality, efficiency, accuracy and accountability under the present legal regime, in the presidential election, the votes cast at each polling centre shall be counted, tabulated and the outcome of that tabulation announced without delay by the presiding officer. The results announced at each polling station shall be transmitted to the constituency returning officer, who in turn will openly and accurately collate the results from the various polling stations in the constituency and then promptly announce the outcome of the collation. From the constituency tallying centre, the returning officer will electronically transmit the results directly to the national tallying centre.

The dispute is on what should happen at the national tallying centre. While the appellant and the 4th respondent insist that, by the provisions of the Constitution, the Act and the Regulations, the appellant is authorised to "*verify the results*" and or "*confirm*" them, the 1st, 2nd and 3rd as well as the 5th and 6th respondents for their part have maintained that the results declared or announced at the polling stations are final and no person or entity can purport to have power to verify, confirm or vary them.

From our own reading of all the provisions under review, the authorities relied on, and bearing in mind the history that we have set out in detail in this judgment, we are convinced that the amendments to the Act were intended to cure the mischief identified by the then former Chairperson of the appellant, and other stakeholders. That mischief was, the spectacle of all the 290 returning officers from each constituency and 47 county returning officers trooping to Nairobi by whatever means of transport, carrying in hard copy the presidential results which they had announced at their respective constituency tallying centres. The other fear was that some returning officer would in the process tamper with the announced results.

One of the factors in the electoral system reforms that was underscored in the 2016 and 2017 amendments to the Elections Act, was the use of information technology to guarantee the accuracy and integrity of the results of elections. Section 44 was introduced in the 2016 amendment to provide, *inter alia,* that the appellant shall;

"44. (1) …establish an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and <u>electronic transmission of results.</u>

…

(3) ...ensure that the technology in use under subsection (1) is <u>simple, accurate, verifiable, secure, accountable and transparent.</u>

…

(5) …in consultation with relevant agencies, institutions and stakeholders, including political parties, make regulations for the implementation of this section..." (*Emphasis supplied****)***

In 2017 section 44A was inserted after section 44 to provide that;

"44A. Notwithstanding the provisions of section 39 and section 44, the Commission shall put in place a complementary mechanism for identification of voters and <u>transmission of</u> <u>election</u>

***results that is simple, accurate, verifiable, secure, accountable and transparent** to ensure that the Commission complies with the provisions of Article 38 of the Constitution". (*Emphasis supplied*)*

Pursuant to section 44(5) aforesaid the Elections (Technology) Regulations, 2017 were promulgated to provide for, among other things, information security, data availability, accuracy, integrity, confidentiality, and retention of the voting materials for three years following the elections. They also provide for the establishment of the Elections Technology Advisory Committee composed of members and staff of the appellant, Registrar of Political Parties, representatives of majority and minority parties in Parliament, Political Parties Liaison Committee and Information Communication Technology professional bodies. The mandate of the Committee includes, advising the appellant on adoption and implementation of election technology policies. It has the power to engage experts or consultants

We are satisfied that with this elaborate system, the electronic transmission of the already tabulated results from the polling stations, contained in the prescribed forms, is a critical way of safeguarding the accuracy of the outcome of elections, and do not see how the appellant or any of its officers can vary or even purport to verify those results, particularly when it is clear that, by Article 86 (d), section 2 of the Act and regulation 93(1), all election materials, including ballot boxes, ballot papers, counterfoils, information technology equipment for voting, seals and other materials, are to be retained in safe custody by the returning officers for a period of three years after the results of the elections have been declared, unless required in proceedings in court. Under section 13 of the Election Offences Act, it is a criminal offence punishable, on conviction, by a fine not exceeding Kshs 500,000 or to imprisonment for a term not exceeding 5 years or both, to interfere with election material by destroying, concealing or mutilating it. In ***Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 Others** ([2014] eKLR),* this Court stressed the importance of safekeeping of the counterfoils of ballot papers.

The information contained in **Form 34**, which has since been replaced following the promulgation of the Elections (General) (Amendment) Regulations, 2017, is primary information that is itself arrived at after an elaborate process at two levels of the electoral system to safeguard the integrity of the outcome before it is transmitted to the national tallying centre. **Regulations 73** to **90** enumerate the process of counting of votes, declaration and transmission of results.

Once the presiding officer closes the polling station at the end of voting, he is required, in the presence of the candidates or agents to open each ballot box and empty its contents onto the counting table or any other facility provided for the purpose; cause to be counted, the votes received by each candidate by announcing the name of the candidate in whose favour the vote was cast; display to the candidates or agents and observers the ballot paper sufficiently for them to ascertain the vote; and put the ballot paper at the place on the counting table, or other facility provided for this purpose, designated for the candidate in whose favor it was cast. The total number of votes cast in favour of each candidate is then recorded in a tallying sheet in Form 33.

At this stage any candidate or agent may dispute the inclusion in the count, of a ballot paper; or object to the rejection of a ballot paper. During the exercise, all the ballot papers that do not bear the security features determined by the appellant; or which are marked against the names of more than one candidate; or on which anything is written or so marked as to be uncertain for whom the vote has been cast, will be marked with the word "**rejected**" and not counted. If an objection is raised to the rejection, the presiding officer shall add the words "**rejection objected to**".

The presiding officer will eventually take stock of the number of ballot papers issued to him by the appellant before the commencement of the voting, the number of ballot papers issued to voters; the number of spoilt ballot papers; and the number of ballot papers remaining unused. In the presence of the

candidates or their agents the presiding officer must seal, in separate tamper-proof envelopes the spoilt ballot papers, if any, the marked copy register and the counterfoils of the used ballot papers. The candidates or their agents, who may wish to do so, are permitted to affix their seals to the envelope. Thereafter the presiding officer shall, as soon as practicable, deliver the ballot boxes, and the tamper-proof sealed envelopes to the returning officer who shall take full charge of them for safe custody from that stage on.

Authorised agents of a political party or a candidate are permitted to attend at the venue of vote counting within the polling station. A person nominated as a deputy to the candidate, where applicable, police officers on duty, observers and representatives of the media, duly approved or accredited by the appellant may also be present during vote counting.

The presiding officer, the candidates or agents are required to sign the declaration in respect of the presidential elections in Form 34. Each political party, candidate, or their agent are supplied with a copy of the declaration before the results are communicated to the returning officer. Any candidate or agent, if present when the counting is completed, may require the presiding officer to have the votes rechecked and recounted or the presiding officer may on his or her own initiative, have the votes recounted, at most twice. Until the candidates and agents present at the completion of the counting have been given a reasonable opportunity to exercise the right for a recount no steps can be taken on the completion of a count or recount of votes. A copy of the results is affixed at the entrance to the polling station.

We bear in mind that presidential election, where two or more candidates are nominated, are held in each constituency and the foregoing process is undertaken at the constituency, the details of which are recorded at the end of the exercise in Form 34. It is inconceivable that those details, arrived at after such an elaborate process can be viewed as provisional, temporary or interim. The inescapable conclusion is that it is final and can only be disturbed by the election court.

It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion. It sounds ill that a contrary argument that is so anathema and antithetical to integrity and accuracy should fall from the appellant's mouth.

By Article 86, the appellant is enjoined to ensure that—

"…..

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

It is, in our view fallacious and flies in the face of the clear principles and values of the Constitution to claim that the chairperson of the appellant can alone, at the national tallying centre or wherever, purport to confirm, vary or verify the results arrived at through an open, transparent and participatory process as we have already set out.

Article 138(3)(c) buttresses this argument. It stipulates that; ***"(3) In a presidential election—***

……….

(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."

Our interpretation of this Article is that the appellant, which is represented at all the polling stations, constituency and county tallying centres can only declare the **result** of the presidential vote at the constituency tallying centre after the process we have alluded to is complete, that is, after tallying and verification. It is equally instructive that regulation 83(3) recognises the finality of the results declared at the constituency. It states that;

"83(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".

Considerable heavy weather was made of the distinction between "*announced*" as used in Article 86 and "*declare*" in Article 138, the argument for the appellant and the 4th respondent being that it is only the chairperson of the appellant that can "*declare*" the result of the presidential election, while the presiding and returning officers can only "*announce*" the results. While we note that the two words are not used as terms of art, and that they have indeed been used loosely in the Regulations, we find guidance and are bound to adopt the reasoning of the Supreme Court in ***Hassan Ali Joho & Another v. Suleiman Said Shabhal & 2 Others*** *(supra).* Though the case involved a dispute regarding election of governor, the Supreme Court explained the two words and the law as follows;

"68] Since the Constitution and the Elections Act do not define what amounts to a declaration of election results, the meaning of the term 'declaration' in our opinion can only be inferred from the various contexts in which it has been used in the Constitution, the Elections Act and the Regulations to the Elections Act.

……The word "declared" in the above Article has been used to depict the finality culminating in the declaration of the winner of an election.

72] "Declaration" takes place at every stage of tallying. For example, the first declaration takes place at the polling station; the second declaration at the Constituency tallying centre; and the third declaration at the County tallying centre. Thus the declaration of election results is the aggregate of the requirements set out in the various forms, involving a plurality of officers. The finality of the set of stages of declaration is depicted in the issuance of the certificate in Form 38 to the winner of the election. This marks the end of the electoral process by affirming and declaring the election results, which could not be altered or disturbed by any authority,

……..

84] With due respect to the Court of Appeal, the honourable judges did not evaluate and consider all the relevant provisions of the Constitution, the Elections Act and Regulations thereunder. The holding by the Court of Appeal that the returning officers are only authorized to announce the election results, and that the declaration the presiding officers are required to make relates only to the accuracy of the ballot and not to the winner of the election, with respect, is incorrect and incomplete. Further, the holding that the declaration in Form 35 and 36 is merely a return of or written record of the provisional election results, and not a declaration of election results, in our view, arises from an inadequate consideration of all the relevant provisions of the law, as well as the nature of the electoral process. This Court has considered all the provisions of the law aforesaid, in the earlier part of this judgment, and, without hesitancy has come to the conclusion that the final declaration of election results is by the issuance of the certificate in Form 38 to the

winner of the election. This certificate is issued by the returning officer.

However, we note with appreciation that Justice Fred Ochieng, in Suleiman Said Shahbal v. The Independent Electoral and Boundaries Commission & 3 Others, Election Petition No. 8 of 2013, rightly held as follows:

'If a declaration must be in a formal instrument, I find that the forms containing the results of the elections at every level constitute such formal instruments. When the forms 34, 35, 36, 37 or 38 have been duly signed by the authorized returning officer, [they become] instruments which cannot be challenged save through election petition'.

91] We are in agreement with the learned Judge, in his interpretation of the collective and interlocking provisions of the law relating to the entire electoral process". *(Our emphasis).*

We fully adopt that statement, suffice only to reiterate that since, by dint of Article 138(2), if two or more candidates for presidential election are nominated, then an election must be held in each constituency whereat the returning officers play the most critical role in the overall result of a presidential election.

It cannot be denied that the Chairperson of the appellant has a significant constitutional role under Sub-Article (10) of Article 138 as the authority with the ultimate mandate of making the declaration that brings to finality the presidential election process. Of course before he makes that declaration his role is to accurately tally all the results exactly as received from the 290 returning officers country-wide, without adding, subtracting, multiplying or dividing any number contained in the two forms from the constituency tallying centre. If any verification or confirmation is anticipated, it has to relate only to confirmation and verification that the candidate to be declared elected president has met the threshold set under Article 138(4), by receiving more than half of all the votes cast in that election; and at least twenty- five per cent of the votes cast in each of more than half of the counties.

The only other verification or confirmation that we can envisage and is in fact conceded by the appellant itself in paragraphs 53-57 of the submissions relate to accountability of the ballot. For instance, the number of ballot papers issued out to the constituencies, the number of ballot papers issued to and correctly used by voters, the number of spoilt ballot papers and the number of ballot papers remaining unused, which process is verified against Form 34. Any changes to what was counted, confirmed and verified at the constituency level before transmission is manifestly outside his powers and competence. It could well be tantamount to a serious assault on the will of the people of Kenya and an impermissible breach of the Constitution.

Although the Act was amended, section 39 (2) and (3) were not changed, with the result that the appellant is empowered announce the provisional results of an election before determining and declaring the final results. Our reading of the amendments leaves us in no doubt that the retention of section 39 (2) and (3) serves only to sow mischief and confusion after it is stipulated quite clearly in the new section (1D) that:

"(1D) The chairperson of the Commission shall declare the results of the election of the President in accordance with Article 138(10) of the Constitution",

it was unnecessary to retain the impugned provisions. As a matter of fact the entire amendment to section 39 was intended to align it with Articles 81, 82, 86, 101, 136 and 138 to provide for procedure at the general elections, especially the role of the appellant to conduct the elections, determine, declare and publish the results. By dint of section 39(1) of the Act, the appellant is required to declare and

publish the results immediately after close of polling. To facilitate the conduct of elections, the appellant is required to appoint returning officers at the constituency and county levels, whose roles are specified as follows;

"(1A) The Commission shall appoint <u>constituency returning</u> officers to be responsible for—

(i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;

(ii) <u>collating and announcing the results from each polling station in the constituency for the election of the President</u>, county Governor, Senator and county women representative to the National Assembly; and

(iii<u>) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre</u> and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.

(1B)……….county returning officers……

(1C) For purposes of a presidential election the Commission <u>shall</u> —

(a<u>) electronically transmit</u>, in the prescribed form, the tabulated results of <u>an election for the President from a polling station</u> to the constituency tallying centre and to the national tallying centre;

(b<u>) tally and verify the results</u> received at the national tallying centre; and

<u>(c) publish the polling result</u> forms on an online public portal maintained by the Commission.

(1D) <u>The chairperson of the Commission shall declare the</u> <u>results of the election of the President in accordance with Article 138(10) of the Constitution".</u> (Emphasis supplied)

We hold that, going by the flow and arrangement of foregoing provisions, from the constituency returning officers (at the constituency tallying centre), the county returning officers (at the county tallying centre) to the Chairperson of the appellant (at the national tallying centre), the intention of Parliament was to delineate roles at the three levels of election determination and declaration. This was in conformity with Article 138 of the Constitution. We reproduce it to illustrate this point.

"138. (1)...

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

(3) In a presidential election—

(a) …

(b) the poll shall be taken by secret ballot on the day specified in Article 101 (1) at the time, in the

places and in the manner prescribed under an Act of Parliament; and

(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.

(4) A candidate shall be declared elected as President if the candidate receives—

(a) more than half of all the votes cast in the election; and

(b) at least twenty- five per cent of the votes cast in each of more than half of the counties.

…

(7) The candidate who receives the most votes in the fresh election shall be declared elected as President.

…

(10) Within seven days after the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall—

a) declare the result of the election; and

b) deliver a written notification of the result to the Chief Justice and the incumbent President". *(Emphasis supplied)*

It is evident to us from the above sequence of events that the role of the Chairperson of the appellant is circumscribed. Article 138 deals with events at the polling stations where votes are counted, tallied, verified and declared. We hold further that reference to the appellant in Sub Article (3)(c) is not to be construed to mean the chairperson but rather, the returning officers who are mandated, after counting the votes in the polling stations, to tally and verify the count and declare the result. The appellant, as opposed to its chairperson, upon receipt of prescribed forms containing tabulated results for election of President electronically transmitted to it from the near 40,000 polling stations, is required to tally and "verify" the results received at the national tallying centre, without interfering with the figures and details of the outcome of the vote as received from the constituency tallying centre. At the very tail end of this process, in Article 138(10) the chairperson then declares the result of the presidential election, and delivers a written notification of the result to the Chief Justice and to the incumbent President. That is how circumscribed and narrow the role of the chairperson of the appellant is.

Should a dispute arise from that election, though conducted in 290 constituencies, it would be farcical to suggest, as the appellant did, that that would require an aggrieved candidate to file 290 petitions. There is no more substance in that argument than there would be in a contention that petitions should be filed against all presiding officers in their thousands.

To conclude on the relationship between the appellant and its chairperson, the appellant is defined in section 2 of the Act as well as section 2 of the Independent Electoral and Boundaries Commission Act to mean;

*"…**the Independent Electoral and Boundaries Commission established under Article 88 of the Constitution."***

The appellant is declared by Article 253 to be a body corporate with perpetual succession and a seal. It is independent and in the performance of its functions, it is not subject to the direction or control of any person or authority. The appellant consists, in law of the chairperson and six members, supported by a secretary. (See sections 5 and 10 of the Independent Electoral and Boundaries Commission Act).

The chairperson on the other hand is appointed under Article 250 of the Constitution. The chairperson therefore cannot be, and is not, the appellant. It is envisaged in Article 86 that for the purpose of conducting an election the appellant will be represented at the polling stations and constituency tallying centres by the presiding officers, and the returning officers, respectively, who as we have seen, are appointed by the appellant. They are in every respect employees of the appellant and its agents in the eyes of the law. It is as hypocritical as it is incongruous for the appellant to doubt the competency, proficiency and honesty of its own staff as the reason for the need to "verify" the results to ensure they are not tampered with. The appellant has the opportunity, indeed a duty, to vet all its prospective employees to ensure they pass the integrity test before engaging them. Members and employees of the appellant are bound by a code of conduct. In any case apart from the offences related to voting, or any other election-related offences committed by members or employees of the appellant created under the Election Offences Act, section 30 of the Independent Electoral and Boundaries Commission Act makes it an offence for a member or employee of the appellant, to knowingly subvert the process of free and fair elections. A person who is convicted of an election-offence is not eligible to hold public office for a period of ten years following the conviction. As we have indicated, there are several mechanisms that the appellant can and must deploy to eradicate malfeasance on the part of its staff and officers.

We now turn our attention to amendments to the Regulations, which we alluded to earlier. It will be recalled that the High Court annulled Section 39(2) and (3) of the Act and regulations 83(2) and 87(2)(c) on 7th April, 2017. One would have expected the concerned institutions, including the appellant, to either comply with the determination of the court or if aggrieved, to challenge it in this Court as the appellant did within two weeks on 24th April 2017. Instead, 14 days following the delivery of the judgment impugned in this appeal, the appellant issued a gazette supplement, being Legal Notice No. 72 of 21st April, 2017, making drastic amendments to the Elections (General) Regulations 2012, whose effect was clearly to render impotent and circumvent the declaration by the High Court of the inconsistency with the Constitution of section 39(2) and (3) of the Act and regulations 83(2) and 87(2)(c). For instance, Form 34 which was headed

"DECLARATION OF PRESIDENTIAL ELECTION RESULTS AT A POLLING STATION" has been replaced by two forms, Form 34A and 34B, the former now headed "PRESIDENTIAL ELECTION RESULTS AT THE POLLING STATION" and the latter "COLLATION OF PRESIDENTIAL ELECTION RESULTS AT THE CONSTITUENCY TALLYING CENTRE". Form 34C is the one to be used in place of Form 37 for the final declaration of the result of election of the President at the national tallying centre. The new regulation 87 specifies that upon receipt of Form 34A from the constituency returning officers the Chairperson of the appellant shall "**verify the results against Forms 34A and 34B received from the constituency returning officer at the national tallying centre".**

The controversial regulations 83(2) and 87(2) were not affected by the amendments, and the object is not difficult to see. The High Court having found those regulations to be inconsistent with the Constitution, it was in bad faith for the appellant to re-enact them while pursuing this appeal.

It is our firm position that the purpose for which section 39(2) and (3) of the Act and regulations 83(2) and 87(2)(c) were promulgated or made have the effect of infringing constitutional principles of transparency, impartiality, neutrality, efficiency, accuracy and accountability.

To suggest that there is some law that empowers the chairperson of the appellant, as an individual to alone correct, vary, confirm, alter, modify or adjust the results electronically transmitted to the national tallying centre from the constituency tallying centres, is to donate an illegitimate power. Such a suggestion would introduce opaqueness and arbitrariness to the electoral process - the very mischief the Constitution seeks to remedy. We reiterate the words of the learned Judges of the Supreme Court in **George Mike Wanjohi** (supra) that;

"112. … 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."

Accuracy of the count is fundamental in any election. Voter turnout determines the outcome of any electoral contest. Numbers are therefore not only unimpeachable, but they are everything in an election. The lowest voting unit and the first level of declaration of presidential election results is the polling station. The declaration form containing those results is a primary document and all other forms subsequent to it are only tallies of the original and final results recorded at the polling station.

We reiterate, as we conclude that there is no doubt from the architecture of the laws we have considered that the people of Kenya did not intend to vest or concentrate such sweeping and boundless powers in one individual, the chairperson of the appellant. The responsibility of the appellant to deliver a credible and acceptable election in accordance with the Constitution is so grave and so awesome that it must approach and execute it with absolute fealty, probity and integrity. The appellant must in all its dealings be truly above suspicion and command respect of the people of Kenya for whom it acts. Much depends on it, indeed the present and future peace of the country.

Ultimately we find no fault in the determination of the High Court that to **the extent that section 39(2) and (3) of the Act and regulation 87(2)(c)** provide that the results declared by the returning officer are provisional, and to the extent that regulation 83(2) provides that the results of the retuning officer are subject to confirmation by the appellant, these provisions are inconsistent with the Constitution and therefore null and void.

There is no merit in this appeal, which we accordingly dismiss, with no orders as to costs due to its public interest nature.

Dated and delivered at Nairobi this 23rd day of June, 2017.

ASIKE-MAKHANDIA

……………..……....

JUDGE OF APPEAL

W. OUKO

……………………..

JUDGE OF APPEAL

P. O. KIAGE

……………………......

JUDGE OF APPEAL

K. M'INOTI

……………………...

JUDGE OF APPEAL

A. K. MURGOR

……………………....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

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