REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A)

ELECTION PETITION APPEAL NO. 13 OF 2018

BETWEEN

CHRISTOPHER ODHIAMBO KARANI.....APPELANT

AND

DAVID OUMA OCHIENG.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

ISAIAH NABWAYO (RETURNING OFFICER,

UGENYA CONSTITUENCY.....3RD RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kisumu,

(Honourable T. Cherere, J) delivered on the 1st of March, 2018

In

Siaya High Court Election Petition No. 1 of 2017)

****

JUDGMENT OF GITHINJI, JA

BACKGROUND

[1] This is an appeal from the judgment and decree of the election court **(F.W. Cherere, J)** dated 1st March 2018 invalidating the election of the appellant as a Member of National Assembly for Ugenya Constituency in Siaya County.

[2] On 8th August, 2017, nationwide multiple elections were held for the election for six positions of President, Members of National Assembly, Members of the Senate, Women Representative in the national Assembly, Governors, and County Executive members.

His Excellency **Hon.Uhuru Kenyata and Hon. Raila Odinga** amongst others were the candidates for the position of the President of the Republic of Kenya. The former was the incumbent and was sponsored by Jubilee Party. The latter was sponsored by Orange Democratic Movement Party (ODM), one of the opposition parties affiliated to National Super Alliance (NASA), an umbrella body of various opposition parties.

[3] The 1st respondent, **David Ouma Ochieng** was elected as Member of the National Assembly for Ugenya Constituency in the 2013 General Elections under ODM party. He testified that he won the nominations for ODM candidate for the 2013 elections but was denied the Nomination Certificate which he later obtained after he filed a case before the Political Parties Tribunal.

Prior to August, 2017 elections, he left ODM and formed another party – Movement for Development and Growth (MDG) which was registered on 7th December, 2016.

The reason he gave for leaving ODM was due to flawed nominations. Thereafter, the 1st respondent applied to ODM Secretariat for affiliation of MDG to NASA but he got no positive response.

[4] In the 8th August, 2017 elections, the appellant herein was the ODM candidate for the Member of National Assembly for Ugenya Constituency. The 1st respondent sponsored by MDG and three other candidates from other political parties vied for election as a Member of National Assembly. After the elections the appellant was declared as duly elected having garnered 23,765 votes. The 1st respondent was the runners-up having garnered 23,418 votes – a victory margin of 347 votes.

[5] On 4th September, 2017, the 1st respondent filed a petition seeking a determination that the election for Member of National Assembly for Ugenya Constituency was not conducted substantially in accordance with the Constitution and the relevant electoral laws; that the results declared were invalid, null and void; that the election of the appellant as the elected Member of National Assembly for Ugenya Constituency be declared null and void and orders directing the Independent Electoral and Boundaries Commission (IEBC) to conduct fresh elections in conformity with the Constitution and the Elections Act.

The broad grounds of the petition were malpractices during the campaign periods; malpractices during the voting process, campaigns in the polling stations on the polling day; malpractices during the polling process and harassment and intimidating of Presiding Officers and Returning Officers.

The particulars of all those malpractices were given in the petition and the 1st respondent's supporting affidavit. In addition, the 1st respondent filed respective affidavits of 183 witnesses.

[6] The 2nd respondent (IEBC) was served with the petition at its offices on 6th September, 2017 while the 3rd respondent (Returning Officer) was served personally on 7th September, 2017.

The 1st respondent was served through an advertisement published in Standard Newspaper on Friday 8th September, 2017. However, the three respondents did not file respective responses to oppose the petition within the seven (7) days stipulated by ***Rule 11 (1)*** of the Elections (Parliamentary and County Elections), Petition Rules, 2017. (Election Petition Rules, 2017).

[7] On 23rd September, 2017, the IEBC and the Returning Officer filed a Notice of Motion dated 23rd September, 2017 seeking extension of time within which to file a response and a further order that upon the time

being enlarged, their response be deemed properly filed and served. Various reasons for delay were given including the time taken to send the file to their advocate in Kakamega, tracing the scattered witnesses, and the limited human resources due to numerous petitions filed in courts across the country.

That application was allowed by consent of the respective counsel on 18th October, 2017.

[8] Similarly, on 27th September, 2017, the appellant filed a Notice of Motion dated 25th September, 2017 for enlargement of time for filing a response to the petition. He also sought a further order that his response to the petition dated 22nd September, 2017 and witnesses' affidavits be deemed as duly filed and served. The application was based on three grounds namely, that he was not served with the petition, that he fell sick on 6th September, 2017 and was admitted in hospital until 13th September, 2017 and that he learnt of the petition from a friend on 14th September, 2017. The application was supported by the affidavit of the appellant and documents annexed thereto and a supplementary affidavit sworn on 12th October, 2017.

The 1st respondent filed a replying affidavit opposing the application. Subsequently, the 1st respondent filed a Notice of Motion dated 2nd October, 2017 for orders, *inter alia*, that the response filed by the appellant be struck out on the ground that it was filed out of time.

Both applications were heard and considered by the election court. By a ruling dated 16th November, 2017, the appellant's application was dismissed and the 1st respondent's application was allowed, with the result that appellant's response was struck out with costs.

[9] The Petition was listed for settlement of issues on 21st November, 2017. On that occasion, **Mr. Achach**, learned counsel for the 1st respondent herein objected to the participation of the appellant at the hearing of the Petition. He invoked ***Rule 11 (8)*** of Election Petition Rules, 2017 which provides:-

"A respondent who has not filed a response to a petition as required under this rule shall not be allowed to appear or act as a party in the proceedings of the petition".

The respective counsel for the parties made brief submissions. **Mr. Odek,** learned counsel for the 2nd and 3rd respondents herein supported the objection. On his part, **Mr. Mugoye**, learned counsel for the appellant herein opposed the objection and submitted in essence that, ***Rule 11(8)*** does not bar a respondent from cross-examining a petitioner and his witnesses and that the Rule only barred a respondent from calling witnesses. He further submitted that by virtue of Article 159 of the Constitution, technicalities should not be allowed to bar a party from exercising his rights to be heard.

By a ruling dated 21st November, 2017, the election court upheld the objection and made findings that:

1. Rule 11(8) of the Rules which is couched in mandatory terms bars the 3rd respondent from participating in this petition, either by himself, or by counsel.

2. Article 159 of the Constitution was not meant to aid in the overthrow or destruction of rules of procedures and cannot therefore be of any assistance to the 3rd respondent"

The 3rd respondent referred to in the ruling is the appellant in this appeal.

[10] When the petition came for hearing on 4th December, 2017, the appellant's counsel applied for stay of the hearing of the petition pending appeal against the rulings of 16th November, 2017 and 21st November, 2017. The application was supported by the 2nd and 3rd respondents but it was opposed by the 1st respondent's counsel. The election court made a ruling on the same day.

Although the ruling of 4th December, 2017 was not incorporated in the record of appeal, it is apparent that the application was disallowed.

Upon the dismissal of the application for stay of proceedings, the appellant's counsel applied for leave to be present during the hearing of the petition. The election court observed that the court being a public court, the appellant did not need the leave of the court to be present during the proceedings.

[11] Thereafter, the petition was heard. The 1st respondent gave evidence and called thirty nine (39) witnesses. The 3rd respondent gave evidence and eight (8) other witnesses testified in support of the case for the 2nd and 3rd respondents.

[12] By a judgment delivered on the 1st March, 2018, the election court considered the evidence relating to the alleged malpractices and made findings that the malpractices were proved. The election court concluded thus:

" … I find and hold that electoral malpractices, irregularities and illegalities witnessed in the impugned election were such that it could not be said that the elections had been conducted substantially in accordance with the Constitution and the relevant electoral laws and the results therefrom do not pass the test of being transparent, accountable, verifiable and credible"

Ultimately, the election court allowed the petition with costs, invalidated the election of the appellant, ordered fresh elections to be held and capped the costs at Kshs. 7 million.

THE APPEAL

[13] The appellant assails the decision of the election court on nine grounds. The 2nd and 3rd respondents have cross-appealed against the decision of the election court on 17 grounds. The 1st respondent filed a supplementary record of appeal dated 12th April, 2018 and a Notice of Motion dated the same day for leave to file the supplementary record of appeal. The supplementary record introduced the affidavit of service of the petition sworn by **Daniel Achach** with annextures thereto and the supplementary affidavit of the appellant dated 12th October, 2017 which were all part of the proceedings in the election court and which had been omitted from the record of appeal. At the pre-hearing conference, **Hon. T.J. Kajwang** for the appellant conceded to the application and the supplementary record was deemed as properly filed. The grounds of appeal fall into two distinct categories, those which relate to the denial of a right of the appellant to a fair hearing and those which relate to the merits of the decision of the election court. The grounds of cross-appeal fall into the latter category.

[14] The issues framed by the appellant regarding the grounds in the first category are:

"1. Whether by refusing to extend time, the striking out of appellant's response to the petition and denying him an opportunity to cross-examine witnesses, denied the appellant any fair hearing contrary to Election Laws, the Constitution and the Rules of Natural Justice"

2. If answer to the above is in the affirmative, what is the consequence of this upon the judgment"

3. Whether the learned Judge manifested bias against the appellant and in favour of the 1st respondent...

6. Whether the trial court addressed its mind to the nature and ramification of Article 159 of the Constitution".

On the other hand, the 1st respondent's counsel framed two issues relating to the first category namely, whether the learned Judge properly and judiciously exercised her discretion in dismissing the appellant's application for enlargement of time and whether the Court should interfere with the exercise of discretion.

FAIR TRIAL - BIAS

[15] The appellant's application for enlargement of time and the grounds of that application have already been referred to in paragraph 8 of this judgment. The appellant stated at paragraph 19 and 20 of the supporting affidavit sworn on 23rd September,2017 thus:

"19. That I was not served with the petition herein and I only came to learn about the petition from a friend that the petitioner had placed an advertisement by way of substituted service on the Standard Newspapers on the 7th September, 2017.

20. That at this time, I was in Hospital undergoing treatment having been admitted on 6th September, 2017 and stayed in the hospital in Mombasa until 13th September, 2017 when I was discharged".

He annexed a copy of a letter dated 6th September, 2017 from Alfarooq Hospital which stated in the relevant part.

"He was admitted and treated for the same at our facility as from 06/09/2017 and was discharged on 13/09/2017."

[16] The 1st respondent in his replying affidavit sworn on 2nd November, 2017 referred to the affidavit of service sworn by **David Achach Omoro** and stated that he gave the mobile phone of the appellant to the said **Daniel Achach Omolo** who contacted the appellant on 6th and 7th September, 2017 about the service of petition and that upon service by advertisement in the Standard Newspaper, he sent a text message to the appellant informing him of the advertisement. The 1st respondent further stated that based on the conduct of the appellant he believed that the appellant was deliberately avoiding service of the petition and that the appellant's non-communication for 7 days and supposed hospitalization was based on the misguided belief that the petition would be dismissed for lack of service. The 1st respondent filed a further replying affidavit sworn on 4th October, 2017 to which he annexed a letter from **Alfarooq Hospital** dated 3rd October, 2017 which stated in the relevant part:

"We hereby confirm that the above referred Christopher Odhiambo Karani was not admitted in our health facility. Attached letter presented by him was not issued from our facility."

The letter was signed by Dr. Balahuddin Fargoogui, a director of the hospital.

[17] The appellant filed a supplementary affidavit sworn on 12th October, 2017 in which he denied that he was called by **David Achach Omoro** or that he avoided service. In paragraph 22 of that affidavit, he reiterated the contents of paragraph 19 and 20 of the supporting affidavit and annexed another letter dated 11th October, 2017 from Alfarooq Hospital which stated in the relevant part:

"***We hereby confirm that the above named patient was treated at the facility on the 6/09/2017, and continued with day care follow-ups under my supervision as an outpatient. In this regard, such patients are treated as outpatient and that outpatient records does not form part of the in-patient records"***

The letter is shown to have been signed by **Dr. George Oguna.**

[18] The election court considered the application, the respective submissions and the law.

On the issue whether or not the appellant was served with the petition, the court held that service on the appellant by advertisement was effective service within the provisions of ***Article 87(3)*** of the ***Constitution*** and ***section 77 (2)*** of the ***Elections Act***. The election court then considered whether it should exercise its discretion in the appellant's favour.

Firstly, the court made a finding that the two (2) letters produced by the appellant from **Alfarooq Hospital** were plainly untrue and that the appellant was not sick as alleged. Secondly, the court considered whether the appellant had seen the advertisement of the petition and made a finding that he was aware of the service of the petition by advertisement but took no immediate action to defend it. Thirdly, the court made a finding that the reason for delay was based on falsehoods and that the appellant had come to court with unclean hands. Fourthly, the Court considered the provisions of ***Article 159(2) (d)*** of the ***Constitution*** and asked itself whether it could ignore procedural technicalities. The court made a finding that since the application was based on falsehoods; it could not ignore procedural technicalities and decide the application in the appellant's favour.

Fifthly, the court considered the overriding objective of the of election petition Rules as stipulated in ***Rule 4(1) and 4(2)*** and made a finding that the objective of the rules is to achieve the clear objective that election disputes must be determined within strict timelines. Lastly, the court considered the issue of public interest and made a finding that public interest is a consideration for exercising time. Nevertheless, the court made a finding that extension of time was not in the public interest and that it was in the public interest that there be compliance with the Constitution, the legislation and rules made thereunder.

SUBMISSIONS

[19] The appellant's counsel submitted in the written submissions, *inter alia*, that the powers of the court to extend time are subject to overriding objective of the Rules and ***Article 159 (2) (d)*** of the ***Constitution;*** the delay of 12 days did not adversely affect the court's ability to determine the petition within six months or prejudice the 1st respondent; the court not being a document examiner could not make conclusions as to which letter, the appellant's or 1st respondent's letter on the appellant's admission in hospital was genuine; that even in perjury the court had the option of allowing the appellant to be heard given the gravity of the matter; that the court was biased in allowing IEBC's application but dismissing the appellant's application; that the appellant's right to a fair hearing and the rules of natural justice under ***Article 50*** of the ***Constitution*** entitled the appellant to participate in the election petition and that the appellant who was present and willing to participate should have been given a chance to defend personal allegations of electoral malpractice. **Hon. Kajwang** for the petitioner submitted in his oral submissions, among other things, that the right to fair hearing cannot be limited as provided in ***Article 25*** of the ***Constitution*** and that ***Rule 11 (8)*** is unconstitutional as it limits the right to fair hearing.

[20] In his written submissions, the 1st respondent's counsel submitted, amongst other things, that the election court considered all the conditions set out in ***Nicholas Kiptoo Arap Korir Salat versus the Independent Electoral and Boundaries Commission & 7 others [2014] eKLR (Salat's case)***, and found that in all situations, the appellant's conduct militated against the exercise of the court's discretion in his favour; that the appellant had not shown or identified any reason for this Court to interfere with the exercise of discretion; that the appellant had abandoned the reasons he gave in the election court for his failure to respond in time and seems to be prosecuting a new application for extension of time; that this Court, not being a court of review, cannot substitute its judgment for that of the election court; that lack of candour is harshly frowned upon by courts and however strong a party's case is, the guilty party cannot benefit from the court's equitable remedy; that the IEBC's application was separate and was allowed by consent; that the appellant is not candid for accusing the Judge of bias by allowing one application and dismissing the other ; the 1st respondent would have suffered prejudice by miscarriage of justice by having his right to a fair hearing breached; the application was disallowed on the basis of falsehood and perjury; the appellant's right to fair hearing was not violated as he lost the right through blatant disregard of the Rules and, lastly, that ***Article 159*** of the ***Constitution*** would only aid a deserving and innocent party.

TIMELINES

[21] This aspect of the appeal is about timelines for settling electoral disputes. ***Article 87(1)*** of the ***Constitution*** provides:

"Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes"

Article 87(2) prescribes, *inter alia,* that petitions concerning an election other than a presidential election shall be filed within twenty eighty (28) days after the declaration of results by the IEBC.

Further, ***Article 105 (2)*** as read with ***Article 105(I)*** of the Constitution provides, inter *alia,* that a question whether a person has been validly elected as a Member of Parliament shall be heard and determined by the High Court within six (6) months of the date of lodging the petition. ***Article 105 (3)*** commands Parliament to enact legislation to give full effect to ***Article 105***.

The Election Act which contains provisions for election disputes resolution in part VII is the envisaged legislation. ***Section 96 (1)*** of the Election Act, which is in part VII aforesaid, gives power to the Rules Committee constituted under the Civil Procedure Act to make rules generally to regulate the practice and procedure of the High Court with respect to filing and trial of election petitions including, *inter alia*, specifying the time within which any requirement of the rules is to be complied with.

[22] The Election Petition Rules 2017, is a subsidiary legislation enacted pursuant to ***section 96 (1)*** of the ***Elections Act***. The making of such a subsidiary legislation is regulated by the ***Statutory Instruments Act no. 23 of 2013***. As ***section 5*** thereof provides, before such a regulation is made, it is subjected to consultation or public participation and ultimately to parliamentary scrutiny and approval (section 10). Further, as ***section 13*** provides, the parliamentary scrutiny involves whether, *inter alia,* the proposed subsidiary legislation is in accord with the provisions of the Constitution; the Act pursuant to which it is made or other written laws and whether it infringes on fundamental rights and freedoms of the public.

By ***section 29*** and ***34*** of the ***Interpretation and General Provisions Act***, subsidiary legislation is construed as, and has the same legal force, as the Act conferring the power. Although the phrase "***subsidiary legislation"*** connotes a subordinate legislation, considering the rigorous process of the making of a subsidiary legislation and its legal force, a subsidiary legislation is subordinate only so far as it does not go through the whole process of enacting a legislation and in so far as it has to be consistent with Act conferring the power and the Constitution. It follows that the Election (Parliamentary and County Elections) Petition Rules, 2017 are part of the Electoral laws in their own right. Indeed, the phrase "electoral laws" is defined in ***Regulation 2*** of the ***Electoral Code of Conduct*** in the second schedule to the Elections Act as meaning, the Constitution, the Elections Act and Subsidiary Legislation made thereunder.

The fact that the Rules are made under an Act does not lessen their legal force. Therefore, in relation to this appeal, ***Rules 11(1)*** and ***11(8)*** of the Election Petition Rules ***2017*** have the same legal effect as if they had been enacted under the ***Elections Act***.

[23] The timelines have been extended to election petition appeals before this Court. By ***section 85A (1) (a)*** and (***b)*** of the ***Election Act*** an appeal to this Court has to be filed within thirty days of the decision and be heard and determined within six (6) months of the filing of the appeal. The appeals to this Court are regulated by the ***Court of Appeal (Election Petition) Rules, 2017,*** which has also timelines for taking steps in the appeal.

[24] The question of timelines in the electoral disputes resolution is summarized by the Supreme Court in ***Hon. Lemanken Aramat versus Harun Meitemei Lempaka and 2 others [2014] eKLR (Aramat's case)*** at paragraph 69 partly thus;

"We have to note that the electoral process and the electoral dispute – resolution mechanism in Kenya are marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the time lines prescribed in the Constitution and the electoral law".

And at paragraph 78:

"We are not, with respect, in agreement with the learned counsel for the 1st respondent that there is any conflict at all in this case, between the electoral requirements of timelines on the one hand, and values of the Constitution on the other hand. It is clear to us that compliance with timelines, is itself a Constitutional principle one that reinforces the Constitutional values attendant upon the electoral process"

Further, in ***Ali Hassan Joho and another versus Suleiman Said Shabbal and 2 others [2014] eKLR,*** the Supreme Court said in part at paragraph 101 that:

"…expedition in the disposal of electoral disputes is a fundamental principle under the Constitution …"

[25] It is not necessary to refer to the numerous decisions of the Supreme Court and of this Court to the effect that Constitutional timelines for filing election petitions in ***Article 87(2) of the Constitution*** and the statutory timelines in ***section 85A*** of the ***Elections Act*** relating to filing of appeals are sacrosanct and cannot be extended.

The same constitutional principle of time lines applies to proceedings in election court and in the appellate court except that the rules confer jurisdiction on the election court and the appellate court to extend time.

In **Aramat's *case,*** the Supreme Court said at paragraph123:

"A Court dealing with a question on procedure where jurisdiction is not expressly limited in scope as in the case of Article 87(2) and 105(1)(a) of the Constitution – may exercise a discretion to ensure that any procedural failings that lends itself to cure under Article 159, is cured. We agree with the learned counsel that certain procedural shortfalls may not have a bearing on the judicial power (jurisdiction) to consider a particular matter. In most cases, procedural shortcomings will only affect the competence of the cause before the court, without in any way affecting Courts' jurisdiction to entertain it. A court so placed, taking into account the pertinent facts and circumstances may cure such defects; and the Constitution requires such exercise of discretion in matters of a technical character".

ANALYSIS

[26] In the preceding paragraphs, I have endevoured, albeit in a brief summary, to show the importance of timelines in the electoral disputes resolution and also the status of subsidiary legislation. I will now consider the first aspect of the appeal.

The first ground of appeal states in part:

" The learned Judge erred in law by denying the appellant his right to natural justice and to any or any fair hearing guaranteed in Article 50 of the Constitution despite the fact that his election was under challenge and particularly by:

a) Striking out the appellant's response to the petition and all documents annexed thereto without justifiable cause;

b) Exercising discretion injudiciously, unreasonably and arbitrarily by failing to admit into the record as properly filed the appellant's pleadings and evidence which had already been filed with the Honourable Court and served upon all other parties".

The other reasons why the appellant claims that was denied a right to natural justice and fair hearing are also

enumerated. These reasons include denying the appellant the right to cross-examine witnesses. In the second ground of appeal, the appellant states that the learned Judge erred in law and injudiciously exercised her discretion arbitrarily and unreasonably in determining the application for enlargement of time. The appellant has stated the reasons why the learned Judge exercised her discretion arbitrarily and unreasonably which includes:

"Elevating technicalities of procedure with the consequence of frustrating substantive justice in locking out the appellant from participating in the hearing."

The first two grounds of appeal are aptly summarized in the first issue framed by the appellant. It is apparent that the issues of natural justice, fair hearing and the application of technicalities of procedure are raised in the context of the dismissal of the application to extend time and the subsequent application of ***Rule 11(8)*** of the Election Petition Rules 2017. That is to say that, the underlying complaint is the manner in which the election court exercised its discretion in dismissing the application to extend time.

[27] The right to fair hearing as enshrined in ***Article 50 (1)*** of the ***Constitution*** is a cardinal constitutional principle. That provision gives every person a right to have any disputes that can be resolved by the application of the law decided in a fair public hearing before an independent court or body. Further, under ***Article 25***, the right to a fair trial is amongst the fundamental rights which should not be limited. The elements of fair hearing include giving a party in proceedings or a trial a reasonable opportunity to be heard and whether that opportunity has been given depends on the facts of each case. The case of ***Alphonse Kondi Riaga versus Commissioner for Cooperative Development [2016] eKLR*** cited by the 1st respondent shows that, if a party is given a reasonable opportunity to be heard and does not utilize that opportunity, the only point he can be heard on why he did not utilize the opportunity.

In ***Wavinya Ndeti versus Independent Electoral & Boundaries Commission [IEBC] & 4 others [2014] eKLR,*** this Court said in part:

"***It stands to reason that the enactment of section 85A (a) having been sanctioned by the Constitution cannot be inconsistent with the right of access to justice and fair hearing. As the Supreme Court of Nigeria held in Senator John Akpanu doedehe versus Godswill Obot Akabio SC. No. 154 of 2012, where a Constitution provides a limitation period for hearing a matter, the right to fair hearing is guaranteed by the Courts within the specified period. In one view, the same is true when the limitation period is provided by a stature sanctioned by the Constitution like in the instant case. The right of access to justice and fair hearing is guaranteed by the courts within the law".***

The appellant in that appeal (Wavinya Ndeti) filed a petition in the Supreme Court against the decision of this Court based on the grounds, *inter alia*, that ***Article 159 (1) and (2)*** of the ***Constitution*** were violated and the petitioner's right to just and fair trial under ***Article 25(1) and 50(1)*** of the Constitution were violated. The Supreme Court in ***Wavinya Ndeti versus Independent Electoral & Boundaries Commission (IEBC) & 4 others [2015] eKLR*** in allowing a preliminary objection to the petition said at paragraph 43:

"The Court of Appeal has itself noted that Section 85A (a) of the Elections Act having been sanctioned by the Constitution could not be inconsistent with the right of access to justice and fair hearing. That Court's judgment focused on the interpretation of section 85A of the Election Act, the Election Rules and the Court of Appeal Rules, and on clarifying the jurisdiction of the Court of Appeal to extend time in matters of election petition appeals. The Appellate Courts holding in this regard has been reaffirmed repeatedly in our decisions cited above"

[28] ***Article 159(2)*** of the ***Constitution*** provides that, in exercising judicial authority the Courts and tribunals should be guided by the principle *inter alia* that:

" (d) Justice shall be administered without undue regard to procedural technicalities".

The appellant relied on a passage in the Ruling of Ouko JA in the majority decision in ***Nicholas Arap Korir Salat versus Independent Electoral and Boundaries Commission (IEBC) and 6 others [2013] eKLR*** to the effect that deviations from form and procedures which do not go to jurisdiction of the court, or to the root of the dispute or which do not occasion prejudice or miscarriage of justice should spare an offending party the draconian approach of striking out pleadings. On the other hand, the 1st respondent relied on the decision of the Supreme Court in ***Raila Odinga & 5 Others Vs Independent Electoral and Boundaries Commission and 3 others [2013] eKLR (Raila 2013)*** at paragraph 218 where the Court said in part with respect to ***Article 159(2) (d)*** of the ***Constitution***.

"The essence of that provision is that a Court should not allow the prescriptions of procedure and form to trump the primary objective of dispensing substantive justice to the parties. The principle of merit, however, in our opinion bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of process of justice is called upon to appreciate all relevant circumstances and the requirements of a particular case, and conscientiously determine the best cause".

[29] It is noteworthy that the phrase "***procedural technicalities***" in ***Article 159 (2) (d)*** is qualified by the preceding phrase ***"undue regard".*** The word***, "undue"*** is defined in the Concise Oxford Dictionary 9th Edition. The first meaning is "excessive, disproportionate". Thus, ***Article 159 (2) (d)*** cannot be interpreted to mean that all procedural stipulations are to be disregarded in the administration of justice. Certainly, the procedural requirements which facilitate the Courts to function as courts of justice in a particular case are not targeted. The courts have a duty to determine objectively in every case where the question of undue procedural technicality arises whether the procedural stipulation falls in the class of undue procedural technicality and if so, whether it should be disregarded in favour of substantive justice.

[30] ***Rule 11*** of Election Petition Rules 2017 gives a respondent who wishes to oppose a petition, 7 days to file a response. Such a response should be supported by an affidavit sworn by the respondent ***(Rule 11(5).*** If a respondent wishes to call a witness, such a witness is required to file an affidavit which should be filed at the time of filing the response ***{Rules 11 (6) and 11(7)*** } respectively.

The appellant did not comply with those Rules. He filed the response, his affidavit and affidavits of witnesses 12 days outside the stipulated 7 days. Such time could be extended *under Rule 19(1) which provides:*

*"**Where any act or omission is to be done within such time as may be prescribed in the Rules or ordered by an election Court, the election court may for purposes of ensuring that injustice is not done to any party extend or limit the time within which the act or omissions shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired"***

DETERMINATION

[31] I have already referred to the application for extension of time made by the appellant at paragraph 8, 13, 14, 15, 16, 17, the findings of the court at paragraph 18 and the respective submissions at paragraph 19 and 20 above.

It is clear from the impugned Ruling of 16th November, 2017, that the election court considered extensively the applicable law, the reasons for delay, the questions of procedural technicalities, and the overriding objectives of the Rules, timelines and public interest before arriving at the decision. The court in particular considered the general principles for extension of time as restated by the Supreme Court in ***Salat's case*** In that case, the Court restated the underlying principles that a court should consider in exercise of discretion whether to extend time or not thus:-

" 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving

party at the discretion of the Court;

2. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court;

3. Whether the Court should exercise the discretion to extend time is a consideration to be made on a case to case basis;

4. Whether there is a reasonable reason for delay. The delay should be explained to the satisfaction of the Court.

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time".

[32] Lack of personal service of the petition was given as one of the three reasons for delay. ***Article 87(3)*** of the ***Constitution*** and ***Section 72 (2)*** of the ***Election Act*** authorizes, without any condition, service by advertisement in a newspaper with national circulation. That was done in the Standard Newspaper. The learned Judge was right in finding that this was effective service. The second reason given was that the appellant did not see the advertisement. The learned Judge made a finding that the appellant was aware of the advertisement. The court was right. The law presumes that he saw it.

The main reason for the delay was that the appellant was admitted at **Alfarooq Hospital** from 6th to 13th September, 2017. He swore to that fact in his affidavit. When the hospital denied that the appellant was admitted in that hospital, the appellant produced another letter allegedly from the same hospital admitting that he was not so admitted but treated as an out-patient. The appellant did not produce other basic documents such as hospital cards or payment receipts. The election court found the contents of the two letters to be plainly untrue and made a finding that the appellant was not sick. The falsehood that the appellant was admitted in hospital was self-evident. It is clear that the appellant did not give a full honest and acceptable explanation for the delay.

[33] The election court was exercising a judicial discretion which had to be exercised judicially upon the settled principles. That discretion was given to the election court. An appellate court cannot interfere with the exercise of that decision even if it could have exercised the discretion differently unless ***"it is satisfied that the Judge exercising the discretion has misdirected himself in some matter and as a result, has arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result, there has been misjustice"*** (as per ***Newbold P. in Mbogo versus Shah [1968] EA 93 at page 96 – f-g).***

The appellant has not identified any misdirection in the findings of the election Court. He relied on the broad principles of denial of fair hearing and undue regard to technicalities of procedure and also on the gravity of the matter.

Rule 11(1), 11(5), 11(6), gave the appellant an opportunity to be heard in the petition. He did not utilize that opportunity.

Rule 19(1) gave him another chance to apply for extension of time to be heard. He did not satisfy the principles for the extension of time and lied on the falsehoods. He let that opportunity slip away. The stipulation as to time for lodging a response and the necessary affidavits is not, in my view, a mere procedure technicality. It is one of the

mechanisms sanctioned by the Constitution for timely resolution of electoral disputes.

The stipulation in ***rule 11(8)*** that a respondent who has not filed a response as required by the Rule shall not be allowed to appear or act as a party in the proceedings of the petition is not unconstitutional. It is a consequence of failure to comply with timelines sanctioned by the Constitution and the election court had no discretion after dismissing the application for extension of time.

Both a petitioner and a respondent in an election petition as provided in ***Article 27(1)*** of the Constitution are equal before the law and have the right to equal protection and equal benefit of the law.

[34] In ground 3 and 4 of the grounds of appeal, the appellant assails the decision of the election court on ground of bias by allowing the application for extension of time by 2nd and 3rd respondent while dismissing the appellant's application and rejecting all arguments by the appellant's counsel without justifiable cause. It is clear from the record that the two applications were based on different grounds, and more importantly, the application by the 2nd and 3rd respondent, was allowed by consent of all counsel including the appellant's counsel. Thus, the election Court did not make a judicial determination of the merits of the 2nd and 3rd respondents' application. It follows that the accusation of bias has no merit and is most unfortunate.

[35] Upon considering this aspect of the appeal objectively, applying the principles of electoral laws, and considering the special and rigid electoral disputes resolution regime, I am satisfied that the election court exercised its discretion to dismiss the application to extend time and to strike out the appellant's response and affidavits judicially and in accordance with the law.

The imbroglio that the appellant is enmeshed in was self-inflicted and inexcusable. I would dismiss this aspect of the appeal.

REMEDIES

[36] Moreover, the relief sought in the appeal cannot be lawfully granted. The relief sought is that:

"The documents filed by the appellant on 27th September, 2017 be admitted and deemed as part of the record and be fully considered in the determination of this appeal."

The effect is that the Court should admit the evidence and evaluate it together with the respondent's evidence. By ***Section 85A (1)*** of the ***Elections Act,*** the Court has jurisdiction to entertain "***matters of law only***".

This means that, if the appeal is allowed, the Court would not have jurisdiction to consider the rejected evidence.

[37] In ***Evans Odhiambo Kidero and 4 others versus Ferdinand Ndungu Waititu and 4 others [2014] eKLR in [Kidero's case), Njoki SCJ,*** considered remedies available where there is a breach of fair trial. The learned SCJ said that the remedy of nullification of election is not available for denial of a right to fair trial. At paragraph 350, the learned SCJ reasoned in part:

"…the right to a fair trial is a right that cannot be limited. However, it is an individual right in personam and the remedy for violation of such right cannot be nullification of an election. The Raila Odinga case reiterated that an election reflects the views of the people expressed through the vote, and not just rights of individuals and therefore, Courts of law must be careful not to exercise their power in such a manner as to interfere with the people's expression in instances where the proven irregularities do not affect the election results".

[38] I would respectfully agree with that view. The denial of a right to fair trial is trial-related. It is a judicial error which is not directly related to the conduct of the election. Nullification of an election on the basis of denial of the right to fair trial would be to erroneously treat an election petition as ordinarily private suit.

[39] The learned SCJ also discussed the remedy of a re-trial and found that in that case, the six months stipulated by ***Article 105(2)*** of the ***Constitution*** had expired. The learned Judge reasoned at paragraph 360, partly, thus:

"***This means that the length of time that the Constitution has allocated for every petition to be heard and determined by trial Court is confined to six months from the date of filing. The import of this provision is that an election petition is only alive for six months; a re-trial is only available where there is a live case."***

[40] The Supreme Court decision in Kidero's case was rendered on 29th August 2014. Earlier in the same month, the Supreme Court had rendered the decision in Aramat's case on 6th August, 2014. In Aramat's case, the Supreme Court was dealing with a case where the Court of Appeal had overturned the decision of the election court and ordered the election Court by its Deputy Registrar to recount all the votes cast in 69 polling stations and in essence, issue a Certificate to IEBC of the winner after recount. Several issues were raised in the appeal including whether the Court of Appeal conferred jurisdiction to the election court which had become *functus officio* and whether the election petition in the election court had been filed out of time.

[41] At paragraph 139, the Supreme Court said in part:

"… we would not agree with the opinion of counsel for the 1st respondent that the Appellate Jurisdiction Act, (Cap 9 Laws of Kenya) confers jurisdiction upon the Court of Appeal to remit an electoral dispute matter back to the High Court after the six months limit set in Article 105(1) and (2) of the Constitution had lapsed. The Constitution and the Election Act, which are the foundation of the special electoral-dispute regime confers upon the High Court the power to determine electoral disputes within six months; and the appellate court cannot confer upon itself powers to resurrect the jurisdiction of the election courts, after such jurisdiction is exhausted under the law."

While agreeing with the decision of the majority that, the appeal should be allowed on the ground that the petition in the election court was filed out of time, Mohammed Ibrahim, SCJ expressed the view that the majority should have stopped further consideration of the appeal upon making a finding that the election court lacked jurisdiction.

[42] At page 120 of the Aramat's case, the Supreme Court had quoted a Canadian decision with approval to the effect that any *obiter dicta* comment of the Supreme Court should be accorded deference unless there are compelling reasons not to do so.

[43] In the instant appeal, the election petition was filed in the High Court on 4th September, 2017. The six months stipulated by Article 105 expired on or about 3rd March, 2018.

Whilst I have not myself formed a conclusive view on whether or not the jurisdiction of the election court is exhausted after the six months period, and cannot be re-opened by an appellate court in any circumstances, (which in any case would be *obiter)* the decision of the Supreme Court at page 139 of the Aramat's case is binding on this court and even if it is an o*rbiter dicta* commands due deference.

Thus, an order for retrial is likely to be encumbered by legal complexities thereby causing delay.

[44] In conclusion of this aspect, had the appeal had succeeded, it seems to me that there would have been no effectual remedy that would have guaranteed the reception of the appellant's evidence in answer to the petition.

MERITS OF THE APPEAL

[45] I will now consider the second part of the appeal which relates to the merits of the decision of the election court. In the petition, the 1st respondent referred to ***Articles 1, 38, 81, 86*** of the Constitution and various sections of the Elections Act; the Electoral Code of Conduct and various provisions of the ***Elections (General) Regulations 2012*** as amended by ***Elections (General) Amendment Regulations 2017*** and averred that the elections were conducted in violations and fragrant disregard of the Constitution and all laws governing the conduct of elections. The petition was supported by the 1st respondent's affidavit and 183 affidavits of the witnesses. However, only 40 witnesses including the 1st respondent gave evidence at the trial.

In paragraph 5 of this judgment the general malpractices complained of are indicated. The 1st respondent has categorized all malpractices into four categories in the supporting affidavit thus:

A. Non-compliance with campaign laws, regulations and code of conduct.

B. Non-compliance with laws and regulations on assisted voting/voters who could not read, write or are disabled.

C. Canvassing for votes in polling stations and in the queues.

D. Intimidation of the Returning Officer and other election officials at the tallying centre.

At paragraph 89 of the supporting affidavit, the 1st respondent averred that the implications of all malpractices on the voting and final result was that the election did not meet the constitutional, statutory and regulatory thresholds required for a free, fair, credible and transparent election and that, to that extent, the elections were invalid and should accordingly be nullified.

Lastly, at paragraph 90 of the supporting affidavit, the 1st respondent averred:-

"That I believe that due to the massive irregularities malpractices, non – compliance with law, electoral offences and lapses in judgment by the electoral officials in a very closely contested elections fundamentally affected the results of the said to the extent that the same could not produce a clear winner, hence the said elections should be annulled and proper elections that meet constitutional, statutory thresholds required of a free, fair, credible and transparent elections be conducted."

[46] ***Article 38*** of the Constitution deals with political rights. Under ***Article 38(1),*** every citizen is free to make political choices including to campaign for a political party or cause. Under ***Article 38(2),*** every citizen has a right to free, fair and regular elections based on universal suffrage and the free expression of the will of electors, for *inter alia*, any elective public body or office established under the Constitution.

Lastly, under ***Article 38(3),*** every adult citizen has the right without unreasonable restrictions to, amongst other rights, to vote by secret ballot in any election.

The general principles for the electoral system are provided in ***Article 81*** of the Constitution which includes freedom of the citizens to exercise their political rights under ***Article 38*** and, as provided in ***Article 81 (e),*** to a free and fair elections which are by secret ballot; free from violence, intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner. ***Article 86*** of the Constitution requires the Independent Electoral and Boundaries Commission (IEBC) to ensure, amongst other obligations, that the system used in voting is simple, accurate, verifiable, secure, accountable and transparent.

[47] As provided by ***Article 84*** of the ***Constitution***, candidates for election and political parties in every election are required to comply with the Code of Conduct prescribed by IEBC and by ***Article 88 (4) (i),*** IEBC is responsible for the development of a code of conduct for candidates and parties contesting elections.

The Electoral Code of Conduct developed by IEBC is contained in the Second Schedule to the elections Act. As regulation 3 of the Code provides;

"the objection of the Code is to provide conditions conducive to the conduct of free and fair elections and a climate of tolerance in which political activity may take place without fear, coercion, intimidation or reprisals."

Regulation 6 (a) of the Code provides that all those bound by the code shall;-

"Publicly and repeatedly condemn violence and intimidation and avoid the use of hate speech, language or any other kind of action which may lead to violence or intimidation whether to demonstrate party strength, gain any kind of advantage, or for any other reason..."

ELECTORAL MALPRACTICES

[48] As regards the malpractice of non-compliance with campaign laws, Regulations and the electoral code of conduct, the 1st respondent averred in the petition that the appellant, his campaigners, agents and supporters engaged in a smear and dirty campaign by;

(i) Falsely maliciously and abusively linking the 1st respondent to Jubilee party with an intention of inciting voters against voting for him.

(ii) Falsely, maliciously and abusively linking the 1st respondent to the Jubilee party presidential candidate Uhuru Muigai Kenyatta with the intention of inciting voters against voting for him.

(iii) In misleading the voters that voting for the 1st respondent was tantamount to voting for Uhuru Kenyatta with the intention of inciting voters against voting for him.

(iv) Scare mongering and threatening voters that if they voted for the 1st respondent they would be committing a sin and that they would be seen from NASA offices in Nairobi and followed to their homes thereby undermining the secrecy and integrity at the ballot with the intention of discouraging voters form voting for him.

(v) Scare mongering and threatening the voters that 1st respondent would impeach Raila Odinga as soon as he was elected.

(vi) Scare mongering and threatening voters that the 1st respondent was a jubilee candidate sponsored by Jubilee party under the quise of MDG and always voted with Jubilee members in Parliament.

(vii) Holding a campaign rally at a home in Nyawara village after the campaign period had closed, specifically to give voters reasons not to vote for the 1st respondent.

(viii) Alleging that the 1st respondent worked with the Jubilee Party presidential candidate to murder Chris Musando to rig presidential elections against Raila Amolo Odinga.

The 1st respondent averred that the smear campaigns affected the outcome of all the elections.

[49] The 1st respondent called witnesses who claimed to have attended political rallies at different places and also at a home of senior politician (who they named) to support the ground of smear campaigns. For instance, the 1st respondent called Bernard Ouma Omwenga and Rosemary Odinga to testify on utterances at a campaign rally at Nyalenda Market. Maurice Juma Ogutu, Nelson Ochieng Odhiambo, Martin Ouma Owuor testified about political utterances at a rally at Sihay Centre. Witnesses were also called to testify about the utterances at campaign rallies at Nyahoto market, Nyaharwa, Aboke, Got Nanga, Waliera, Bar – Ndege and Humwend. Jacinta Achieng Nyang'on claimed that at a rally held at Got Nanga Centre, one Steve Juma addressed the rally and stated that the 1st respondent had killed his daughter by witchcraft, that he was a murderer and should not be voted for.

The 1st respondent stated in his affidavit and in the evidence that he filed a suit and obtained an injunction against Stephen Odhiambo Juma and his sponsor against making such false and inciting statements.

The Returning Officer (3rd respondent) admitted in his evidence that the 1st respondent reported a complaint against Stephen Juma and that he called him and cautioned him against committing election offences. The witnesses also testified that they were urged at campaign rallies to vote "six piece" that is for the six ODM candidates who were contesting elective offices.

[50] The election Court reviewed the evidence of the witnesses and made a finding that the evidence regarding smear and dirty campaigns was uncontroverted. The court however rejected the evidence linking the 1st respondent to the death of Chris Musando for the reason that the witnesses did not identify the persons who linked the 1st respondent to the death.

[51] The 1st respondent also called witnesses to prove the ground of non-compliance with the rules and regulations on assisted voters. The 1st respondent pleaded that the assisted voters accounted for more than 50% of all the voters who lined up to vote. The pleaded breaches of the law were that;

i) IEBC and Returning Officer campaigned for and acquiesced to; promoted and permitted the "six-pieces " six-oranges" and "Raila gi Lange " (Raila and his people) voting.

ii) Appellant and his supporters mislead, coerced, intimidated, bullied and compelled voters to vote for the appellant under the guise of six piece, six oranges and Raila gi Lange.

iii) Appellant, his supporters and agents and campaigners misinformed and deluded voters that the appellant was part of the "six piece."

iv) IEBC and Returning Officers, denied the agents particularly those of the 1st respondent the right to participate in the elections and to witness the assisted voters.

v) IEBC and Returning Officer were compliant in the harassment of the 1st respondent's agents and conducted the elections in a partisan and biased manner and misleading illiterate and incapacitated voters in favour of the appellant.

vi) IEBC and Returning Officer maliciously rotated agents in witnessing the assisted voters.

vii) IEBC and Returning Officer eliminated the 1st Respondent's agents in some polling stations.

viii) IEBC and Returning Officer through Presiding Officers marked "Six Piece" voting for assisted voters in favour of the appellant without reading out names of all those contesting the position of member of National Assembly.

ix) IEBC and Returning Officer through Presiding Officers marked ballot papers in favour of the appellant even after being told the voters wanted six piece and the 1st respondent.

x) IEBC and Returning Officer through Presiding Officers allowed clerks and other unqualified persons to assist voters.

xi) IEBC and Returning Officers Presiding Officers and Deputy Presiding Officers assisted voters simultaneously.

The 1st respondent averred that as a result of the malpractices, voters left the polling stations without knowing who they voted for.

[52] The 1st respondent gave evidence and called his agents from various polling stations as witnesses. Evidence were given relating to Nyaharwa Polling stations 1 and 2, Magombe Primary School polling station, Lifunya primary School Polling Station 1 and 2, Humwend Poling station 1 & 2, Siranga Primary School Pooling Station 1 and Siwar Primary School Polling station 1. He also called Presiding Officers and Deputy Presiding Officers from Ogeya Polling Stations 2; Nganga Polling Stations, Ralak polling station 1 and Bar – Ndenge. He also called a Presiding Officer in Charge of ICT at the Tallying Centre.

[53] The 3rd respondent gave evidence and the 2nd respondent called eight other witnesses. These were the Presiding Officers at the Nyamasanda polling station 1; Deputy Presiding Officer at Onyondo polling Station; Deputy Presiding Officer at Miyare Polling Station 1, Presiding Officer, at Ogeya polling Station1, Deputy Presiding Officer at Ralak polling station 3; and Deputy Presiding Officer at Usinda Primary School Polling Station. Presiding Officers at Magombe Primary School Polling Station and Presiding Officer at Sigweng Karuoth1 polling station. Other than Magombe Polling Stations, the Polling Stations referred by the 2nd and 3rd respondent's witnesses were not the ones referred to by the 1st respondent's witnesses in the evidence.

[54] Some witnesses gave evidence as follows: Viviane Rebecca Nerima Omondi, the Presiding Officer of Ogeya Primary School polling station testified that the Returning Officer instructed him to allow six agents for ODM while MDG have only 2 agents and that ODM Party agents demanded that the assisted voters who wanted to vote "six-piece" should automatically he deemed to want to vote for ODM candidates and further that ODM candidates for member of the National Assembly went to the polling station and demanded to know why she was not allowing "six – Piece" voting. Diana Awino Odhiambo – agent for the 1st respondent at Hamwend polling station 1, stated that ODM party brigade stormed the polling station and added their agents to six and thereafter Presiding Officer marked ballot papers for assisted voters in favour of the six ODM candidates. Wycliff Omondi Otieno – a Presiding Officer at Magombe Primary School Polling Station; called by 2nd and 3rd respondents, stated that he allowed only one agent to witness voting by assisted voters and also allowed rotation of 2 agents every time a voter was assisted as it was impracticable for all agents to witness voting by assisted voters. He admitted that Emma, (the agent for MDG) complained three times regarding her exclusion from witnessing voting by each assisted voter and that he did not record any incident in the polling station diary. Peter Mwandha Opondo – Presiding Officer at Sigweng Karuoth polling station, called by 2nd and 3rd respondents, stated that some voters went to the polling station asking to vote "six – piece" and in one case when he called out the names of the voter, the voter voted for non – ODM candidates and that the voter did not know what "six – piece" meant.

He also testified that there was pressure on him from ODM agents who wanted him to mark all ODM candidates whenever a voter asked to vote "six Piece" and that he indicated in the polling station diary that ODM agents stormed the room and demanded that he allows voters who had asked to vote "six piece" to vote for the six ODM candidates. The Returning Officer stated that it was brought to his attention that NASA was arranging voting "six – piece" for all ODM candidates in the Constituency and educated voters that there was no candidate called "six Piece" and also informed the candidates of the strategy. It was also his evidence that the IEBC legal team allowed

them to admit an agent for each candidate; that the fact that NASA was allowed an agent for each candidate was against the Regulations, that all agents should have witnessed voting for all assisted voters and that no record was kept by the Presiding Officers for assisted voters.

Lastly, Jared Omondi Buoga, the Presiding Officer in charge of ICT testified that on the voting day at about 10.00 a.m and following complaints from candidates, a message was sent from the Tallying Centre to all Presiding Officers directing them not to allow "six piece" voting for assisted voters.

[55] The election court considered the evidence. The court appreciated that ODM had a right to ask that only ODM candidates should be elected but said:

"However to intimidate a Presiding Officer to allow voters that asked to vote "six-piece" to vote for 6 ODM candidates only without letting the voters to (sic) pick a candidate of their choice as happened at Singeny Karuoth polling station 01 among other polling stations was an irregularity that the court cannot disregard since it goes to the reliability of the election"

The Court considered the requirement of ***Regulation 72 of Elections (General) Regulations, 2012*** relating to assisted voters and said;

"In the absence of form 32 and marked registers, I find and hold the 1st and 2nd respondents have failed to account for the assisted voters and the reasons for which they were assisted and this raises doubt in the mind of the court as to whether the election was free and fair"

As regards the witnessing of assisted voters, the court said:-

" ..... The Presiding Officers and their deputies that testified conceded that they randomly rotated agents so that only two agents witnessed voting by assisted voters. It was also conceded that the petitioner's agents did not witness the voting for all assisted voters since there were more ODM agents at the polling stations.

By randomly rotating agents to witness voting by assisted voters, the 1st and 2nd respondent breached Regulations 72 of the General Regulations, 2012 which required that such voting be witnessed by all agents"

The election court rejected the explanation that rotation of agents was a management tool for the reason that;

"It denied the petitioner's agents an equal chance with ODM agents that included those of 3rd respondent to witness the voting by assisted voters".

[56] The particulars of the malpractice of canvassing for votes in the polling stations and in the queues pleaded in the petition were two, namely, firstly, that the appellant and his supporters, agents and campaigners openly campaigned for "six Piece" voting for the appellant in polling stations and, secondly, the IEBC and Returning Officer allowed the agents of the appellant to wear badges bearing the name of the appellant.

In the supporting affidavit, the 1st respondent deponed that he had information that the appellant visited Magombe, Nyaharwa, Ogeya, Sihay and Inungo polling stations where on the way into and out of polling rooms urged the voters in the queues to vote "six – Piece", that the appellants agents, campaigners and party members visited and some remained in Humwend Sigweng Karuoth; Ukwala Boys; Sega Township, Lela and Nyaharwa polling stations canvassing in the queues for "six Piece" voting; that he personally witnessed the appellant's agents inside Humwend, Nyaharwa, Siranga, Kanyaundo Ukwala Boys and Miyare polling rooms wearing badges with the name of the appellant; that he was informed that the appellant's agents wore badges bearing the name of the appellant in Sigweng Karuoth, Got- Nanga, Sega Township, Humwend; Ukwala Boys, Nyambiro, Kagonya Jiraho, Ralak,

Lifunya, Yenga, Lela and Mathirwa polling rooms and that the appellant's supporters went to Ralak and Ukwala Boys polling stations with posters bearing the portrait of the appellant and were ordered out of the two polling stations.

[57] The 1st respondent called two witnesses in respect canvassing for voters at Nyaharwa polling stations and two witnesses in respect of Magombe Primary school polling station which the appellant is said to have visited. The 1st respondent annexed the badges that the appellant's agents displayed and called two witnesses in respect of Lifunya polling station; one witness for Sigweng Karuoth and two witnesses in respect of Ukwala.

The 1st respondent also called four witnesses in relation to the campaign by appellant's supporters at Humwend, Sigweny Karuoth and Ukwala Boys polling station. The 1st respondent also gave evidence. The Returning Officer and respondents' witnesses denied this evidence.

[58] The election court considered the evidence and stated;

" Although the Presiding Officers and their deputies that testified denied receiving any complaints from the petitioners agents, the 1st and 2nd, respondents deliberately filed incomplete polling station Diaries purposely omitting the pages where said evidence ought to have been recorded and gave no reasonable explanation for the said omission. The only inference the court can make is that the omission was part of a scheme intended to conceal evidence that was adverse to the 1st and 2nd respondents and this court hold it against them".

[59] As regards the malpractice of intimidating of Returning Officers and other election officials at the tallying centre, the 1st respondent averred in the petition that the appellant harassed and intimidated the Presiding Officers in the polling stations to allow "six-piece" voting and to mark all "six-piece" votes in favour of the appellant and that the appellant harassed, assaulted and insulted the Presiding Officers and Returning Officers at the Tallying centre. In his supporting affidavit, the 1st respondent stated that he was informed that the appellant and his agents took over the tallying centre as soon as the results started coming from the polling stations; that the appellant grabbed the microphone from the Returning Officer and demanded that he be declared the winner; that he was warned by the DCIO against going to the tallying centre for safety reasons; that the appellant, his agents and supporters threatened, intimidated and put pressure on the Returning Officer thereby denying the Returning Officer the chance to enter any reservations or complaints about the results that he finally announced.

[60] Although Jared Omondi Buoga, the Presiding Officer in charge of ICT deponed that the appellant and his team assaulted, intimidated and put pressure on the Returning Officer at the tallying centre, the Returning Officer denied that he was assaulted. He however stated that there was a lot of tension at the tallying centre due to the closely contested gubernatorial and Member of Parliament positions.

[61] The election court did not make a finding that the appellant harassed, assaulted and insulted Presiding Officer and Returning Officer at the Tallying Centre but relied on the evidence of Peter Mwandha Opondo, a Presiding Officer at Sigweny Karuoth polling station that the appellant and ODM agents stormed the polling room to demand "six-piece" voting to find that there was coercion, intimidation and bullying of the Presiding Officers.

SUBMISSIONS

[62] In ground 5 of the appeal, the appellant states that the learned judge erred in law by improperly shifting the burden of proof to the 2nd and 3rd respondents without the 1st respondent having first discharged the onus of proof. The particulars of the errors are given as allowing the petition on the basis of electoral malpractices which were not proved to the required legal and evidentiary burden; finding the electoral malpractices were proved despite failure by the 1st respondent to present evidence of reports to police and IEBC, making, sweeping findings with respect to the alleged electoral malpractices, inferring a scheme to conceal evidence; disregarding the testimony of Presiding

Officers, neglecting to discharge her duty as an impartial, neutral and objective arbiter by making generalized findings absent evidence to support them; and by rendering a judgment contrary to the weight of evidence adduced. The issues framed by the appellant in this aspect of the appeal include whether the court addressed its mind to the strength and weakness of the petition; whether the court imported extraneous matters; whether the court properly applied its mind to the burden and standard of proof and whether the 1st respondent proved, to the requisite legal and evidentiary standard that the election should be nullified.

[63] In the written submissions, the appellant submitted, inter alia, that the 1st respondent failed to discharge the onus of proof; no proof was presented identifying specific agents who wore the appellant's badges and no proof or reports to the IEBC, there was no proof of harassment and intimidation of Presiding Officers and Returning Officers and no such report was made to the IEBC or to the police; the 1st respondent did not present proof of any report to IEBC or adduce evidence on the alleged malpractices during the campaign period; there is no law barring use of "six piece" voting campaign slogan; rotation of agents was a managerial tool; that it was factually untrue that the choices of assisted voters was made for them; the adverse finding that IEBC deliberately filed incomplete polling stations' diaries and the adverse inference was not supported by positive evidence and that the learned judge failed to probe the veracity of the 1st respondent's allegations.

ANALYSIS

[64] The appellant's 5th ground of appeal states that the burden of proof was shifted to the 2nd and 3rd respondents. The cross appeal by the 2nd and 3rd respondents raises similar issues of evidentiary nature to those raised by the appellant. It is convenient that the grounds of appeal touching on the onus of proof and shifting of burden of proof be considered together with the similar grounds raised in the cross appeal more so because the 1st respondent has submitted on these grounds together.

[65] The relevant grounds of cross appeal are numbers 1, and 5 – 15. Those grounds include the averments that the learned judge erred in finding that the 1st respondent had presented detailed grounds of his allegations without giving specific details; the learned judge erred in law and in fact in finding that the 1st respondent proved the allegations to smear and dirty campaign; in relying on the evidence for coached witness; in relying on evidence of witnesses which lacked material information on the persons and dates when the alleged malpractices were committed; in finding that the 1st respondent was not duty bound to report incidences of malpractices and election offences; in finding that failure to avail Form 32 and marked register resulted in failure to account for assisted voters when the same was not pleaded in the petition; in selectively relying on polling station diaries; in finding that Presiding Officers were intimidated and coerced and that the court erred in law in finding that the mechanisms employed by the Presiding Officers by rotating agents was illegal and compromised the results of the elections.

The issues framed by the 2nd and 3rd respondents are directly derived from the grounds of cross – appeal and are aptly summarized in issue no. 14 – whether the allegations of malpractices, irregularities and illegalities by the appellants and the 2nd and 3rd respondents were proved.

The 2nd and 3rd respondents have also made extensive written submissions to which I will refer, where relevant, at the appropriate stage.

In brief, the 1st respondent submitted in the written submissions that, the petition set out in detail the grounds upon which the petition was presented, complete with Constitutional, statutory and regulatory infractious and the contended irregularities and malpractices as required by Rule 8; that the facts upon which the petition is based including the polling stations were contained in the affidavit of the petitioner and 183 other witnesses affidavits; that the appellant's attack on the judgment fails the test of ***section 85A*** of the ***Elections Act*** and that ground 5 of the appeal and grounds 5-15 of the cross-appeal should be disregarded.

Without prejudice to the foregoing submissions, the 1st respondent made extensive submissions showing that the grounds of the petition were proved and that the election court reached the correct decision.

[66] The ground that the learned judge erred in finding that the 1st respondent had presented detailed grounds of allegations in the petition has been raised out of contex. What the learned judge said was;-

" The detailed grounds upon which the petition is premised are to be found in the petition, the petitioners affidavit in support of the petition as well as witnesses affidavit":.

This was not a finding, it was said as a prelude to the analysis of the evidence. The 1st and 2nd respondents did not in the response to the petition raise any issue of the competence of the petition based on the ground that it was based on general allegations.

It is true that the 2nd and 3rd respondents mentioned that the petition was based on general assertions. However, that was in relation to the nature of the alleged electoral offences, malpractices and misconduct. The four specific grounds of the petition were clearly indicated in the petition and the full particulars of each ground was given. The supporting affidavit which is an integral part of the petition and, thus, a pleading, gave details of the grounds of the petition and the names of the witnesses who would support each ground. I have no doubt that the petition complies with the requirements of ***Rule 8*** of the election petition Rules, 2017. It is my view with respect that the petition is a model of an election petition. I find no merit in this ground of appeal.

MATTERS OF LAW ONLY

[67] ***Section 85 A (1) of the Elections Act*** provides that;

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

In ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others [2014] eKLR***, the Supreme Court interpreted at paragraph 81 the phrase "***matters of law only"*** in ***section 85A*** as including a question or an issue involving;

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

[68] The Supreme Court added at paragraph 93,

"However, as we already noted, section 85A of an Elections Act is not an inconsequential legal provision. Much as the court is free to navigate the evidential landscape of appeal, it must, in a distinct measure, show deference to the trial judge; regarding issues such as the credibility of the witnesses and the probative value of evidence. The court must also maintain fidelity to the trial record. The evaluation of the evidence on record is only to enable the court to determine whether the conclusions of the trial judge were supported by such evidence, or whether such conclusions were so perverse, that no reasonable tribunal would have arrived at the same."

In formulating the meaning of "***matters of law only***", the Supreme Court was aided by several decisions from other jurisdictions including the decision of the Supreme Court of Philippines in ***New Rural Bank of Guimba vs Fermina S Abad and Rafael Susan GR No. 161818 [2008]*** where the court said in part:-

"A question of law exists when the doubt or controversy concerns the application of law or jurisprudence to a certain set of facts; or when the issue does not call for an examination of the probative value of the evidence presented the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the querry invites calibration of the whole evidence considering mainly the credibility of the witnesses, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation"

[69] The words used in the memorandum of appeal are not determinative of whether the appeal involves "matters of law only". It is the duty of the appellate court to assess whether or not the appeal in substance and in truth raises matters of law only. The use of the word "only" is an indication that the Legislature intended matters of law to exclude mixed questions of law and fact. An appellate court should appreciate the legal position that ***section 85A*** gives the appellate court limited jurisdiction in electoral dispute resolution that of the correction of errors of law only and not the correction of ordinary judicial errors of fact made by the election court within its jurisdiction.

DETERMINATION

[70] The essence of ground 5 of the appeal is that the 1st respondent did not discharge the burden of proof – that is, he did not prove the electoral malpractices alleged in the petition and that the election court shifted that burden of proof to the 2nd and 3rd respondents.

[71] The essence of the grounds of cross appeal is that the appellant did not prove the ground and electoral malpractices, the basis of the petition.

I have already given an outline of the 1st respondent's case in respect of each electoral malpractice and the witness called without reproducing their evidence except where it is necessary to illuminate the decision of the election court. I have also outlined the findings of the election court in respect of each electoral malpractice. Before the consideration of the evidence, the election court stated the principles of law applicable to the petition including the onus of proof and standard of proof citing the relevant authorities and constitutional and statutory provisions. In respect of malpractices during the campaign period, the election court was guided by the decision of the Court of Appeal in ***Cornel Rasanga Amoth Vs William Odhiambo & 2 Others [2014] eKLR. (Cornel Rasanga's Case)*** Thereafter, the court considered the entire evidence and ultimately made findings of fact already referred to.

[72] The witness' evidence relating to malpractices in campaign rallies in various places was uncontroverted since the appellant did not participate in the trial and since the 2nd respondents and appellants case was largely based on the events of the polling day. The evidence presented to the election court by the 1st respondent was largely oral evidence which was direct evidence (see ***sections 62 and 63 of the Evidence Act***). As regards the malpractices on the voting day, the election court preferred the evidence of the 1st respondent to that of the 3rd respondent and their defence witnesses. As indicated before, the evidence of the respondents' witnesses except in one polling station did not relate to the polling stations referred to by the 1st respondent's witnesses. It is evident that the evidence to prove electoral malpractices was cogent.

[73] A study of the grounds of the appeal and most of the grounds of cross appeal excepts grounds 2, 3 4 and 16 reveals that this Court is being asked to review or re-evaluate the evidence presented to the electoral court and find that it had no probative value or that it was untrue or false. The grounds of appeal and cross appeal raise the question of credibility of the 1st respondent's case and the sufficiency of the evidence. Most of grounds of cross appeal expressly refer to errors of facts. Those are questions of fact and not law which the Court has no jurisdiction to entertain. I would for that reason dismiss these grounds of appeal and cross – appeal.

OTHER ISSUES

[74] This is the appropriate occasion to consider grounds 2, 3 and 4 of the cross appeal. These grounds deal with joinder in the petition of all persons whose conduct was complained of. These grounds no doubt raise legal issues. The 2nd and 3rd respondents complain that the election court erred in finding that it was the duty of the 2nd and 3rd respondents to join them; in finding that a mere mention of the person in the petition was sufficient notice to that person and in finding that failure to join them was fatal.

The issue of the joinder of the persons whose misconduct is complained of in the petition was raised by the 2nd and 3rd respondents at the trial. The 2nd and 3rd respondents relying on the definition of a "respondent" in ***section 2*** of the Election Petition Rules, 2017 submitted in the trial court that the senior politician against whom numerous claims had been made in the petition and other persons adversely mentioned should have been joined as respondents in the petition. However, the 1st respondents position was that, the allegation made against the senior politician were made against him as campaigner and it would be ridiculous to join him in the petition when he was running for a senatorial seat. The election court relying on the decision of the Court in ***Cornel Rasanga's Case*** made a finding that failure to include as respondents all persons alleged to have participated in the dirty campaign against the 1st respondent was not fatal to the petition.

[75] ***Section 2*** of the ***Election Petition Rules 2017*** states that a respondent in relation to the petition means;

a) the person whose election is complained of;

b) the returning officer;

c) the commission and

d) any other person whose conduct is complained of in relation to an election.

Rule 9 thereof provides that the Commission shall be a respondent in every petition filed under the Rules. In the ***Cornel Rasanga's case***, the Court of Appeal reasoned that a petition gives a reasonable notice to the respondent that evidence would be called against the people mentioned and that persons mentioned have an opportunity to file affidavits in response with leave of the court under ***Rule 15***.

[76] This Court of Appeal has already made a decision on the issues raised in ***Cornel Rasanga's case***. The definition of who a respondent is in ***section 2*** of the ***Rules*** merely shows that any other person whose conduct is complained of in relation to an election may be joined as a respondent. There is no Rule similar to ***Rule 9*** which compels a petitioner to join such a person as a respondent in the petition. The petition is not a criminal prosecution against such persons and the discretion of the election court is not likely to affect them. If the determination is interpreted to be mandatory, the proceedings in the election court would be protracted and costly. The course suggested by the Court of Appeal is the most practicable and reasonable; that such persons either be called as witnesses by the respondents or they seek leave to file an affidavit and give evidence. I would reject this ground of appeal.

RESULT OF THE ELECTION

[77] Further, ground 6 of the appeal raises a legal issue that the election court nullified the election on the basis of non-compliance with the law and regularities without considering whether the non-compliance affected the outcome of the elections. On this ground, the appellant's counsel submitted, amongst other things, that mere non-compliance with the law does not invalidate an election, that the learned judge having correctly identified the test failed to apply it correctly; that the election court failed to objectively consider whether the election which is presumed by law to be lawfully conducted was vitiated. The 1st respondent's counsel submitted, inter alia, that the election could not pass the test of transparency, accountability, verifiability and credibility in view of the

malpractices; that the learned judge took into consideration all relevant factors; that without the very many instances of non-compliance with the law, the margin of votes between the two below candidates could have been reduced to a level where they could obviously put the victory in doubt and that if the adjustments were to be made for the effect of irregularities the contest would seem much closer that it appeared when first determined.

[78] Although ground 16 of the cross appeal is not clearly worded it implicitly raises the same legal-issue the effect of malpractices irregularities and illegalities on the results of the election.

Indeed, the 2nd and 3rd respondents' counsel has submitted in the written submissions, amongst other things, that the 1st respondent did not challenge the election results and therefore the question of procedural irregularities of such magnitude as to affect the results does not arise; that the procedural or administrative irregularities and other errors occasioned by human imperfections are not enough by themselves to vitiate an election; that the learned judge framed an issue about the meaning of the phrase " affected the result" and the margin of votes which issue was not pleaded and that the election court erred in considering the margin of result and the returned result when the petition was entirely on the qualitative aspect of the election.

[79] ***Section 83*** of the ***Elections Act*** which apply to this appeal provided before the 2017 amendment;

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

In ***Peter Munya's case****, (supra)* the Supreme Court construed that provision and said at paragraph 217:

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

and at paragraph 218, the Supreme Court said in part;

" Where, however, it is shown that the irregularities were of such magnitude that they affected the election results, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough by and of themselves, to vitiate an election"

[80] The phrase "affected the result of the election" was interpreted by the Court of Appeal of Tanzania in ***Mbowe v Eliufo [1967] EA 240*** where George CJ said at page 242"

" in my view the phrase "affected the result" the word "result" means not only the result in the sense that a certain candidate won and another lost. The result may be said to be affected after making adjustments for the effect of proved irregularities, the contest seems much closer than it appeared to be when first determined"

The Uganda Supreme Court in ***Rtd Col. Kizza Besige VsYoweri Kaguta Museveni & Electoral Commission of Uganda, Presidential Election No. 102 of 2011***, said in part

" That means that to succeed the petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that the winning majority would have been reduced. Such reduction would have to be such as would put victory in doubt"

[81] The election court specifically dealt with the question whether the established electoral malpractices affected the integrity of the election and the result. The Court considered the applicable legal principles and the

jurisprudence. It considered the winning margin of 347 votes and the impact of the electoral malpractices particularly the impact of the "dirty" campaign and said in part at paragraph 66 of the judgment.

"The election campaigns were repeatedly bombarded with malicious propaganda against the petitioner. The propaganda was beyond what was ordinarily expected from opponents in an election campaign. From the evidence, the county is basically an ODM and Raila zone. I find that the propaganda that the petitioner was supporting Honourable Uhuru Kenyatta was not only offensive but also a blow below the belt as it were. Taking together all that has been outlined in the foregoing, one cannot say that a fair chance was given to the petitioner to campaign or that electors were given a fair chance to pick a candidate of their choice. To put it bluntly the campaign was not free and fair. The campaign was perverted to the extent that it fundamentally subverted the will of the people and compromised the integrity of the election"

I have already quoted paragraph 90 for the 1st respondent's supporting affidavit where he stated that the electoral malpractices affected the results to the extent that the election could not produce a clear winner.

[82] It is clear therefore that the electoral court considered the nature of the electoral malpractices and whether or not those malpractices affected the results of the election and came to the conclusion that electoral malpractices established were of such magnitude that they affected the results of the election. The electoral malpractices established to have been proved by the election court affected the very core of the Constitutional principles of the electoral system that of free expression of the will of electors through a free and fair election.

In the circumstances of the case, I too find that the malpractices were of fundamental nature and put the narrow victory of the appellant in doubt. I am satisfied that the elections were validly nullified.

COSTS

[83] Lastly, on the issue of costs, the appellant stated that he was condemned to pay Kshs. 3.5 million as costs without being granted an opportunity to be heard on the issue of costs. The 2nd and 3rd respondent's claim in the cross appeal that the elections court erred in awarding the exorbitant costs of Kshs. 7 million. The election court noted that the parties were in agreement that the petition was complex. The 1st respondent had claimed kshs. 7 million. The 2nd and 3rd respondents had asked for Kshs. 10 million. The election court capped the costs at Kshs. 7 million. The capping of costs was at the discretion of the election court. The election was nullified due partly to the malpractices by the appellant and partly due to malpractices by 2nd and 3rd respondents.

In view of the complexity of the matter, there is no good reason to interfere with the decision to cap the costs at Kshs. 7 million. As regards the costs of this appeal, the Court of Appeal election petition Rules 2017 do not provide for capping of costs. However, ***Rule 108*** of the Court of Appeal Rules 2010 gives the Court discretion when making a decision on payment of costs to assess the same or direct them to be taxed. It would not be just to arbitrarily assess the costs of this complex appeal without hearing the respective counsel for the parties. The appropriate direction is to order the costs to be taxed.

CONCLUSION

[84] For all the above reasons, I would dismiss the appeal with costs to the 1st respondent. As the 2nd and 3rd respondents supported the appeal, I would not award costs to them nor would I award costs of the cross – appeal to the appellant. I would award the costs of the cross appeal to the 1st respondent with an order that the costs of the 1st respondent both in the appeal and cross appeal be taxed.

[85] As Okwengu & J. Mohammed, JJA agree, that the appeal be dismissed and as to the order of costs, the judgment of the Court shall be as follows:

1. The appeal is dismissed with costs to the 1st respondent which costs shall be taxed.

2. The Cross-appeal by the 2nd and 3rd respondent is dismissed with costs to the 1st respondent which costs shall be taxed.

3. The 2nd and 3rd respondents shall bear its/his own costs of the appeal and the Cross-appeal.

4. The appellant shall bear his own costs of the cross-appeal.

Orders Accordingly

Dated and delivered at Kisumu this 16th day of August, 2018

E.M. GITHINJI

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF HANNAH OKWENGU, JA.

Introduction

[1] In the general elections that were held on 8th August 2018, **Christopher Odhiambo Karani** (the appellant), was a candidate for election as Member of National Assembly for Ugenya Constituency under an Orange Democratic Movement (ODM) Party ticket. There were four other contenders for the same constituency including **David Ouma Ochieng'** (the 1st respondent) who contested under the Movement for Democracy and Growth (MDG) party ticket. **The Independent Electoral and Boundaries Commission** (2nd respondent) conducted the elections under the supervision of its Returning Officer **Isaiah Nabwayo** (3rd Respondent), who declared the appellant the winner. The election was closely contested with the appellant winning by a narrow margin of 347 votes, having garnered 23,765 votes, while the 1st respondent who was the closest contender garnering 23,418 votes.

[2] The 1st respondent challenged the outcome of the election by instituting a petition before the High Court sitting as the election court in Siaya. He challenged the conduct of the elections on the grounds that the electoral process was marred with irregularities, and various electoral malpractices attributed to the appellant, the 2nd and 3rd respondents, and other persons who were not named as parties in the petition. The appellant filed a reply to the petition and supporting affidavits denying the allegations made in the petition. The 2nd and 3rd respondents also similarly filed a joint response, denying the allegation in the petition. The responses were both filed out of time. Consequently the appellant filed a motion dated 25th September 2017, and similarly the 2nd and 3rd respondents filed a motion for extension of time so that the responses and the affidavits are admitted out of time.

[3] The 2nd and 3rd respondents' motion for extension of time was allowed by consent recorded in court on 18th October 2017. However, although the 2nd and 3rd respondents did not oppose the appellant's motion, the 1st

respondent contested it. The election court therefore proceeded to hear and determine the motion on merit. In a ruling dated 16th November 2017, the election court dismissed the appellant's notice of motion dated 25th September 2017, and struck out the appellant's response to the petition, with costs to the 1st respondent.

[4] It appears that the appellant continued attending the court proceedings, and this prompted counsel for the 1st respondent to raise an objection against the appellant's continued participation. When the petition came up for directions on 21st November 2017, counsel for 1st respondent relying on **Rule 11(8)** of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017** (2017 Petition Rules), submitted that the striking out of the appellant's response to the petition barred the appellant from subsequent participation in the proceedings. Counsel for the 2nd and 3rd respondents supported this position. The appellant argued through his counsel that in striking out his response, the court did not order that he had ceased being a party to the proceedings, and that as a necessary party whose election was being challenged he ought to take part in testing the evidence that would be led in court through cross-examination of witnesses. By a ruling delivered on the same day, the election court upheld the 1st respondent's objection, holding that the appellant, by virtue of **Rule 11(8)** of the **2017 Petition Rules**, was barred from participating in the petition, either by himself or by counsel.

[5] On 4th December 2018 when hearing of the petition was set to begin, counsel for the appellant indicated that the appellant had instituted an appeal before the Court of Appeal at Kisumu against the ruling of the election court. Counsel reasoned that by dint of **Rule 18(1)** of the **Court of Appeal Election Petition Rules**, **2017 (2017 Court Rules)**, the orders of the election court in the respective rulings were stayed, the consequence of which was that the appellant remained a party to the petition. The appellant also prayed for a temporary stay of the proceedings of the election court pending the hearing and determination of the appeal in the Court of Appeal. In a ruling delivered the same day the election court dismissed the application for stay of proceedings and directed that the hearing of the petition proceed. Thereafter the appellant sought and was allowed to be present in the proceedings without playing any role.

[6] The petition proceeded to full hearing with forty (40) witnesses testifying for the 1st respondent; twelve (12) witnesses testifying in support of the 2nd and 3rd respondents' case, and the appellant though present in court not participating in the proceedings. Judgment was delivered on 1st March 2018, allowing the petition and in effect nullifying the election of the appellant as the validly elected Member of National Assembly for Ugenya constituency. The court awarded costs to the 1st respondent capped at Ksh. 7 million, to be borne by the appellant and 2nd and 3rd respondents, in equal amount of Ksh. 3.5 million each.

The appeal and cross-appeal

[7] The appellant was dissatisfied with both the rulings and judgment of the election court, hence this appeal. He filed a Notice of Appeal on 2nd March 2018 and the Record of Appeal on 29th March 2018. The appeal is predicated on two main aspects. First it challenges the propriety of the proceedings of the election court in regard to the appellant's right to a fair hearing, following the striking out of his response to the petition and consequent bar from participating in the proceedings; and secondly it challenges the findings and conclusion of the election court in the judgment. In his Memorandum of Appeal dated 28th March 2018, the appellant has raised several grounds of appeal captured under nine (9) broad grounds.

[8] One of the complaints raised by the appellant is that the election court denied him the right to natural justice and fair hearing that is guaranteed under **Article 50** of the **Constitution.** This is because he was not heard despite the fact that his election was the subject of the 1st respondent's petition. The appellant faulted the trial court for: striking out his response to the petition and supporting pleadings; denying him an opportunity to participate in the proceedings after striking out the response including the chance to cross-examine witnesses called by the respondents; making adverse findings on the appellant without affording him a hearing; and depriving him the right to be heard in the main petition as well as on the question of costs. The appellant also challenged the election court

for arbitrarily exercising its discretion in denying his motion for extension of time, and demonstrating bias in dismissing the appellant's motion despite allowing a similar motion by the 2nd and 3rd respondents, and disregarding the appellant's case without justifiable cause.

[9] On the judgment, the appellant faulted the court on several grounds, namely: improperly shifting the burden of proof to the 2nd and 3rd respondents when the 1st respondent had not discharged the initial burden of proof; allowing the petition on the basis of alleged electoral malpractices which were not proved; making findings on issues that were not pleaded by any party; disregarding the testimony of witnesses who rebutted the 1st respondent's case; making generalized findings without supporting evidence; nullifying the election without considering how the alleged noncompliance with electoral laws and regulations affected the electoral outcome; upholding procedural technicalities over substantive justice in determining the petition and improperly nullifying the election thereby defeating the sovereign will of voters.

[10] Consequently, the appellant urged that his pleadings filed on 27th September 2017 be admitted as part of the record and considered in determining this appeal. He also sought for orders setting aside the judgment of the trial court in its entirety and declaring him as the validly elected Member of National Assembly for Ugenya Constituency. The appellant further prayed for costs of both the appeal and proceedings in the election court.

[11] The 2nd and 3rd respondents filed a Notice of Cross-Appeal dated 3rd April 2018 supporting the appeal and seeking to have Orders 1 to 4 made in the judgment set aside, and an order for costs made in their favour in both the appeal and cross-appeal. The cross-appeal is based on 17 grounds challenging the election court for among other things, making findings on the basis of generalized allegations in the petition; denying the respondents an opportunity to interrogate the allegations; finding that it was the duty of the appellant and the 2nd and 3rd respondents to join to the petition all persons against whom allegations were made; and finding that such non-joinder was not fatal to the petition and that allegations made in the petition were sufficient notice to persons adversely mentioned. The 2nd and 3rd respondents also faulted the court for relying on: evidence of coached witnesses; evidence devoid of material disclosure; evidence that had introduced new grounds that had not been pleaded in the petition; and finding that the 1st respondent was not duty bound to report incidences of malpractices and election offences, before the election court could entertain such allegations.

[12] It is also the 2nd and 3rd respondents' case that the election court erred in finding that the allegations made in the petition were proved when there was no evidence of prior reporting; that the finding disregarded the evidence given in court by the respondents' witnesses; and that the finding that the witnessing by rotation agents of voting by witness assisted, was illegal. The court was also faulted for selectively relying on polling station diaries that were presented in court, and for making conflicting conclusions on allegations linking the 1st respondent to the murder of Chris Musando. The 2nd and 3rd respondents also challenged the award of costs of Ksh. 7,000,000 to the 1st respondent, for being exorbitant.

Submissions

[13] All parties filed their respective written submissions. Following directions of the court issued on 20th April 2018, the appeal and the cross appeal were heard together on 22nd May 2018. At the hearing of the appeal, the written submissions were highlighted by counsel. Mr. T. J. Kajwang', Mr. Ligunya and Mr. Mugoye appeared for the appellant, Mr. Kwach, Mr. Sagana and Mr. Achach appeared for the 1st respondent, while Mr. Olendo represented the 2nd and 3rd respondents.

Submissions for Appellant

[14] In arguing the appeal the appellant addressed four main issues. Firstly, whether the court exercised its discretion judicially in striking out the appellant's response to the petition and in locking out the appellant from

participating in the hearing. Secondly, whether the court wrongly applied the incidence, burden and standard of proof in election matters. Thirdly, whether the election court wrongfully nullified the appellant's election without proof of the alleged non-compliance with the Constitution, electoral laws, national legislation, or proof that the alleged non-compliance affected the electoral outcome. Fourthly, whether the election court wrongfully nullified the appellant's election defeating the expression of the sovereign will of the Ugenya people.

[15] Counsel for the appellant submitted that under **Article 25** of the Constitution, the right to a fair hearing under **Article 50(1)** of the Constitution cannot be limited; that the right to fair hearing cannot be defeated by non-compliance of **Rule 11** of the **2017 Petition Rules**; and that the exercise of the election court's discretion ought to have been guided by **Article 159(2)** of the Constitution. Counsel faulted the election court for condemning the appellant without giving him a hearing; and exercising its discretion under **Rule 19** of the **2017 Petition Rules** on whether or not to extend time for admission of the appellant's response, without considering the reasons given by the appellant for the delay.

[16] In addition, counsel for the appellant argued that in denying the appellant a right to participate in the proceedings, the election court, failed to balance the interest of the parties before it, and public interest that requires that elections should not be trivially nullified or overturned; and that the election court failed to consider that it was obliged to give effect to the overriding objective of the **2017 Petition Rules** which was to ensure just, expeditious, proportionate and affordable resolutions of election petitions.

[17] Furthermore, counsel urged the Court to follow its precedent set by a majority decision in **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others (2013) eKLR** that deviations and lapses which do not go to the root of the dispute, and which do not occasion prejudice or miscarriage of justice to the opposite party, ought not to be elevated to the level of a criminal offence; and that the Court should rise to its calling to do justice by sparing the parties the draconian approach of striking out pleadings.

[18] It was argued for the appellant that, by allowing a similar application for extension of time filed by the 2nd respondent who had filed its response to the petition ten days late the election court showed bias against the appellant by rejecting his application for extension of time for a response filed twelve days late when no prejudice could have been suffered by the 1st respondent for the delay nor did the delay affect the court's ability to determine the petition within the statutory timeline. It was reiterated that the appellant who was present in Court ought to have been given a chance to defend the personal allegations of electoral malpractices that were said to have marred his election.

[19] In regard to the issue of burden of proof, the Supreme Court decision of **Raila Odinga vs IEBC & 3 others [2013] eKLR, (Raila 2013 decision),** was relied upon for the proposition that the standard of proof in election petitions was an intermediate standard between a balance of probabilities in civil litigation and proof beyond reasonable doubt in criminal matters, and that the legal burden rests on the petitioner but the evidential burden keeps shifting. Relying on this Court's decision in **Timamy Issa Abdalla vs Swaleh Salim Swaleh Imu & 3 others [2014] eKLR,** it was submitted that this Court must be satisfied that the election court acted judicially and correctly applied the law; and that the conclusions drawn by the election court from the facts were reasonable and in accordance with the spirit and purpose of the Constitution.

[20] Further, it was submitted that the 1st respondent did not discharge the burden of proof, as he failed to prove the alleged electoral malpractices; and that the findings of the election court that there were electoral malpractices was not supported by evidence, but was based on misdirection, wrong inferences, and conclusions on issues not pleaded.

[21] The appellant drew the Court's attention to the test set by the Supreme Court in **Gitarau Peter Munya vs Dickson Mwenda Githinji [2014] eKLR** (the Munya decision), for annulment of elections. This was addressing

the question whether the identified errors or discrepancies in the election process affected the results and or the integrity of the election and if so, in what particular" Relying also on the Supreme Court decision in **Raila Amollo Odinga & another vs IEBC & 2 others[2017]eKLR,** (**Raila 2017 decision**) it was submitted that the test in section 83 of the Elections Act should be applied disjunctively, and therefore a party seeking to void an election must demonstrate either that the conduct of elections failed to comply with the Constitution, election laws and national legislation or demonstrate that there was non compliance that substantially affected the results; and that the 1st respondent did not meet either of these parameters.

[22] Finally, the appellant maintained that elections were matters of public interest surpassing the interests of the parties to an election petition, as they are demonstrations of the social contract through which the people delegate their sovereignty. Thus, the election court was required by law to defer to the election process by upholding the express will of the people and refraining from nullifying the elections on trivial grounds. The appellant reiterated that the 1st respondent failed to prove that the election process was vitiated, such as to justify nullification of the elections. He urged the court to set aside the judgment of the election court and find that he was properly and validly elected.

The Submissions for 2nd and 3rd respondents

[23] The 2nd and 3rd respondents supported the appeal and urged the Court to allow the appeal and cross appeal. Therefore, we find it appropriate to recapitulate their submissions at this juncture. The submissions made in support of their appeal and cross appeal focused on the application of Article 81 of the Constitution and section 83 of the Elections Act in regard to the standard and burden of proof; the right to be heard and the circumstances justifying nullification of an election.

[24] The 2nd and 3rd respondents submissions in regard to the standard of proof was that although the election court appreciated the required standard of proof, it did not properly apply the required standard in regard to proof of the alleged malpractices; that contrary to the precedent established in **Raila 2017**, the 1st respondent's petition was too general, imprecise, and lacked sufficient details, which denied the 2nd and 3rd respondents an opportunity to respond meaningfully to the allegations.

[25] In regard to persons who were mentioned in the petition as having taken part in the commission of electoral malpractices, but who were not made respondents, the 2nd and 3rd respondents argued that such persons had no opportunity to respond to the allegations; that the election court in finding that the allegations were uncontroverted unfairly shifted the burden of proof to the 2nd and 3rd respondents, and unfairly condemned the appellant. It was maintained that by failing to join all persons whose conduct they complained of, the 1st respondent failed to comply with **section 2** of the **2017 Petition Rules**; that there was breach of Article 50 of the Constitution on the right to fair hearing; and that the evidence adduced by the 1st respondent did not tally with the allegations made in the petition as new evidence was adduced.

[26] The case of **Jackton Nyanungo Ranguma vs IEBC & others [2018]** eKLR, was cited for the proposition that a petitioner in an election petition should not be allowed to go outside his pleadings and affidavits to prove his case, and that the respondent should not therefore be called upon to answer a case whose basis had not been pleaded. The election court was faulted for failing to give directions in regard to filing of further affidavits or the giving of additional evidence, and instead blaming the 2nd and 3rd respondents for failing to avail Form 32s and the Marked Register.

[27] The 2nd and 3rd respondents asserted that the election court's decision on the petition was anchored on illegalities and misapplication of the law; that the 1st respondent relied on evidence of witnesses whose credibility and truthfulness was doubtful; and that the election court selectively relied on the evidence presented.

[28] It was submitted that the election court denied the appellant the right to be heard through its ruling of 16th November, 2017, refusing to have the appellant's reply to the petition admitted out of time; and that denying the appellant the right to cross-examine the 1st respondent's witnesses during the hearing of the appeal further compounded the infraction. In addition the 2nd and 3rd respondent argued that the election court wrongly computed time for the filing of the reply to the petition by relying on the date of the advertisement of the newspaper, rather than the date when the appellants collected the documents.

Submissions for The 1st respondent

[29] In his submissions the 1st respondent reiterated that the election court properly and judicially exercised its discretion in dismissing the appellant's application for enlargement of time. He maintained that contrary to the submissions made by the appellant, the 2nd and 3rd respondents, the application for extension of time made by the 2nd and 3rd respondents was agreed upon by consent of all the parties; and that this was unlike the appellant's application for extension of time which was not agreed upon and therefore had to be determined by the election court.

[30] The 1st respondent posited that the election court rejected the appellant's motion for enlargement of time because the two grounds upon which the motion was anchored were not established; that contrary to the appellants contention that he was not served with the petition, it was established that the appellant was properly served through an advertisement in a local daily newspaper*;* and secondly, that the other ground relied upon by the appellant which was that he was sick and admitted in Alfarooq Hospital, was properly rejected by the election court as there was evidence produced by way of a letter from Alfarooq Hospital that the appellant was never admitted in that hospital at the time alleged.

[31] The 1st respondent relied on **Mbogo & another vs Shah [1968] EA 93, and Shabin Din vs Ram Parkash Anand (1955) 22 EACA 48,** in support of his submission that this Court has no reason to interfere with the exercise of discretion by the election court because the appellant has not shown that the election court misdirected itself or failed to take into consideration matters which it should have taken into consideration or took into consideration extraneous matters or that there was any accident inadvertence or excusable mistake.

[32] The 1st respondent pointed out that the appellant was seeking an equitable remedy which could not be granted to him because of his lack of candor, and that his conduct had shown that he was underserving of the equitable relief. In this regard **Jackson Mokaya vs James Onchangwa Macharia [2014] eKLR;** and **Titus Gicharu Mwangi vs Mary Nyambura Murima & another [2014][eKLR,** were cited.

[33] In regard to the appellant's contention concerning violation of his right to fair hearing, the 1st respondent submitted that the appellant did not file his reply to the petition within time; that Rule 11(8) of the **2017 Petition Rules** precludes a respondent who has not filed a response to a petition from being allowed to appear or act as a party in the proceedings; and that the ruling of the election court refusing the appellant to participate in the petition proceedings was in accordance with **Rule 11(8)** of the **2017 Petition Rules**.

[34] The 1st respondent asserted that his petition set out in detail the grounds upon which the petition was presented, complete with constitutional, statutory and regulatory infractions, alleged irregularities and malpractices, as required by **Rule 8** of the **2017 Petition Rules**. In addition, the facts upon which the petition was based including the polling stations where the errors, omissions, malpractices and irregularities took place were contained in the affidavit of the 1st respondent and other witness affidavits filed together with the petition.

[35] In regard to the standard and burden of proof, the 1st respondent maintained that the election court properly addressed the issue; that the evidence presented by the 1st respondent in the election court was way beyond the required standard of proof both legal and evidential; that there was specific oral evidence adduced in proof of stated

violations by witnesses who were present at the places where the malpractices were committed; and that the court came to a proper conclusion that the allegations were established and correctly shifted the evidential burden to the 2nd and 3rd respondents to offer rebuttal evidence.

[36] The 1st respondent urged that failure to report the electoral malpractices to the police or IEBC did not discount the fact that the malpractices occurred nor should the court ignore clear violations of the Constitution and electoral laws because such violations were not reported. In regard to the 2nd and 3rd respondent's failure to produce Form 32s, polling station registers, and diaries, the 1st respondent drew the Court's attention to section 112 of the Evidence Act that places the burden of proving or disproving a fact upon any person within whose special knowledge that fact is, and urged that the finding of the election court blaming the 2nd and 3rd respondents for filing incomplete polling station diaries, and failing to produce Form 32s for assisted voters without any reasonable explanation, and the drawing of an adverse inference from these facts, could not be faulted.

[37] In addition, the 1st respondent noted that the election court was cognizant of the fact that not every error, mistake or malpractice would vitiate an election, but had made proper findings that the campaigns were not free or fair; that assisted voters were mishandled; that the appellant conducted campaigns outside the campaign period; that the presiding officers who were assisting voters, were coerced, intimidated and bullied to vote "six piece" for ODM candidates, without giving the assisted voters a chance to elect a candidate of their choice; and that the irregularities were of such magnitude as to impugn the results of the elections as the elections were not free and fair.

[38] Finally on costs, it was submitted that the election court properly awarded costs to the 1st respondent who had proved election malpractices, and that the award of Kshs.3.5 million was neither exorbitant nor arbitrary. The Court was urged that the cross appeal was incompetent as it raised matters of law contrary to section 85A of the Elections Act and did not also comply with the requirement of the **2017 Petition Rules** with regard to precise and concise pleadings.

Analysis and determination

[39] In considering this appeal, I am mindful, of the limitation of this Court's jurisdiction as prescribed by **section 85A** of the **Elections Act** in the following terms:

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

[40] This section has been explained and elaborated in various decisions. Of particular importance is the elaboration by the Supreme Court in the ***Munya decision*** on the meaning of a matter of law as a question involving:

"(a) the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;

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

(c) the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on "no evidence", or that the conclusions were not supported by the

established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence."

Competence of the appeal

[41] The issue of the competence of the appeal and cross appeal is one that impacts on this Court's jurisdiction to hear the appeal. Therefore it is appropriate that I commence the analysis by considering whether the grounds that have been raised in these documents fall within the meaning of matter of law as elaborated in the **Munya decision.** According to the 1st respondent, the cross-appeal is incompetent in its entirety, while the appeal is incompetent in part (from grounds 5 to 9). This is because in his view issues of fact instead of issues of law have been raised.

[42] **Rule 6** of the **2017 Court Rules,** provides for the filing of a notice of appeal, while **Rule 10** of the **2017 Court Rules** provides for the filing of a cross-appeal. Unlike the **2010 Court Rules** which provides for the filing of a notice of appeal (Rule 75) and a separate memorandum of appeal (Rule 82), the **2017 Court Rules** does not provide for the filing of a memorandum of appeal. This is not to say that a memorandum of appeal is not necessary in an election appeal.

[43] **Rule 6(3)** of the **2017 Court Rules** that provides for the contents of a notice of appeal, states as follows:

"(3) A notice of appeal shall be in separate numbered paragraphs and shall—

(a) specify whether all or part of the judgment is being appealed and, if part, which part; "

(b) provide the address for service of the appellant and state the names and addresses of all persons intended to be served with copies of the notice; and "

(c) contain a request that the appeal be set down for hearing in the appropriate registry."

[44] As evident **Rule 6(3)** of the **2017 Court Rules** does not require the setting out of the grounds of appeal in the notice of appeal, therefore, a respondent would not be able to know the grounds upon which the judgment is challenged by relying on the notice, nor would it be clear whether the appeal falls within the limited jurisdiction provided under section 85A of the Elections Act, unless the grounds are set out. Therefore, this is an appropriate situation in which Rule 4(2) of the **2017 Court Rules** that provides for the application of the **2010 Court Rules** to election appeals comes in aid so that the provisions of the **2010 Court Rules** with regard to the filing of a memorandum of appeal is applied to fill the lacuna in the 2017 Court Rules.

[45] **Rule 86** of the **2010 Court Rules** provides for the content of a memorandum of appeal to be as follows:

"(1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make.

(2) The grounds of objection shall be numbered consecutively.

(3) A memorandum of appeal shall be substantially in the Form F in the First Schedule and shall be signed by or on behalf of the appellant."

[46] This to say that in addition to filing a notice of appeal, an appellant in an election petition appeal to this Court, should file a memorandum of appeal in accordance with Rule 86 of the 2010 Court Rules setting out grounds of the

appeal in which the points of law upon which the appeal is grounded is concisely and precisely set out, under distinct heads, and without argument or narrative.

[47] The appellant filed the record of appeal containing a memorandum of appeal. The issue of time does not arise as the record of appeal was filed within 30 days in accordance with section 85A of the Elections Act. The memorandum of appeal raises 9 grounds that are clearly set out. Although the appellant has unnecessarily broken down some of the grounds to create sub grounds, this has not impinged on the clarity of the issues raised.

[48] The following issues emerge from the 9 grounds listed in the memorandum of appeal: whether there was breach of the appellant's right to fair hearing that is guaranteed under Article 50 of the Constitution; whether the learned judge of the election court exercised her discretion arbitrarily, and unreasonably in rejecting the appellant's motion for extension of time; whether the learned judge of the election court demonstrated bias against the appellant; whether the learned judge of the election court improperly shifted the burden of proof to the 2nd and 3rd respondent without the 1st respondent discharging the initial onus of proof as required by law; whether in determining the appeal, the election court upheld procedural technicalities against substantive justice; and whether the learned judge improperly and injudiciously nullified the appellant's election as the Member of National Assembly for Ugenya Constituency. In my view all these issues raise points of law as they question the interpretation and application of applicable provisions of the Constitution, the electoral laws and the procedural laws by the election court.

[49] In regard to the cross-appeal **Rule 10(1)** of the **2017 Court Rules** states as follows:

"A respondent who desires to contend at the hearing of an appeal that the decision of the High Court or any part thereof should be varied or reversed, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of his contention and the nature of the order which he proposes to ask the Court to make, as the case may be."

[50] In the cross appeal the 2nd and 3rd respondents have set out 17 grounds. These grounds reveal imprecision, repetitiveness and to some extent lack clarity of issues. Although this does not defeat the essence of the cross appeal, it results in expending judicial time to sift through the web to identify the issues open for consideration by this Court on matters of law as dictated under **section 85A** of the **Elections Act**.

[51] Notwithstanding the poor drafting, I clearly discern issues of law such as issue of non joinder of parties; whether the standard and burden of proof was properly applied; whether the election court improperly determined the appeal on un-pleaded issues, and whether the election court properly applied the test of transparency accountability verifiability and credibility in determining whether the elections were in accordance with the Constitution and relevant electoral laws.

[52] Thus, I am not persuaded that the appeal and cross-appeal fails the competency test as there are substantive issues of law raised in both the appeal and the cross-appeal that deserve to be accorded full consideration on merit. Moreover, much as it is not my intention to encourage poor drafting, I am alive to the constitutional duty of this Court to promote substantive justice, and this duty is all the more heavier in election matters where public interest lies at the heart of each appeal that comes before us.

[53] I reiterate what this court recently observed in ***Wavinya Ndeti & Another v IEBC & 2 Others*** **Election Petition No. 8 of 2018 [2018] eKLR** that:

"50. We are mindful that drafting of pleadings is a technical matter. If the judge had deduced an unknown legal principle from the facts of the case to arrive at his decision, it would be preposterous to shut out a litigant simply on account of inelegance in drafting. The Court has to ensure that justice prevails at all times and that Section

85A is not used as a roadblock to shut out genuine grounds of appeal on account of poor drafting of the grounds of appeal. In essence the Court has to undertake a delicate examination to ensure that appeals are not outrightly and without proper investigation rejected. In the same breadth, we underscore the importance of compliance with Section 85A but we are mindful that oftentimes points of law may inescapably be difficult to separate from factual determination. The line is opaque and therefore circumspection is necessary."

[54] In regard to the substantive appeal, the appellant challenged both orders of the election court arising from the ruling made on 16th and 21st November 2017, as well as the judgment delivered by the election court on 1st March 2018. The Elections Act and the **2017 Petitions Rules** compels a party who wishes to appeal against interlocutory decisions to await the final judgment of the election court. Thus, the jurisdiction of the court on interlocutory matters arising during the petition proceedings is deferred and only crystallizes once a final judgment is made concluding the petition. This position was well articulated by this Court in ***Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 Others*, Nyeri Civil Appeal No. 23 of 2013 (2014) eKLR).**

[55] As already adverted to in this judgment, following the ruling of the election court delivered on 21st November 2017, the appellant did not take part in the proceedings. A question therefore arises as to whether he can challenge the outcome of those proceedings on issues that he did not have an opportunity to take part in. The orders made by the election court nullifying the election of the appellant are orders that directly impact on the appellant. He is therefore, an aggrieved party who ought not to be denied an opportunity to challenge the orders by way of appeal. Moreover, the appellant was sued as a party in the petition and one of the rulings challenged in the appeal is the order denying him participation in the Petition. In my view the appellant is properly before this Court.

The issues

[56] I have narrowed down the issues for determination in the appeal and cross appeal as follows:

a) whether the striking out of the appellant's response to the petition and consequent bar from participating in the election court proceedings was a violation of the appellant's right to a fair hearing, and if so, what are the consequences to the election court proceedings;

b) whether the court made adverse findings on the basis of generalized allegations, and adjudicated the petition on issues not pleaded in the petition;

c) whether the court erred in making adverse findings on allegations against third parties who were not named as parties in the petition;

d) whether the court erred in finding that the required burden and standard of proof in regard to alleged election malpractices was discharged;

e) whether the court erred in finding that the malpractices and irregularities were sufficient to nullify the election;

f) whether the court erred in its interpretation of regulation 72(2) of the General Regulations, 2012 on assisted voting;

g) whether the award of costs made by the election court was just, and who should bear the costs of the appeal.

Appellant's right to a fair Hearing

[57] The issue concerning violation of the appellant's right to a fair hearing, emanates from the rulings of the election court delivered on 16th and 21st November 2017 by which the election court first declined to admit the

appellant's response to the petition that had been filed late, and in the second ruling denied the appellant the opportunity to participate in the proceedings maintaining that the appellant had lost audience before the court after his petition was struck out.

[58] Both the appellant and the 2nd and 3rd respondents are of the view that the court improperly exercised its discretion in taking the draconian measure of striking out the appellant's response to the petition. According to the appellant, the court acted in disregard of the fact that, as the candidate whose election was being challenged, he was a necessary party for the court to be able to make a holistic and fair determination of issues at hand.

[59] In addition, the appellant faulted the court for declining to admit his response, despite having allowed a similar application by the 2nd and 3rd respondents, and also failing to consider that the delay had not affected the proceedings. He questioned the court's finding of perjury against him contending that there was no proof beyond reasonable doubt, particularly, without the aid of a document examiner to determine the authenticity of conflicting letters that were produced by the appellant and the 1st respondent.

[60] In the ruling of 16th November 2017, the election court declined to exercise its discretion to allow the appellant to file his response out of time stating in part as follows:

"As stated hereinabove, the response by the 3rd respondent was filed out of the time. Other than that the response was filed late, the reason for delay advanced by the 3rd respondent as demonstrated hereinabove is based on falsehoods. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court. The 3rd respondent has come to court with unclean hands. I am persuaded by the holding in Nicholas Kiptoo Arap Salat v IEBC & 7 Others (Supra) that the 3rd respondent cannot enjoy an equitable right since he has not acted equitably."

[61] The issue for determination here is whether the court in so finding, exercised its discretion judicially or improperly exercised its discretion thereby violating the appellant's right to a fair hearing. It is not in dispute that the appellant failed to file the response to the petition within seven (7) days of service of the petition as required by **Rule 11(1) of the 2017 Petition Rules,** which provides for the filing and service of a response to a petition as follows:

"(1) Upon being served with a petition in accordance with rule 10, a respondent may oppose the petition by filing a response to an election within seven days."

[62] In regard to this Rule the election court observed that:

"***the rule does not make it mandatory for a respondent to file a response. A respondent who opts to file a response must however file and serve it within 14 days from date of service of the petition."*** Emphasis added

[63] This was an error as **Rule 11(1)** of the **2017 Petition Rules** requires that a response to a petition should be filed within seven (7) days and not fourteen (14) days as stated by the election court. Under **Rule 19 of the 2017 Petition Rules,** the election court has discretionary powers to extend time provided by the Rules in the following terms:

(1) Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired.

(2) Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard

or determined. (Emphasis added).

[64] This Rule has to be read together with **Rule 5** which requires that the '***effect of any failure to comply with these Rules shall be determined at the Court's discretion in accordance with the provisions of Article 159(2)(d) of the Constitution***.' **Rule 4** of the 2017 Election Petition Rules is also a relevant guiding consideration as it obligates the election court to give effect to the objective of the **2017 Petition Rules** which is to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions.

[65] In ***Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 Others* [2018] eKLR,** this Court underscored the need for the election court to balance all these objectives before exercising its discretion to strike out any pleadings. I also take note of the guidance given by the Supreme Court in ***Nicholas Kiptoo Salat v IEBC & 7 Others [2014] eKLR,*** regarding the principles that should be taken into account by a court in exercise of discretion for extension of time. I set out the principles herein verbatim as follows:

"1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

[66] I also bear in mind the well-settled principles that guide an appellate court in considering whether to disturb a court's decision arrived at in exercise of its discretion as stated in ***Mbogo & Another v Shah*** (supra) that:

"…an appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

[67] I reiterate the sentiments of this Court as recently stated in ***Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 Others*** (supra) that:

"In our understanding, rules of procedure must be applied to the advancement of substantial justice, to enforce rights in a manner not injurious to the society, by enlarging the remedy, if necessary, in order to do justice, to prevent delay, reduce expenses and inconveniences. We must also state that many things, especially in the domain of procedure, are left to the discretion of trial judges, and the best judge is the one who relies least on his/her own opinion. A trial judge has a wider field for the exercise of his/her discretion and an appellate court, would be most reluctant to interfere with such exercise of discretion….

Discretion, when properly applied, means sound discretion grounded on the law, and rules; it must not be arbitrary, vague or fanciful; but judicious and regular. Discretion must not be exercised in a manner absolutely unreasonable and opposed to justice...."

[68] Thus, extension of time for the doing of an act required under the Rules of procedure is not a matter of right. A party seeking the court's indulgence where there has been non-compliance with the Rules must demonstrate that he is deserving of the exercise of the court's discretion in his favour. The fact that a similar application made by the 2nd and 3rd respondents for extension of time was allowed would not of itself be a basis for allowing the appellant's application. The election court was required to consider the circumstances of each case. Indeed, the reasons given for the non-compliance was not the same. Besides, unlike the appellant's motion, which the 1st respondent objected to, all the parties agreed to have time extended for the response of the 2nd and 3rd respondents. Thus the allegation of bias anchored on the different rulings, was spurious.

[69] The appellant was duty-bound to provide an explanation to the satisfaction of the court for his non-compliance with the Rules to justify the extension of time. The issue of service of the petition having arisen, the election court properly addressed itself to **Article 87(3)** of the **Constitution** that provides, that service may be direct or by advertisement. This provision is reiterated under **section 78(2)** of the **Elections Act** and **Rule 10(1)** of the **2017 Petition Rules**. The court was therefore, right in concluding that both direct service and indirect service by way of advertisement in a newspaper of national circulation were options available to the 1st respondent in serving the petition.

[70] From the record before the Court, the appellant was served with the petition through a newspaper advertisement that was published on 8th September 2017. As already stated under Rule11 (1) of the **2017 Petition Rules**, a respondent is required to file a reply to the petition within seven (7) days, which in this case expired on 15th September 2017. The time for filing the reply started to run from the date of service of the petition, which in the case of the appellant was the date when the advertisement of service was published in the newspaper.

[71] The argument made by counsel for the 2nd and 3rd respondents that time could only start to run from the time when the appellant collected the documents, has no basis in law. Furthermore, sustaining such a position would defeat the very purpose behind the prescription of timelines in election petition as parties would be left to their own will regarding when to collect the documents, thereby negatively impacting the timeline. The use of advertisement as a primary mode of service of process was also deliberately intended among other things to curb the crafty habit of parties seeking to defeat or delay justice by evading service of process.

[72] It is evident that the election court declined to exercise its discretion to allow the late response by the appellant, citing the appellant's lack of candor in his explanation for the delay. The court found the appellant's explanation that he had been admitted in hospital, doubtful and negated by the letter from the hospital produced by the 1st respondent denying such admission. Although the appellant subsequently attempted to show that he had been treated as an outpatient, the election court was not persuaded. The election court dismissed contents of the letters dated 3rd October 2017 and 11th November 2017 from Alfarooq Hospital, that were relied on by the appellant as untrue, and concluded that the appellant had not been sick as alleged.

[73] The finding made by the election court that the appellant had demonstrated lack of candor in seeking to provide an explanation for his delay, was a finding of fact based on the court's assessment of the appellant's credibility. As an appellate court, this Court is obliged to defer to the trial court's finding in that regard. The election court was unimpressed by the appellant's explanation, which it found untruthful. Therefore, the appellant failed to lay a proper basis for the exercise of the court's discretion in his favour. Besides, by his untruthfulness, the appellant proved unworthy of the equitable remedy of extension of time. In the circumstances I cannot fault the election court for refusing to exercise its discretion in the appellant's favour. Nor did the mere refusal to extend time for filing the response amount to violation of the appellant's right to a fair hearing as the appellant had full notice of the petition and the opportunity to open the door to activate his right to a fair hearing by filing a response within seven (7) days.

[74] By failing to file his response in time, the appellant squandered his right to present his defence and evidence to challenge the allegations made against him in the petition. The appellant further lost the opportunity of having time extended to enable him file his response by failing to convince the court that he had a good reason for not filing his response within time. To the extent that Rule 11 of the **2017 Petition Rules**, provides the opportunity for filing and service of a response to a petition, the Rule is in harmony with the Constitution.

[75] The other issue regarding violation of right to fair hearing arises from the second ruling and order made by the election court barring the appellant from participating in the proceedings following the striking out of his response to the petition. Despite the appellant's unsuccessful attempt to have his response to the petition admitted out of time, the appellant continued to attend court. The 1st respondent objected to his participation citing **Rule 11(8)** of the **2017 Petition Rules,** but the appellant countered that the

striking out of his response did not include an order barring him from attending the proceedings.

[76] Upholding the objection, the election court in the ruling of 21st November 2017 stated in part as follows:

"12. I agree with the submission by 3rd respondent's counsel that it is the election of the 3rd respondent that is disputed but I have no doubt that the lawmakers in couching Rule 11 (8) of the Rules in mandatory terms were also alive to the fact that there are elected respondents who for one reason or another might not defend petitions filed against them.

13. The 3rd respondent's response was struck out by this court's order made on 16th November, 2017. By virtue of that ruling, the 3rd respondent reverted to the position of a respondent who has not filed a response and Rule 11 (8) of the Rules as cited by the petitioner and the 2nd and 3rd respondents is therefore applicable.

Orders

14. From the foregoing; the court makes the following orders:

1. Rule 11(8) of the Rules which is coached in mandatory terms bars the 2nd respondent from participating in this elections either by himself or by counsel.

2. Article 159 of the Constitution was not meant to aid in the aid of overthrow or distraction of Rules of procedure and cannot therefore be of any assistance to the 3rd respondent."

[77] Of concern is whether the order of the election court amounted to denial of the appellant's right to a fair hearing, considering that the appellant was a party in the petition. The ruling of the election court was anchored on **Rule 11(8)** of the **2017 Petition Rules** that provides that a respondent who has not filed a response to a petition as required under the Rules, shall not be allowed to appear or act as a party in the proceedings of the petition. Thus, the issue is whether to the extent that it bars a party from participating in the election petition that has been filed against him, **Rule 11(8)** of the **2017 Petition Rules** violates Article 50 of the Constitution that provides the right to a fair hearing.

[78] In ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others*** **Election Petition Appeal No. 2 of 2018 [2018] eKLR**, this Court referring to Rule 11(8) of the **2017 Petition Rules** observed that without a response, a respondent ought to be excluded from the proceedings. It is noteworthy that in that matter, the respondent had not filed a response but the election court had saved the situation by treating an affidavit sworn by the appellant as a response. In addition, the remark made by the Court was *orbita dictum* and the Court did not address the relationship between Rule 11(8) of the 2017 Petition Rules and Article 50 and 25 of the Constitution.

[79] In ***Harold Kimuge Kipchumba v Independent Electoral & Boundaries Commission & Another*** **Election Petition 25 of 2017 [2017] eKLR**, the High Court made insightful observations on the application of Rule 11(8) as follows:

"Rule 11(8) read alone and applied strictly would, in my view, deny parties justice even in cases where there are extenuating circumstances, the argument (as argued by the Petitioner) being that it is couched in mandatory terms. In my view a party may fail to comply with this provision due to circumstances that he/she had no control over. I think this is what was intended to be cured by Rule 19 (1) and in my view the intention was to give court latitude in extending or limiting time in a case in circumstances that deserve intervention of the court. ...."

[80] When read in context, **Rule 11(1)** does not render it mandatory for a respondent to file a response to a petition. Therefore, a person named as a respondent may choose not to oppose a petition and therefore file no response. However, the import of **Rule 11(8)** is that a person, who for any reason fails to demonstrate his objection to the petition by filing a response, is deemed to have waived his right to act or appear as a party in the proceedings. The Rule may also be read to mean that the only course open to a respondent opposing an election petition to gain entry in the proceedings as an active participant to the proceedings is by filing a response. The Rule is couched in mandatory terms, and if strictly applied, results in a person who is a respondent and who due to some reason has not filed a response, but wishes to participate in the proceedings losing the right to participate in the proceedings.

[81] With the above observations, I pose the question whether Rule 11(8) of the **2017 Petition Rules**, limits the election court's discretion by giving only one option of disallowing a non-complying respondent participation in the petition proceedings. I take the view that the election court is not so limited. I agree with the view of the High Court already adverted to at paragraph 79 of this judgment, that if, Rule 11(8) of the **2017 Petition Rules** is read in isolation and strictly applied, it would deny parties justice. Such an approach would be inconsistent with Rule 5 of the **2017 Petition Rules** that gives the court the discretion to determine the effects of any non-compliance with the Rules in accordance with Article 159(2)(d) of the Constitution, and Rule 4 that requires an interpretation that facilitates the just, expeditious and proportionate resolutions of election petitions.

[82] I take the view that although Rule 11(8) is couched in mandatory terms, the election court was not rendered powerless in view of the foundational authority given by the Constitution to promote substantive justice. The election court was thus clothed with power to exercise discretion under the rules to ensure that justice is done.

[83] Furthermore, the tenets of fair hearing a fundamental right enshrined in **Article 50(1)** of the **Constitution,** affords every person the right to a fair hearing. This inalienable right encapsulates different elements, including a party having notice of the case against him/her and the right to adduce evidence in court, which element is captured under **Rule 11**. There is also the component of the right to rebut adverse evidence in court through cross-examination of adverse witnesses. This aspect of the right to a fair hearing goes beyond the scope of **Rule 11**, and any court faced with the question of interpreting or applying an issue involving the application of a fundamental right, must answer to the call of **Article 20(3)** of the **Constitution** which binds the court to:

"***develop the law to the extent that it does not give effect to a right or fundamental freedom; and adopt the interpretation that most favours the enforcement of a right or fundamental freedom."***

[84] In addition, Article 25 of the Constitution expressly provides that Article 50 that provides the right to fair hearing cannot be limited, such that in exercise of the right to a fair hearing, a party ought not to be impeded from accessing justice through participating in the trial. The appellant was a party adversely mentioned in a petition who lost his opportunity to present his own evidence to oppose the petition. Desperate to have his day in court, he sought to participate by way of cross-examining witnesses on the evidence that would be presented in court. What was the most appropriate action for the court to take in the circumstances"

[85] In my view, the court ought to have been guided by the special circumstances of this case, and the likely effects of consequent orders including, the prejudice that would be occasioned to any of the parties. The court was also bound to abide by the constitutional dictates in Article 159(2)(d) that placed upon the election court the duty to uphold substantive justice and Article 20(3), that obligates the court to interpret Rule 11 of the **2017 Petition Rules** in a way that develops the law and favors the enforcement of the fundamental right of fair hearing.

[86] The appellant was the candidate whose election was being challenged in the election petition. An examination of the petition and record of appeal reveals that the 1st respondent accused the appellant of engaging in various electoral malpractices. These were categorized as: malpractices during the campaign period committed by the appellant and his campaigners, agents and supporters; and allegations of malpractices committed during the voting process by the agents and officers of the 2nd respondent that favoured the appellant. It is therefore, not in doubt that specific allegations were made against the appellant.

[87] Even though the appellant's response to the petition had been struck off, the 1st respondent still remained with the obligation to discharge the burden of proof by establishing the alleged malpractices, and the fact that the malpractices affected the outcome of the elections. This called for the appellant being given the opportunity to participate in the proceedings within the confines of the order made by the court striking out his response. His participation would thus be limited to questioning and testing the veracity of the evidence presented by the 1st respondent and making any submissions on issues of law arising therefrom. This would have assisted the election court in making a fair determination and ensuring that justice is done.

[88] Without the appellant's participation, the court proceeded in regard to the allegations against the appellant on a one-sided perspective. Although counsel for the 2nd and 3rd respondents made attempts to cross-examine the witnesses on evidence touching on the appellant, this could not cure the fact that the appellant was denied his right to a fair trial by being denied the chance to test the veracity of the 1st respondent's evidence by cross-examination. In effect the order made by the court sealed the appellant's fate as the petitioner's evidence was untested.

[89] I cannot overemphasize the need to afford a party the right to confront witnesses giving adverse evidence against them. It is a

crucial element of the inalienable right of fair hearing. **Rule 12(13)** of the **Election Petition Rules** presuppose the right for parties to cross-examine witnesses who have filed affidavits and are eventually called upon to testify. When the response was struck out, the appellant lost the first opportunity to put his defense forward and rebut evidence against him. In my view Rule 11(8) ought not to extinguish the second opportunity of challenging evidence that is eventually presented in court. Rule 11 only addresses the response to the petition, and ought not to be extended to challenge of the evidence adduced in support of the petition.

[90] In ***Jackton Nyanungo Ranguma v Independent Electoral and Boundaries Commission & 2 others*** **Election Petition Appeal 1 of 2018 [2018] eKLR,** this Court adopted the following quotation by the High Court in ***Law Society of Kenya vs Faith Waigwa & 8 Others [2015] eKLR***, on the rational for cross examination:

"Let me once more restate the rationale of cross-examination of witnesses. First, it is a mechanism which is used to bring out desirable facts to modify or clarify or to establish the cross-examiner's case. In other words, cross-examination is meant to extract the qualifying facts or circumstances left out by a witness in a testimony given in examination in chief. Secondly, the exercise of cross-examination is intended to impeach the credit worthiness of a witness. In cross-examination a witness may be asked questions tending for example to expose the errors, contradictions, omissions and improbabilities. In the process, the veracity of a witness's averments is tested. Thirdly, the exercise of cross-examination in some cases gives the court an early chance to get the glimpse of what to expect during the substantive hearing."

[91] In **Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others [2014]** eKLR, (the Kidero decision) Njoki Ndungu SCJ addressing the issue of right to fair trial in an election petition, stated in part as follows:

"[308] Article 50 as read together with Article 25 signal the profound importance of the right to a fair trial within our jurisprudence to the extent that, unlike other constitutional rights and fundamental freedoms in our Bill of Rights, it cannot be limited. The right to a fair trial requires that no person should be deprived of their rights, without first having the opportunity to test the allegations and supporting evidence in a Court of law. Therefore, Courts ought to strike a suitable balance between upholding the constitutional right to a fair trial and the need to enforce statutory provisions on timelines, without offending our unique legal framework"

[92] Needless to state that cross-examination was important in advancing the appellant's right to a fair hearing in regard to the allegations made against him. By holding that Rule 11(8) is mandatory, the election court failed to exercise any discretion concerning participation by the appellant, nor did the court take into account the circumstances and the need to have a holistic view of the dispute. In addition, the election court ought to have taken into account that justice in election petitions goes beyond the interest of the parties before it. There is also the public interest element in the interests of the voters in the constituency whose rights it is the duty of the court to protect by properly dealing with election petitions before it.

[93] In ***Pashito Holdings Ltd. & Another v. Paul Nderitu Ndun'gu & Others [1997] 1 KLR (E&L)***, this Court stated thus:

"An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision..."

[94] In ***Mbaki & Others v. Macharia & Another (2005) 2 EA 206,*** *this Court stated as follows:*

"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

Effect of violation of right to fair hearing in Election proceedings

[95] I believe I have said enough to come to the conclusion that in denying the appellant the right to participate in the election petition proceedings, the election court violated the appellant's right to a fair hearing. I have no hesitation in coming to the conclusion that the proceedings of the election court were defective and on this ground, the consequent judgment ought not to stand.

Nevertheless, the challenge that has given me great anxiety is what order should be made in light of this conclusion. My anxiety stems from the question whether having found that the election court proceedings were defective can I proceed to consider the same proceedings and evidence adduced therein in order to determine the issues that were raised in the substantive appeal and cross appeal"

[96] Again I revert to the **Kidero Decision** in which Njoki Ndungu SCJ stated as follows:

"[350] As I have stated earlier, under Article 25(c) of the Constitution, the right to a fair trial is a right that cannot be limited. However, it is an individual's right, that is a right in personam and the remedy for the violation of such a right cannot be the nullification of an election. The Raila Odinga case reiterated that an election reflects the views of the people expressed through the vote, not just rights of individuals, and therefore, courts of law must be careful not to exercise their power in such a manner as to interfere with the people's expression in instances where the proven election irregularities do not affect the election results. Since the Respondent's case remains speculative until such time the case is reopened for examination of evidence, it is premature to offer as a remedial measure, the nullification of the election at the center of the controversy.

[351] As such, I find that the Court of Appeal erred in nullifying the 1st and 2nd appellants' election as a remedy for the violation of a fair hearing or trial. The Court of Appeal ought to have considered other reliefs for breach or infringement of fundamental rights provided under Article 23(3) of the Constitution. The Constitution clearly stipulates remedial measures for vindicating rights of individuals who may petition a court for redress. The annulment of elections on the sole basis of denial of a right to a fair trial, is not a ground for so doing, under Articles 81 and 86 or Section 83 of the Elections Act."

[97] In regard to the question whether there are any other reliefs that this Court can consider Rule 26 of the 2017 Court Rules provides as follows:

"(1) After the hearing of an election appeal, the Court may make an order—

(a) dismissing the appeal; "

(b) affirming the decision of the High Court; or "

(c) granting any other appropriate relief as contemplated under section 75 (3) of the Elections Act, 2011."

[98] Having found that the trial in the election court was vitiated by the violation of the appellant's right to fair hearing, and the election court having allowed the petition and declared that the appellant was not properly elected as the member of National Assembly, an order dismissing the appeal would in effect be an order affirming the decision of the election court and thus perpetuate the violation suffered by the appellant. Obviously, this would not be an appropriate course to take.

[99] I have considered the Court's options under section 75(3) of the Elections Act. That section states as follows:

"(3) In any proceeding brought under this section, a court may grant appropriate relief, including—

(a) a declaration of whether or not the candidate whose election is questioned was validly elected;

b) a declaration of which candidate was validly elected; or "

(c) an order as to whether fresh election will be held or not." "

[100] Again the option under section 75(3) appears to be limited. A determination of the issue whether or not, the appellant whose election was questioned in the election court was validly elected, such as to justify a declaration under Rule 75(3)(a) or (b) of the Elections Act can only be made from an examination of the evidence adduced in the proceedings of the election court, and as we have already stated the appellant was not given a fair hearing. It would be improper to rely on the same proceedings to make such a

determination.

[101] In my view the use of the word "including" in section 75(3) of the Elections Act means that the court's options are not limited to the reliefs stated in section 75(3) of the Elections Act, but has power to grant any other appropriate relief. This gives the Court the latitude to apply Rule 4(2) of the 2017 Court Rules and fall back on Rule 31 of the 2010 Court Rules that states that:

"On any appeal the Court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs."

[102] In considering the options under Rule 31, I note that the 1st respondent filed his petition in the election court on 4th September 2017 and that the election court delivered its judgment on 1st March 2018. Article 105 of the Constitution provides that:

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

(a) a person has been validly elected as a member of Parliament; or "

(b) the seat of a member has become vacant. "

(2) A question under clause (1) shall be heard and determined within six months of the date of lodging the petition.

(3) Parliament shall enact legislation to give full effect to this Article.

[103] Section 85 of the Elections Act re-enforces the above constitutional provisions by providing that election petitions shall be determined within the period provided by the Constitution. This means that the judgment was delivered within the constitutional time limit as it was delivered just two days before the expiry of the six months period within which, the petition was to be determined. Thus the mandate of the election court expired after the six months period. To this extent the election court is *functus officio* as it completed its mandate that was limited to its primary duty of determining the petition as the trial court hearing the petition.

[104] The question is whether having found that the proceedings of the election court were null and void, this Court can revive the jurisdiction of the election court through an order for retrial, or an order remitting the petition back to the election court with some particular directions to be carried out. In **Lemanken Aramat vs Harun Meitamei Lempaka & 2 Others [2014]** eKLR, (the Aramat decision), the Supreme Court had opportunity to consider whether an order made by this Court in an election petition directing the election court to carry out a recount of the votes after the court's six months constitutional timeline had expired, could extend the jurisdiction of the election court. In determining the issue, the Supreme Court stated as follows:

"[139] ……We would not agree with the opinion of counsel for the 1st respondent that the Appellate Jurisdiction Act (Cap. 9, Laws of Kenya) confers jurisdiction upon the Court of Appeal to remit an electoral-dispute matter back to the High Court after the six-month limit set out in Article 105(1) and (2) of the Constitution has lapsed. The Constitution and the Elections Act, which are the foundation of a special electoral-dispute regime, confer upon the High Court the power to determine electoral disputes within six months; and the appellate Court cannot confer upon itself powers to resurrect the jurisdiction of Election Courts, after such jurisdiction is exhausted under the law.

[140] It is a commonplace that the Constitution is the supreme law of the land, in the terms of its Article 2(1), which binds all persons and State organs. It follows that the Constitution is sovereign, and holds a place of superiority over any orders and decrees of a Court. Accordingly, the Court of Appeal could not confer jurisdiction upon the High Court to conduct a recount, as the jurisdiction of the High Court under Article 105(1) and (2) of the Constitution, was in the first place contestable on the ground of expired timelines, and would in any case have been already exhausted."

[105] Thus, the Supreme Court was categorical that the Court of Appeal cannot extend the six months constitutional time line imposed on the mandate of the election court by Article 105(2) of the Constitution. While I am in agreement with that position, I

note that in the Aramat decision, the election court had no jurisdiction to hear the petition that was subject of the appeal as it was filed outside the statutory time limit. That position also vitiated the jurisdiction of the Court of appeal, as there was no proper appeal before it. Indeed this was essentially the ground upon which the Supreme Court allowed the appeal. Secondly the order directing the election court to conduct a recount required the election court to exercise a jurisdiction that had already expired.

[106] In the **Kidero decision,** an issue arose as to whether the Court of Appeal had jurisdiction to nullify an election in which there was violation of the right to fair trial. In addressing this issue, the Supreme Court criticized the majority decision of the Court of Appeal stating, *inter alia:*

"180. It is clear to us that the Court of Appeal's majority position, even if founded upon notions of "justice and fairness", had overlooked clear imperatives of the law that are overriding. The learned judges had overlooked the law of precedent, expressly declared in Article 163 (7) of the Constitution. They did not recognize that Section 85A of the Elections Act is directly born of Article 87 of the Constitution. They had not taken into account the fact that ideals of justice are by no means the preserve of the intending appellant, and that they must enure to the electorate as a whole. The learned judges perhaps failed to recognize that the overall integrity of the democratic system of governance is sealed on a platform of orderly process, of which the judiciary is the chief steward, and in which the course of justice already charted by the Superior Court's is to be methodically nurtured."

[107] Of interest is that essentially in the Kidero decision, the Supreme Court found that the election petition appeal was incompetent as it was filed outside the mandatory statutory time line provided under section 85A of the Elections Act and this vitiated the jurisdiction. In other words the Supreme Court is yet to deal with a situation in which the appellate jurisdiction of the Court has been properly invoked and it is established that there was violation of right to fair hearing in the election petition.

[108] It is instructive that in the **Kidero decision,** Njoki Ndungu SCJ devoted a lot of thought to the issue of right to fair hearing. In particular, I identify with the following statement in the concurring judgment:

"[363] The right to a fair hearing as guaranteed by the Constitution is so vital that the Constitution itself expresses it as a non-derogable right. I am persuaded that the weight attached to this right by the Constitution itself warrants the exercise by this Court of its inherent powers and conduct a limited evidentiary hearing in which a witness who was not cross-examined will be cross-examined before this Court.

…..

[369] Taking all these legal provisions into consideration, it is manifest that this Court may make any order that the High Court has jurisdiction to make in the enforcement of rights and fundamental freedoms. This Court also has the latitude to make any order that would be necessary for determining the real question in issue in this appeal and to ensure that the principles of the Constitution are promoted - including an order for a witness to be cross-examined. I am alive to the fact that this is not a remedy that this Court would hastily grant but in light of the violation of constitutional rights that occurred it is the most appropriate remedy under the circumstances."

Conclusion

[109] In my view, the most appropriate remedy would have been an order for a retrial since the hearing in the election court was in actual fact a mistrial. However, although this Court like the Supreme Court has inherent jurisdiction, given the limitation of the Court's jurisdiction under Section 85A of the Elections Act, the Court cannot use this inherent jurisdiction to take and consider matters of evidence. Therefore, much as I appreciate my obligation to apply the Constitution in a way that would uphold the fundamental right of the appellant, I must give way to the other competing constitutional right of sovereignty of the people and their right to political representation by persons of their choice. This demands that this election petition appeal be determined on the basis of matters that concern the way that the elections for member of National Assembly for Ugenya Constituency was carried out bearing in mind the principles laid down in the Constitution and the Elections Act.

[110] Therefore, notwithstanding the handicap that the appellant faced during the hearing of the petition in the election court, the determination of this appeal must be made on the basis of the substantive issues raised in the appeal. My brother Hon. Githinji JA has exhaustively addressed the substantive issues and I am in agreement with his reasoning in that regard. I would therefore concur

with the orders that he proposes to make in regard to the appeal, cross appeal and the order for costs.

Dated and delivered at Kisumu this 16th day of August, 2018.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF J. MOHAMMED, J.A.

I have had the advantage of reading in draft the Judgment of **Githinji, JA**. I am in full agreement with his reasoning and conclusions and, therefore, have nothing useful to add.

Dated and delivered at Kisumu this 16th day of August, 2018.

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original**.**

DEPUTY REGSITRAR