REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga; CJ & P, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. 7 of 2018

-BETWEEN-

HON. MOHAMED ABDI MAHAMUD.....APPELLANT

-AND-

1. AHMED ABDULLAHI MOHAMAD

2. AHMED MUHUMED ABDI

3. GICHOHI GATUMA PATRICK

4. INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....RESPONDENTS

-AND-

AHMED ALI MUKTAR.....INTERESTED PARTY

*Being an appeal from the Judgment and Decree of the Court of Appeal at Nairobi **(Waki, Makhandia & Kiage, JJ.A)** in Election Petition Appeal No. 2 of 2018, dated 20th April, 2018)*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Petition of Appeal before the Court is dated 3rd May, 2018 and lodged on 7th May, 2018. The petitioner seeks to challenge the Judgment of the Court of Appeal, sitting at Nairobi *(Waki, Makhandia and Kiage, JJA)* in Election Petition Appeal No. 2 of 2018. The Appellate Court in its Judgment dated 20th April, 2018, dismissed the petitioner's appeal, and in so doing, upheld the decision of the Election Court *(Mabeya, J)* which had nullified the election of the petitioner as Governor of Wajir County.

B. BACKGROUND

[2] In the general election held in the country on 8th August, 2017, six candidates including the appellant and the 1st and 2nd respondents contested the Wajir gubernatorial seat (the election). The appellant garnered 49,079 votes. His runner-up was the 1st respondent who received 35,572 votes. Pursuant to the provisions of Article 180 (4) of the Constitution, the appellant was accordingly declared the Governor of Wajir County.

[3] Aggrieved by that declaration, the 1st and 2nd respondents filed Election Petition No. 14 of 2017 at the High Court at Nairobi challenging the result, on the grounds, *inter alia*, that, contrary to Section 22(2) of the Elections Act, the appellant was not constitutionally and statutorily qualified to contest the seat, in that the degree certificate he had submitted to the Independent Electoral and Boundaries Commission (IEBC) for nomination to vie, was a fraud; and that the conduct of the election was fraught with violence, intimidations, and numerous illegalities and irregularities, which affected both the credibility and results of the election.

[4] After hearing the petition, the High Court *(Mabeya, J)* found that, contrary to Section 22(2) of the Elections Act, the appellant did not have the requisite academic qualification to vie in the election; that in the conduct of the elections, the 3rd and 4th respondents committed several irregularities and illegalities (including compromising the principle of the secrecy of the ballot, and posting results on Form 37C which were neither accountable nor verifiable)¾the totality of which affected both the credibility and the result of the election. The High Court, accordingly, nullified the appellant's election as governor of Wajir County, and directed IEBC to hold a fresh election in accordance with the Constitution and the Elections Act.

[5] Being dissatisfied with that decision, the appellant appealed to the Court of Appeal, mainly faulting the High Court for assuming jurisdiction in the *pre-election nomination dispute* which Article 88(4)(e) of the Constitution reserves for IEBC, and for determining that the appellant was not academically qualified to contest in the election. The appellant further faulted the trial Court, for finding that the irregularities committed, impugned the credibility, and affected the result of the election.

[6] The 3rd and 4th respondents also cross-appealed on more or less the same grounds, but mainly disputing the finding that the conduct of the election was fraught with illegalities and irregularities which undermined its integrity and affected its results.

[7] After hearing that appeal, the Court of Appeal concurred with the High Court, that the appellant did not possess the requisite academic qualifications to contest in the election. Having so found, the Court of Appeal considered the other grounds and the cross-appeal to be moot. Consequently, it dismissed the appeal with costs, and the cross-appeal, with no Order as to costs.

[8] That decision provoked the filing of two appeals before us. The first appeal, Petition No. 7 of 2018, was by Mohamed Abdi Mahamud (the appellant), filed on 7th May, 2018. The second appeal, Petition No. 9 of 2018, filed on 5th June, 2018 was by Gichohi Gatuma Patrick and IEBC (the 3rd and 4th respondents). With the consent of the parties, these appeals were consolidated by Order of this Court made on 11th June, 2018.

[9] However, pursuant to Rule 19 of the Supreme Court Rules, on 21st November 2018, the 3rd and 4th respondents applied to withdraw in entirety their said Appeal No. 9 of 2018. In our Ruling given on the same day, we allowed that application, and that appeal was accordingly withdrawn in its entirety.

C. APPEAL AND PLEADINGS FILED BEFORE THE SUPREME COURT

[10] In his petition of appeal, the appellant challenges the Superior Courts' findings that election Courts have jurisdiction to entertain pre-election nomination disputes; that the appellant lacked eligibility and/or the requisite academic qualification to vie in the election; that the respondents discharged their burden and standard of proof; and that the conduct of the election *was fraught with illegalities and irregularities which undermined its integrity and affected its results*. The appellant also faulted the Court of Appeal for failing to consider all grounds of the appeal and cross-appeal before it.

[11] By its Order dated 28th September 2018, this Court granted the appellant leave to adduce additional evidence on his academic qualification to contest in the election. By the same Order, this Court also allowed Ahmed Ali Muktar, the Deputy Governor of Wajir County, to be joined as an interested party in this appeal.

[12] On 5th October, 2018 the 1st and 2nd respondents filed a Notice of Motion dated 4th October, 2018 seeking the striking out of this appeal on account of its incompetence, for want of jurisdiction on the part of this Court. On 11th October, 2018 this Court

directed, through its Deputy Registrar, that that motion be heard along with the appeals.

[13] Pursuant to Rule 39 of the Supreme Court Rules, 2012, on 5th October 2018, the 1st and 2nd respondents also filed Notice of Affirmation of the Court of Appeal's decision dated 20th April, 2018, on the ground that since the Superior Court's findings and conclusions were all supported by the evidence on record, and so the Supreme Court cannot re-open and overturn the concurrent factual findings of the Superior Courts, the appellant's election and this appeal are untenable.

[14] By their Notice of Motion dated 4th and filed on 5th October 2018, the respondents applied to have the appellant compelled to tender his additional evidence by way of *viva voce* evidence, or be cross-examined on the averments in his affidavit evidence. That application, which the appellant strenuously opposed, was based on the grounds that, as the respondents and their witnesses orally testified and were cross-examined on the averments in their affidavits ¾ thus affording the parties equal opportunity ¾ the appellants and the deponents of additional affidavit evidence should be subjected to the same treatment, to test the veracity of that evidence. Being of the view that that application was a gimmick to vary its Ruling of 28th September, 2018, without establishing the review criteria already set out in ***Fredrick Otieno Outa v. Jared Odoyo Okello & 3 Others*** [2017] eKLR, this Court dismissed it, holding that "*on a second appeal, principally on matters of constitutional interpretation and application*" no value would be added by cross-examination on further evidence. Instead, it would stretch the hearing of this appeal "*to unreasonable levels*."

D. SUBMISSIONS BY THE PARTIES

(i) The Appellant's Case

[15] Regarding this Court's jurisdiction to entertain this appeal, counsel for the appellant argued that since the trial Court nullified the appellant's election, *inter alia*, on the ground that the election was not conducted in accordance with the Constitution, a decision the Court of Appeal affirmed, and on the authority of its decisions in ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*** [2014] eKLR and ***Erad Suppliers & General Contractors Ltd v. National Cereals & Produce Board*** [2012] eKLR, this Court has jurisdiction under Article 163(4)(a) of the Constitution to entertain this appeal.

[16] As regards the election Court's jurisdiction to entertain pre-election nomination disputes, Professor Ojienda and Mr. Ngatia, counsels for the appellant and Mr. Karori, counsel for the 3rd and 4th respondents, cited the cases of ***International Centre for Policy & Conflict & 5 Others v. Attorney-General & 5 Others*** Petition No. 552 of 2012; [2013] eKLR, and ***Michael Wachira Nderitu & 3 Others v. Mary Wambui Munene & 4 Others*** Pet. No. 549 of 2012; [2013] eKLR, as well as ***Kituo Cha Sheria v. John Ndirangu Kariuki & Another*** [2013] eKLR, to support the argument that Article 88(4)(e) of the Constitution and Section 74(1) of the Elections Act, vest IEBC with exclusive jurisdiction to determine pre-election nomination disputes. In the circumstances, it was urged, the Superior Courts erred in holding that Election Courts also have jurisdiction to entertain such disputes. Counsel were particularly critical of the trial Judge for departing from his own earlier decision in ***Josiah Taraiya Kipelian Ole Kores v. Dr. David Ole Nkedienye & 3 Others*** [2013] eKLR, in which he had, quite correctly, held that the election Court has no jurisdiction to entertain pre-election disputes.

[17] At any rate, argued counsel, since IEBC, for want of prosecution, had dismissed the challenge by a Wajir County voter, Abdirahman Mohamed Abdille, of the appellant's qualification to contest in the election, and with no appeal from that decision ¾ by dint of the High Court decision in ***Susan Wambura Jackson v. Charles Nyaangi Nyamohanga*** [2010] eKLR, and the Court of Appeal decision in ***Njue Ngai v. Ephantus Njiru Ngai & Another*** [2016] eKLR ¾ the matter was *res judicata* and the High Court should not have entertained it, even if it had jurisdiction to entertain pre-election disputes.

[18] Counsel for the appellant canvassed the issue of the appellant's academic qualification to contest in the election on three fronts. One, that lack of academic qualification is not one of the vitiating factors in Articles 81 and 86, that can invalidate an election. As such, the nullification of the appellant's election on the ground that he lacked the requisite academic qualification to contest in the election, violated his rights under Articles 38, 43(1)(f), 81 and 86 of the Constitution.

[19] Secondly, counsel submitted that under Article 180(2) of the Constitution, an aspiring Governor needs only to be qualified to

be a member of the County Assembly (MCA). The eligibility to aspire to be a member of the County Assembly is provided for in Article 193(1)(b) of the Constitution, which introduces the requirement of educational qualification, the particulars of which the Constitution delegated to Parliament, for appropriate legislation. Pursuant to that mandate, Parliament enacted Section 22(1)(b)(ii) of the Elections Act, which prescribed a University degree as the minimum requisite academic qualification for one to contest as an MCA. Counsel argued that although the appellant is a holder of a Bachelor of Business Administration degree, and even a Masters degree in Diplomacy & International Relations, by dint of Section 22(1A) of the same Act, introduced by the Election Laws (Amendment) Act No. 1 of 2017, the requirement of a degree qualification for one to contest a gubernatorial seat was deferred to the first election after the 2017 general election. As such, even if the appellant held no degree, he was still qualified to vie in the election.

[20] Thirdly, counsel argued that IEBC produced before the trial Court copies of the appellant's Bachelor of Business Administration Degree certificate dated 1st March, 2012; academic transcript; Master of Diplomacy & International Relations degree dated 12th March 2015 ¾ all from Kampala University, and an accreditation letter from the Kenyan Commission of Higher Education dated 11th January 2013. Since the 1st and 2nd respondents dismissed all of them as forgeries, by dint of Section 107 of the Evidence Act, they bore the burden of proving that allegation to the required standard of "beyond reasonable doubt", which they failed to discharge. Instead, they persuaded the two Superior Courts to hold, wrongly, that, under Section 112 of the Evidence Act, the issue of the appellant's academic qualification was a matter within his personal knowledge, and thus shifted the burden of proof to the appellant, to establish the authenticity of those certificates.

[21] Counsel submitted that the Court of Appeal's summary dismissal, under the doctrine of mootness, of all grounds of appeal save two was a dereliction of its constitutional obligation, on account of having sacrificed, at the altar of expediency, the appellant's non-derogable constitutional rights to a fair hearing. They urged us to assume the jurisdiction of the Court of Appeal as mandated by Sections 20 and 21(3) of the Supreme Court Act, as well as Rules 3(5) and 18 of the Supreme Court Rules, 2012, and determine the other grounds of appeal that the Appellate Court ignored.

[22] Counsel cautioned us to eschew the narrow interpretation most of our Courts have given the phrase "matters of law only" in Section 85A of the Elections Act. In their view, to avoid an interpretation that will run counter to the Constitution, and thus run afoul of the supremacy clause in Article 2(4) of the Constitution, that Section should be given a broad interpretation, premised in the context of Articles 19(3)(b) & (c), 20(3) & (4), 24, and 259(1) of the Constitution, that "matters of law only" encompass not only matters of statute and common law but extends to the constitutional provisions which come into play in any given matter, always not losing site of the jurisdiction of both the Court of Appeal under Article 164(3), and the Supreme Court under Article 163(4) of the Constitution. Counsel opined that this is what this Court had in mind when it stated at paragraph 76 of its Judgment in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** SC Application No. 5 of 2014; [2014] eKLR, that when considering the issue of whether or not an election was conducted in accordance with the principles of the Constitution in any electoral dispute, the operative principles in question are those in Articles 81(e) and 86 of the Constitution. They urged that failure to adopt that broad interpretation would, without any legal basis, be subordinating Sections 20 and 21(3) of the Supreme Court Act as well as Rules 3(5) and 18 of the Supreme Court Rules, 2012 to Section 85A of the Elections Act, and would cause grave injustice, even in clear cases of absurdity. They relied on this Court's decision in ***Fredrick Otieno Outa v. Jared Odoyo Okello & 3 Others*** SC Petition No. 6 of 2014; [2017] eKLR, urging that where circumstances demand, this Court is clothed with inherent jurisdiction under Article 163, to do justice. They urged this as the requisite approach, in considering the appellant's additional evidence before this Court. There was no proof, they concluded, that the election was not conducted in accordance with the Constitution, the Elections Act and Election Regulations. Consequently, counsel urged us to allow this appeal with costs.

(ii) Submissions by the Interested Party

[23] As already stated, the interested party is the Deputy-Governor of Wajir County. He supports this appeal on the ground that the Superior Courts erred: in failing to appreciate that his non-joinder rendered the election petition in the High Court a nullity; in finding that the appellant lacked the requisite academic qualification to vie in the election; in finding that an election Court has jurisdiction to determine pre-election nomination disputes; and in nullifying the election, and ordering a fresh election, in violation of Article 180(2) of the Constitution.

[24] On the first ground, Mr. Havi, learned counsel for the interested party, submitted that as the Court correctly held in the case of ***Josiah Taraiya Kipelian Ole Kores v. Dr. David Ole Nkedienye & 3 Others*** [2013] eKLR, the position of Deputy-Governor is elective. Article 180(6) of the Constitution provides for a joint election of Governor and Deputy-Governor, and appends, like twins conjoined at the hip, the election victory of the Deputy-Governor to that of the Governor. Non-joinder of the interested party in the High Court petition, therefore, it was urged, rendered the petition a non-starter and a nullity. In support of that contention, he cited

the Court of Appeal decision in ***Mwamlole Tchappu Mbwana v. IEBC & 4 Others*** [2017] eKLR.

[25] On the appellant's eligibility to contest the election, counsel submitted that Article 180(2) & (5) of the Constitution, read together with Section 22(2) of the Elections Act, prescribes a degree from a University recognized in Kenya, as the requisite minimum academic qualification for election as Governor and Deputy-Governor. Upon being satisfied with their academic qualifications, IEBC nominated both the appellant and the interested party to contest in the election. Although a third party challenged the nomination of the appellant before a committee of IEBC, that complaint was dismissed for want of prosecution. In the circumstances, as the High Court held in the case of ***Mohamed Dado Hatu v. Dhadho Gaddae Godhana & 3 Others*** [2017] eKLR, the election Court had no jurisdiction to entertain the pre-election nomination dispute.

[26] Even if the High Court, as the election Court, had jurisdiction to entertain that dispute, counsel submitted that under Section 120 of the Evidence Act, the recording of the consent Order on 9th October, 2017, admitting the appellant's documents without strict proof, was an estoppel against any factual inquiry into the validity of the appellant's University degree certificate.

[27] Counsel submitted that a Governor's cessation of eligibility to continue holding that position does not automatically terminate the election of the Deputy-Governor. In his view, a purposive reading of Article 182 of the Constitution makes it clear that if a Governor ceases to be eligible for election under Article 180(2), a vacancy is created to be occupied by the Deputy- Governor, for the remainder of the term of the election. Since the interested party himself holds a University degree, and is therefore qualified to occupy the position of Governor, counsel urged us to find that the High Court erred in ordering a by-election upon nullification of the appellant's election as the Governor.

[28] On the basis of those submissions, counsel for the interested party urged that even if the appellant's disqualification is upheld, the Order directing a by-election should be set aside, to enable the interested party to assume the position of Wajir County Governor, for the rest of the term. He urged that this appeal be allowed.

(iii) 3rd and 4th Respondents' Submissions

The 3rd and 4th Respondents filed their written submissions dated 16th October, 2018 on 18th October 2018 in support of the appeal. On the jurisdiction of this Court to hear this appeal, they urged that the appeal was well within the province of Article 163(4)(a) of the Constitution as defined by this Court in the cases of ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others***, Petition No. 10 of 2013, [2014] eKLR; ***Erad Suppliers & General Contractors Limited vs National Cereals & Produce Board*** [2012] eKLR; and ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** [2014] eKLR.

[29] They submitted that as held in the case of ***The Kenya Section of the International Commission of Jurists v. the Attorney General & 2 others***, Criminal Appeal no. 1 of 2012 [2012] eKLR, the Supreme Court has a responsibility under the provision of section 3 of the Supreme Court Act: to provide authoritative and impartial interpretation of the Constitution, to settle the law on uncertain jural questions, and to develop rich jurisprudence. Hence they urged that the present matter presents weighty legal questions that ought to be finally adjudicated by the apex Court. In particular, that the Court of Appeal misconstrued Article 88(4) of the Constitution which confers upon the 4th Respondent (IEBC) the jurisdiction to determine nomination disputes raised by any candidate by finding that the election Court had jurisdiction to adjudicate a pre-election dispute.

[30] Through Counsel Mr. Karori, it was urged that the role of IEBC in the conduct of elections is provided for in Article 88 of the Constitution and section 74 of the Elections Act. It was submitted that the law was followed by the 3rd Respondent, Mr. Gichohi, the Returning Officer when he cleared candidates to vie in the gubernatorial election. Mr. Gichohi deponed in an affidavit how he followed Regulation 47 in accepting nomination papers from the Appellant. Under this regulation, he is supposed to receive certified copies of certificates of the educational qualification. Further, that under Regulation 47(2) where the body that issued the certificate is not based in Kenya, a candidate is required to seek authentication of that body with the Kenya National Examination Council or the Commission for University Education in case of a university degree. Counsel submitted that thus, the minute a candidate produces these two documents, there is no reason why he/she should not be cleared to vie for a seat.

[31] Counsel averred that the Appellant herein provided certified copies of his degree from Kampala University and a certificate from the Commission for University Education authenticating that degrees from Kampala University are permitted. It was submitted that under the existing legal framework, there is no requirement that IEBC investigates the certificate or degree provided by a candidate. The rationale for this, it was submitted, was that given the magnitude of the number of candidates involved in an election, it would be a tedious task to the IEBC. That for instance, in the last General Election, IEBC received more than 16, 259 certificates

from candidates. Investigating all these certificates would have been quite an insurmountable task.

[32] However, Counsel submitted, the law provides a mechanism under Article 88(4) for a person challenging the authenticity of any certificate or degree produced by a candidate to lodge a complaint before the IEBC. Hence the power of IEBC under Article 88(4) to settle electoral disputes including disputes relating to or arising from nomination but excluding election petitions. In this regard it was urged that the matters herein fall under IEBC jurisdiction pursuant to the Constitution.

[33] Mr. Karori urged that it was common ground that the 1st respondent did not challenge or question the issue of the Appellant's degree before the IEBC despite the 1st Respondent's own admission on record that he knew that the Appellant had no degree. This act, Counsel contended was a typical case of gambling by waiting and seeing whether he wins the election or not. He urged that if this Court was to uphold that a pre-election dispute could be raised before the election Court, despite what Article 88 of the Constitution says, it will be "rewarding impunity and gambling". He urged the Court to assert that pre-election matters must be dealt by the body established under the Constitution to deal with that issue, namely the IEBC. He reiterated that despite knowledge of existence of a problem with the degree, it was not raised before the proper body designated to deal with such an issue. In this regard, it was contended that both the High Court and the Court of Appeal erred in delving into the determination of the issue. Particularly, that the Court of Appeal erred in saying that it was permissible for the 1st Respondent to wait or not take this complaint before the proper body and instead raise it before the election Court.

[34] It was further submitted that, a challenge was lodged against the degree of the Appellant before the IEBC by a non-party to this appeal but the complaint was dismissed for want of prosecution. That the IEBC did everything that it ought to do under the law, hence that issue could not be reopened before the High Court. They cited the case of ***Njue Ngai v. Ephantus Njiru Ngai & Another*** [2016] eKLR in urging that the dismissal of a matter for want of prosecution is as good as a final judgment unless it is set aside on application. Hence the issue having been before the IEBC and dismissed for want of prosecution, it could not be reopened before an election Court.

[35] The 3rd and 4th respondents also submitted that before the Court of Appeal they had raised and submitted on other issues other than the nomination issue. The Court of Appeal took heed of their submissions and the issues therein and clearly outlined them in its judgment. However, that the Court of Appeal reached the conclusion that there was only one issue that would determine the matter one way or the other: the issue of education qualification. Hence the 3rd and 4th Respondents urged that that single issue remains what will only determine this matter before this Court as it will resolve the dispute within the parties that took them to the High Court. They contended that if that was not the case, then the Court of Appeal judgment will be perverse to the extent that it did not deal with substantial issues that were raised before it. Consequently, it was Mr. Karori's submission that the Court of Appeal having considered the arguments and having arrived at the decision that either one or the other resolves the dispute between parties, none of the parties can now say that in fact those issues are still alive and a determination on those issues would affect the outcome of whether or not the governor won in the elections that were held. Hence, it was urged that even before this Court, there is only a single issue for determination.

[36] In the ultimate, it was urged that the appeal be allowed and for the benefit of IEBC, the Court answer the question whether or not it is permissible for a party knowing of the existence of an issue that would affect the nomination of a candidate to sit and wait, almost as a trap until such time as the outcome of the election is decided before raising the challenge, and what that does to the provisions of Article 88(4) of the Constitution that appoints IEBC as the party more suited to deal with pre-election issues.

(iv) Submissions by the 1st Respondent

[37] In response to the appellant's, interested party's, and the 3rd and 4th respondents' submissions, counsel for the 1st respondent, Mr. Abdullahi, SC, assisted by Mr. Omwansa Ombati, contended that this appeal was incompetent, and wholly unmeritorious.

[38] Counsel argued that as the nullification of the appellant's election was predicated mainly upon academic disqualification, under Section 22(2) of the Elections Act, no issue of constitutional interpretation or application was entailed; and so, this Court has no jurisdiction to entertain an appeal premised upon Article 163(4)(a) of the Constitution. He contended that, as this Court had observed in the case of ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others*** [2012] eKLR, and in its Advisory Opinion in ***The Matter of the Interim Independent Electoral Commission*** [2011] eKLR, without jurisdiction, a Court cannot entertain any proceedings at all. He therefore urged us to allow the respondents' Notice of Motion dated 4th October, 2018 and strike out this appeal, with costs.

[39] On the appellant's eligibility/qualification to vie in the election, counsel submitted that Articles 180(2) and 193(1)(b), read together with Section 22(2) of the Elections Act, prescribe a degree from a university recognized in Kenya, as the minimum academic qualification for election as County Governor. He impugned his counterparts' contention that such a requirement was suspended by Section 22(2A) of the Elections Act until after the 2017 general elections, as sheer absurdity, based on a misapprehension of the concepts of "eligibility" under Article 180 of the Constitution, and "qualification" under Section 22 of the Elections Act.

[40] Citing several English authorities, counsel urged that the trial Court's role is not a mere dress-rehearsal; it is the first and last night of the show, with regard to the reception of evidence and findings of fact thereon. As such, counsel urged that, to maintain public confidence in the appeal process, Appellate Courts should not only accord deference to the trial Courts' findings of fact, but should do so in a consistent and standardized manner.

[41] Counsel submitted that given the injunction which Section 85A of the Elections Act imposes on Appellate Courts, in electoral disputes (as it specified in ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others,*** SC Petition No. 2 of 2012; [2012] eKLR, and ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** [2014] eKLR), it will be perverse for this Court to descend into the arena of fact-finding. As such, counsel asserted that the concurrent findings of fact by the first two Superior Courts, that the appellant lacked the requisite academic qualification to contest in the election, and that the conduct of election was fraught with illegalities and irregularities which impinged upon its credibility and affected its results, are not open zones for this Court.

[42] Counsel further contended that the affidavits which the appellant filed as part of his additional evidence, violate the basic rule of evidence in Section 2 of the Evidence Act, and are therefore, incompetent. As to papers annexed to the appellant's affidavit of 8th October, 2018, it was urged that they do not fall within the exceptions to primary evidence contained in Section 68 of the Evidence Act, and therefore, they are mere hearsay, and of no probative value.

[43] Counsel further argued that for an affidavit to be admissible for use by the Courts, Section 88 of the Civil Procedure Act, read together with Sections 2(1) and 4(1) of the Oaths and Statutory Declarations Act, require it to be sworn before a Commissioner of Oaths, or Notary Public duly appointed by the Chief Justice to administer oaths in Kenya. In the circumstances, he argued that the affidavit of Segawa Hanza, sworn before a Commissioner of Oaths/Notary Public in Kampala, Uganda is also valueless.

[44] Rules 12 and 13 of the Election (Parliamentary and County Elections) Petition Rules, 2017, require witnesses in electoral disputes to appear in Court and be cross-examined on the averments in their affidavits. In this case, the appellant and the deponents of affidavits in support of his case, successfully resisted the 1st and 2nd respondents' application to have them cross-examined on their averments. As such, counsel contended that their affidavits, untested by cross-examination, are of no probative value. He cited the cases of ***Hosea Mundui Kiplagat v. Sammy Komen Mwaita & 2 Others*** [2013] eKLR; ***Moses Wanjala Lukoye v. Bernard Alfred Wekesa Sambu & 3 Others*** [2013] eKLR; ***Noah Makhalang'ang'a Wekesa v. Albert Adome & 3 Others*** [2013] eKLR; ***John Murumba Chikati v. Returning Officer, Tongaren Constituency & 2 Others*** [2013] eKLR; ***Peter Kimori Maranga & Another v. Joel Omagwa & 2 Others*** [2013] eKLR; and ***Jacinta Wanjala Mwatela v. County Returning Officer (Taita Taveta) & 3 Others*** [2013] eKLR, in support of that argument.

[45] In his affidavit sworn and filed on 8th October, 2018 pursuant to the Order granting the appellant leave to adduce additional evidence, the appellant deposed that he is a holder of Bachelor Business Administration degree and a Masters in Diplomacy & International Relations obtained from Kampala International University in 2012 and 2015 respectively. That, however, contradicts his sworn testimony before the Parliamentary Departmental Committee on Defence and Foreign Relations (the Parliamentary Committee) on 3rd September 2014, when he was being vetted on his suitability to serve as Kenya's ambassador to Saudi Arabia: he said he was, at that time, pursuing his Bachelor of Business Administration degree, and a Masters in Diplomacy & International Relations, but was yet to graduate. It also contradicts his Statutory Declaration sworn on 25th May, 2017 for clearance to vie in the election: for he had there deposed that his highest academic achievement was "a Bachelor of Business Administration" degree. On the "sham affidavit doctrine", which is a principle of evidence that a party is not allowed to contradict his own prior deposition or testimony, counsel submitted that the appellant's affidavit is, therefore, of no value.

[46] Counsel further submitted that the annexures to the appellant's said affidavit are diametrically at variance with those in the replying affidavits of the 1st respondent, and those of Jacob Onyango Orinda, Yussuf Shueb Abdullahi, Dr. Timothy K. Sato, and Habiba Hussein Abdi.

[47] While the averments as well as the annexures to the appellant's said affidavit represent that the appellant obtained a Bachelor

of Business Administration and a Masters in Diplomacy & International Relations from Kampala University, the counter-affidavits filed at the instance of the 1st and 2nd respondents assert that the appellant never studied at Kampala University. In the letter dated 22nd October 2018, a copy of which is annexed to the 1st respondent's affidavit sworn on 26th October 2018, the Ugandan Permanent Secretary, Ministry of Internal Affairs stated that his office had "*established no record of his [the appellant's] travels into or out of Uganda during the said period from 2009—2012 ….*" The appellant's name was also not on the graduation booklet; instead it was on a simulated "dean's list", signed on 13th December 2011 (about 3 months before graduation on 1st March 2012) by Segewa Hamza, the Registrar, and not the Dean himself.

[48] Learned counsel urged that the additional evidence had brought no value to the appellant's case; and so, there was no legal basis for disturbing the two Superior Courts' concurrent findings regarding eligibility to vie in the election. He cited a comparative Nigerian case, ***First Bank of Nigeria Plc v. May Medical Clinics & Diagnostics Centre & Another,*** Suit No. SC.184/1995, in aid of such a submission.

[49] Counsel contested the appellant's contention that the election Court has no jurisdiction to entertain pre-election nomination disputes. He submitted that the question of a candidate's academic qualification goes to the root of the election in question: it is a mandatory, statutory prerequisite against which the validity of a gubernatorial election is to be gauged. He submitted that the election Court, acting under Section 75 of the Elections Act, has unquestionable jurisdiction to determine the pre-election nomination dispute. He relied on the Ugandan Supreme Court decision in the case of ***Abdul Balingira Nakendo v. Patrick Mwondha,*** Election Petition No. 09 of 2007, in support of that submission.

[50] On the issue of burden of proof, counsel for the 1st respondent submitted that, like in civil cases, the legal burden of proving allegations in an election petition always remains with the petitioner. But once he establishes a *prima facie* case, as this Court stated in ***Raila Odinga & 5 Others v. Independent Electoral & Boundaries Commission & 3 Others*** SC Petition No. 5 of 2013; [2013] eKLR, (a view the High Court also held in ***Moses Wanjala Lukoye v. Bernard Alfred Wekesa Sambu & 3 Others*** [2013] eKLR), the evidential burden of proof shifts to the respondent.

[51] In this case, the first Superior Courts having found that the respondents had made out a *prima facie* case questioning the appellant's academic qualification to vie in the election, the evidential burden of rebuttal, it was urged, shifted to the appellant. He urged that one's academic qualification is not a matter of public knowledge as it is not published anywhere. Relying on Section 112 of the Evidence Act, counsel submitted that the two Courts below cannot be faulted for holding such a matter to have been within the special or peculiar knowledge of the appellant, and so he bore the duty to explain. Instead of testifying in rebuttal, the appellant evaded the issue of his academic qualification, by claiming that the same had been determined by the Ugandan High Court; he failed to testify in his own case. In counsel's view, that left the 1st and 2nd respondents' evidence challenging the appellant's academic qualification uncontroverted, with the result that the two Superior Courts below had no choice but to accept it.

[52] On the dismissal of the 3rd and 4th respondents' cross-appeal, counsel submitted that the Court does not act in vain: and so, the appellant's eligibility to vie in the election was foundational and dispositive of the appeal. Counsel urged that once the Court of Appeal upheld the High Court decision that the appellant was not legally qualified to participate in the election, on the doctrine of mootness as per ***Chris Munga Bichage v. Richard Tong'i & Others*** [2017] eKLR, and in the words of Viscount Simon in the English case of ***Sun Life Assurance Company of Canada v. Jervis*** [1944] AC 111, (HL) at 114, no "*live issue*" remained for the Court of Appeal's consideration.

[53] In the *alternative,* counsel submitted, a proper evaluation of the evidence on record affirms the concurrent findings of the Superior Courts that the principle of secrecy of the ballot was flouted; a number of the result- declaration forms were not signed by the returning officers, thus rendering them worthless; and, despite the concession by the parties that a majority of the voters in the County were illiterate, and were therefore assisted to vote, only 4 Forms 32, in respect of assisted voters, were completed. Counsel urged that, the cumulative effect of all these findings is that the conduct of the election violated the constitutional principle on free and fair elections, and affected the outcome.

[54] With the foregoing submissions, counsel urged us to dismiss this appeal with costs.

(v) Submissions by the 2nd Respondent

[55] Senator Orengo, learned counsel for the 2nd respondent, associated himself with the submissions made on behalf of the 1st respondent. He urged that the importance of academic qualification for the position of Governor, could not be emphasized enough.

He dismissed the "dean's list" as evidence that the appellant graduated in March, 2012. He submitted that, as Mr. Sato deponed in his affidavit, the appellant's name having not been recorded in the graduation booklet, there was no evidence that the appellant studied and/or graduated from Kampala University. Learned counsel, on those submissions, urged us to dismiss this appeal with costs.

(vi) The Appellants Rejoinder

[56] In his rejoinder, counsel for the appellant faulted the Court of Appeal for failure to consider all the grounds of appeal, on the basis that such grounds raised matters of fact, which Section 85A of the Elections Act prohibits the Appellate Court from considering. He submitted that, despite the inelegance in the drafting of the memorandum of appeal, the Court of Appeal should, nevertheless, have deduced points of law therein, and duly considered them. He urged this Court to adopt such an approach.

E. ANALYSIS

[57] From the grounds of appeal, the issues raised by the interested party, the respondents' Notice of Affirmation of the Court of Appeal decision, and the rival submissions tendered by the parties, *four main issues* arise for determination by this court. They are:

(i) whether this Court has jurisdiction to entertain this appeal;

(ii) whether the High Court, sitting as an election Court, had jurisdiction to entertain a pre-election dispute arising from nominations, notwithstanding the provisions of Article 88 (4) (e) of the Constitution, and Section 74(1) of the Elections Act;

(iii) whether this Court has jurisdiction to determine issues that were never addressed by the Court of Appeal; and

(iv) whether or not the appellant had the requisite academic qualification to vie for the position of Governor for Wajir County.

(i) Whether the Supreme Court has Jurisdiction to Entertain this Appeal

[58] The 1st and 2nd respondents and the interested party argued that the major ground upon which the first two Superior Courts based their decision was: the appellant's lack of academic qualification, under Section 22 of the Election Act, to vie in the Election. According to them, that did not involve the interpretation or application of the Constitution. They referred us to the case of ***Aviation & Allied Workers Union of Kenya v. Kenya Airways Ltd. & 3 Others*** [2017] eKLR, urging that the Superior Courts' "mere reference to provisions of the Constitution" is not enough. They urged us to down our tools, for lack of jurisdiction to entertain this appeal.

[59] The appellant, on the other hand, argued that this appeal is well founded on *Article 163(4)(a) of the Constitution.* Relying on the appellant's replying affidavit, sworn and filed on 18th October, 2018, counsel for the appellant submitted that, apart from the fact that the issue of the appellant's academic qualification was central in the proceedings giving rise to this appeal, the High Court also found that the election "*was not conducted in accordance with the Constitution and the election law*." Counsel contended that the latter element alone, clothes this Court with jurisdiction under Article 163(4)(a) to determine this appeal.

[60] It is now settled that a Court cannot "*arrogate to itself jurisdiction through the craft of interpretation.*" The Court's jurisdiction is donated by either the Constitution or Statute or both. And, a Court's jurisdiction is not a matter of procedural technicality but one that goes to the root of the Courts' adjudication process. If a Court lacks jurisdiction to entertain a matter, it downs its tools.

[61] On this Court's jurisdiction, it is clear from Article 163 of the Constitution, that not all decisions of the Court of Appeal are appealable to the Supreme Court. As Mutunga CJ & P observed in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others*** S.C Petition No. 2B of 2014; [[2014] eKLR ***(Munya 2)***, a view that was reiterated by this Court ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others,*** *SC* Petition No. 2 of 2012; [2012] eKLR and in ***Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 Others*** [2014] eKLR, "*the chain of Courts in … [our] constitutional set-up, have the professional competency to adjudicate upon issues … [placed] before them; and only cardinal issues of law or of jurisprudential moment deserve the further input of the Supreme Court.*"

[62] Under Article 163(4)(a), upon which this appeal is based, only issues founded on constitutional interpretation or application, and where such issues have been canvassed, and have formed the basis of the Superior Courts' decisions, can be entertained by this Court.

[63] The question as to who is eligible for election as County Governor is provided for by the Constitution. Towards this end, Article 180 (2) thereof provides that: "*to be eligible for election as county governor, a person must be eligible for election as a member of the county assembl*y." On the other hand, Article 193(1) provides, *inter alia,* that "*unless disqualified under clause (2), a person is eligible for election as a member of a county assembly if the person is ¾ (a) a registered voter; and (b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament."* It follows that *Section 22(1)(b)(ii) of Elections Act is clearly a derivative of the provisions of Articles 180 (2) and 193 (1) of the Constitution.* In interpreting the said Section, therefore, a Court of law has to measure and balance it against these *constitutional provisions.*

[64] We agree with the appellant that the issue of his *academic qualification* for election as the Governor for Wajir County, was central in the proceedings before the two Superior Courts. It was raised in paragraphs 21, 28 and 29 of the petition before the High Court, and became a focal basis upon which the Court nullified the appellant's election. On its part, the Court of Appeal was even more specific on the issue. It stated, in its Judgment, that one of the issues for determination was "*whether the appellant met the constitutional and statutory qualifications to vie for position of governor*…." Upon consideration of that issue, it affirmed the High Court decision, that the appellant was *not academically qualified* to participate in the election.

[65] But even more compelling regarding the question whether, this Court has jurisdiction to entertain the Appeal, is the fact that, we are also being called upon to determine whether, an election court has jurisdiction to determine pre-election disputes, notwithstanding the provisions of Article 88(4) (e) of the Constitution. There can be no clearer issue requiring this Court to interpret and apply the Constitution than this one. Consequently, we have no doubt that this Court has jurisdiction to determine the Appeal.

(ii) Whether an Election Court has jurisdiction to determine pre-election disputes, including disputes relating to, or arising from nominations notwithstanding the provisions of Article 88 (4) (e) of the Constitution and Section 74 (1) 0f the Elections Act

[66] The question as to whether an election Court has jurisdiction to determine pre-election disputes, has been extensively considered by this Court in two recent decisions. In ***Silverse Lisamula Anami v. Independent Electoral and Boundaries Commission & 2 Others*** SC Petition No. 30 of 2018, we were cognizant of the fact that there are conflicting decisions by Election Courts, and the Court of Appeal on this matter. On the one hand, the Courts have held that pre-election disputes, including those relating to or arising from nominations, are a preserve of the IEBC, under Article 88 (4) (e) of the Constitution. On the other hand, the Courts have held that, notwithstanding the provisions of the foregoing Article, Election Courts retain the jurisdiction to determine pre-election disputes. In addressing the *conflicting judicial opinions* at paragraph 54, we rendered ourselves thus:

"***How do we resolve the apparent conflicting positions taken by the Court of Appeal and election Courts" Our view is that Articles 88(4)(e) and 105(1) and (3) must be read holistically, and that whereas the IEBC and PPDT are entitled, nay, empowered by the Constitution and Statute to resolve pre-election disputes including nominations, there are instances where the election Court, in determining whether an election is valid, may look to issues arising during the pre-election period, only to the extent that they have previously not been conclusively determined on merits, by the IEBC, PPDT or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the Constitution. Where a matter or an issue has been so determined, then the election Court cannot assume jurisdiction as if it were an appellate entity, since that jurisdiction is not conferred on it by the Constitution."***

[67] In ***Sammy Ndung'u Waity v. Independent Electoral & Boundaries Commission & 3 Others,*** SC Petition No. 33 of 2018, this Court in a majority decision, extensively reviewed the decisions of the High Court and Court of Appeal, regarding the question. The Court emphasized the fact that the Constitution has to be interpreted *holistically* and *purposively,* and that the Constitution, being a living charter, is always speaking, and that in interpreting its provisions, a Court of law must keep in mind that, the constitution cannot subvert itself. *Towards this end, every constitutional provision supports the other, and none can be read so as to render another inoperable.* At paragraph 67, the Court stated:

"***In our perception, this conflict cannot be resolved by either, discounting [outright] one school of thought, or wholly embracing the other. What is critical is the need to harmonize these well-reasoned opinions, so as to give effect to both Articles 88(4) (e), and 105 (1) (a) of the Constitution, as read with Section 75 (1) of the Elections Act. Doing so would be to stay faithful to the edict that a Constitution must be interpreted purposively and holistically."***

[68] So as to ensure that Article 88 (4) (e) of the Constitution is not rendered inoperable, while at the same time preserving the efficacy and functionality of an election Court under Article 105 of the Constitution, the Court developed the following principles:

(i) all pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT, as the case may be, in the first instance;

(ii) where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, such dispute shall not be a ground in a petition to the election Court;

(iii) where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution; the High Court shall hear and determine the dispute before the elections, and in accordance with the Constitutional timelines;

(iv) where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court;

(v) the action or inaction in (iv) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, even after the determination of an election petition;

(vi) in determining the validity of an election under Article 105 of the Constitution, or Section 75 (1) of the Elections Act, an election Court may look into a pre-election dispute if it determines that such dispute goes to the root of the election, and that the petitioner was not aware, or could not have been aware of the facts forming the basis of that dispute before the election.

[69] We believe that the foregoing principles may pave the way in streamlining the electoral dispute-resolution processes, both at the pre-election and post-election stages. Applying the reasoning in ***Silverse Lisamula*** and the majority decision in ***Sammy Waity*** *[supra],* alongside the foregoing principles, to the instant case, we note that a complaint had been lodged before the IEBC Dispute Resolution Committee by a Mr. Abdirahman Mohamed Abdille, questioning the *suitability of the petitioner to vie for the position of County Governor* on account of his *academic qualifications.* However, this complaint was pursued no further, and was not prosecuted. As a consequence, the IEBC Dispute Resolution Committee dismissed it *for want of prosecution.*

[70] The 1st respondent herein *did not file any complaint to the IEBC*, questioning the petitioner's academic qualifications, nor did he pursue the original complaint, which had been lodged by Mohamed Abdille. In fact, he is on record as stating that *he had all along been aware* of questions surrounding the petitioner's academic qualifications, not just in 2017, but, *since the year 2013.* At page 541 of Volume 2 of the Record of Appeal, the 1st respondent is on record as testifying thus:

"***A basic degree was a requirement. The others are not in contention. The Governor does not have a basic degree. I know this as early as 2013 but I cannot remember the month. That was four (4) years ago. In 2013 he ran for it but I did not file a case. Neither did I in 2017…"***

Again At Page 590 of the same Volume, he testifies thus:

"For as long as I have known the 1st Respondent, I knew that he did not have a degree. This was in 2007."

[71] On both occasions, he chose not to lodge any complaint at the IEBC until after the elections of 2017, when the petitioner had been declared the winner of the election. In other words, the 2nd respondent decided to ignore, or overlook the clearly established constitutional mechanisms for resolving pre-election disputes, *until after he had lost the election*.

[72] What are we to make of a situation where a contestant ignores the Constitution, drags an entire County through a gruelling election, only to turn around and intone that his rival was not qualified to vie in the first place" Is an election Court to assume jurisdiction over such a dispute *in such circumstances"* We think not. If we were to allow contestants, or any other person, to consciously incubate a dispute, bypassing the Constitution, and originating it at an election Court, that would surely render Article

88 (4) (e) of the Constitution inoperable. For if one can originate any dispute at an election Court, why bother with the IEBC" The IEBC, in relation to election disputes, would surely become otiose! It is in this regard that we developed principle number (iv) hereinabove, which states that:

"Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court."

[73] In ***Silverse Lisamula*** *[supra],* the question as to whether the 3rd respondent therein was a registered voter, had been determined by the IEBC Dispute Resolution Committee. No appeal was preferred to the High Court sitting as a Judicial Review Court, or in its supervisory capacity. This Court, in holding that the matter could not be revived at the election Court, thus stated:

"To put our holding into context, therefore, there is evidence that the question whether the 3rd respondent was a registered voter in Shinyalu Constituency, by the fact of a difference in names – Justus Kizito Mugali, as opposed to Justus Gesito Mugali M'Mbaya – was determined by the IEBC Dispute Resolution Committee, which resolved that the names referred to the same person, and proceeded to issue a nomination certificate to the 3rd respondent. *No appeal or judicial review proceedings were instituted to challenge that decision and, although the petitioner was not a party to the proceedings, it has not been shown that he was unaware of them, or that when he became aware of the same, he took any action, save the filing of the election petition before the election Court. On what basis can this Court now find otherwise" We submit, none. In any event, the decision of that quasi-judicial body within the IEBC, stands, and has never been overturned. The election Court and the Court of Appeal were bound by it, and therefore, properly declined to assume jurisdiction on that matter. We see no reason to overturn that decision."* [Emphasis added]

[77] Similarly in ***Sammy Waity*** *[supra],* this Court, in a majority decision, stated at paragraph 86:

"***Accordingly, the question as to the validity of the 2nd respondent's independent candidature, only arose in Election Petition No. 2 of 2017, filed in the High Court, challenging the declaration of the former as the Governor-Elect for Laikipia County, on 11th August, 2017. This issue was neither canvassed at the IEBC or the PPDT. The fact that the 2nd respondent had decided to contest the ensuing election as an independent candidate, was definitely known to the petitioner, since it was the basis of the Preliminary Objection in Election Petition No. 10 of 2017.*** *The petitioner having been the Chief Agent for the Jubilee Party for Laikipia East Constituency, knew all along, or ought to have known, that the 2nd respondent had quit the party and would be contesting the ensuing election as an independent candidate. With this knowledge, he chose not to challenge the validity of the independent candidature at the appropriate forum."* [Emphasis Added]

[78] It is therefore clear that the Court places a premium on, whether a petitioner *had prior knowledge of the facts giving rise to the pre-election dispute.* In the appeal before us, one could argue that the pre-election dispute was not determined on merits, since it was dismissed for want of prosecution. As such, it cannot be said to fall within the ambit of Article 88 (4) (e) of the Constitution. Such an argument is informed by judicial decisions to the effect that a dismissal of a matter for want of prosecution, does not operate as an estoppel in civil proceedings.

[79] Such a contention may hold water in ordinary civil proceedings, but not in election disputes where *constitutional provisions*, and *timelines* are at play. Here, the person who lodged the complaint decided not to prosecute it, for whatever reasons. The 1st respondent not only chose not to pursue, or revive the complaint, he chose not to lodge any complaint at all. So, the complaint that was dismissed for want of prosecution was not his complaint.

[80] On the basis of the foregoing reasoning, we find and hold that both the Election Court and the Court of Appeal wrongly assumed jurisdiction, in determining what was clearly a *pre-election dispute*, regarding the academic qualifications of the petitioner. However, as our principle number (v) (above) stipulates, a petitioner's inaction does not prevent him from presenting the dispute for resolution before the High Court, sitting as a *judicial review Court,* or *in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution.*

[81] This Principle as read with Principle (vi) means that at any time, the judicial process is never closed. It also preserves the authority of the Constitution, in the event of the occurrence of certain "tragedies", to which our attention was drawn. For example, what would happen if a person who is not a citizen of Kenya were to slip through the IEBC vetting process and become elected M.P, Governor, or even President" Or what happens if a person who is not qualified as provided for by the Constitution, slips

through the IEBC vetting process and gets elected" The answer lies in the two principles. In the one instance, where the tragedy was not known, the Election Court assumes jurisdiction. In the other instance, where the tragedy was known, the High Court takes over under Article 165 to preserve the Constitution. This interpretative framework is not only holistic and purposive, it is also forward looking. After all, whatever can slip through the IEBC vetting process, can also slip through the Election Court petition processes! At the end of the day, the constitutional pre-election dispute resolution mandate of the IEBC is respected, the efficacy of the Election Court is preserved, and above all, the authority of the Constitution is intact!

(iii) Whether this Court has jurisdiction to determine issues that were never addressed by the Court of Appeal

[82] The Court of Appeal, in agreement with the Election Court, that the petitioner lacked the requisite academic qualifications, decided to nullify the election, *on that ground alone.* The Court declared all the other grounds to be moot. Notwithstanding this decision by the Court of Appeal, it was urged that this Court should nonetheless assume jurisdiction, and determine the issues that were left unresolved by the Appellate Court.

[83] It is our position that, in the absence of a determination by the Court of Appeal on an issue, no appeal can properly fall before the Supreme Court in exercise of its *appellate jurisdiction.* In ***Basil Criticos v. Independent Electoral and Boundaries Commission & 2 Others*** [2015] eKLR, we posed the following question:

"*In the absence of a Judgment by the Court of Appeal, in which constitutional issues have been canvassed, what would this Court be sitting on appeal over""*

[84] The same question obtains in the prevailing circumstances. In this regard, we are in agreement with Justice Lenaola's opinion on this question, as expressed in paragraphs 203, 204, 205, 206 and 207 of his dissent.

[85] Our determination of the first three issues means that the Court has to down its tools at this stage. However, before doing so, we think it is important to advert to the issue of *additional evidence.* It is on record that following an application by the appellant, the Court in a Ruling dated 28th September, 2018, granted the applicant leave to adduce additional evidence. The additional evidence that was adduced was in the form of degree certificates and other testimonials. The application for additional evidence was an interlocutory one. In making the application, counsel for the appellant submitted that the additional evidence would aid the Court in making a just and fair decision after the substantive hearing.

[86] Ideally, had the jurisdictional questions been determined upfront, before the substantive hearing, it may not have been necessary to grant leave to the applicant to adduce the additional evidence. But in view of the exigencies of election petition timelines, it has been the pracitce of this Court to determine all issues, both preliminary and substantive, at the main hearing. Hence the situation in which the Court finds itself. When the interlocutory Order allowing the additional evidence was granted, the Court had yet to pronounce itself, on the critical question as to whether, and under what circumstances, an election Court may assume jurisdiction, to determine pre-election disputes.

F. THE DISSENTING OPINION OF JUSTICE D. K. MARAGA, CJ & P

[87] I have had the advantage of reading in draft the majority Judgment in this appeal. I agree with the factual background and the summary of the submissions advanced by the parties. I do not therefore need to re-harsh them in this dissent. With profound respect, I am, however, not in one with the majority decision and the final Orders they have proposed.

[88] The major issue in this appeal, is whether or not the appellant possessed the requisite academic qualification to vie in the Wajir Gubernatorial contest (the election). By its Order made on 28th September, 2018, this Court granted the appellant leave to adduce additional evidence on his academic qualification to contest in the election. In the circumstances, this Court has to consider the additional evidence adduced by the parties. As such, before I consider the written submissions filed by counsel for the parties and their oral highlights of them, I need to summarize the additional affidavit evidence tendered by the parties pursuant to our Ruling of 28th September, 2018.

(a) Additional Evidence

[89] Pursuant to this Court's Ruling of 28th September, 2018, on 8th October 2018, the appellant filed his affidavit of additional

evidence. He annexed to that affidavit Secondary School and Teacher Training certificates as well as certificates on his career progression in the education sector. With regard to his university education, he annexed copies of the letter of admission to Kampala University; academic documents for both his undergraduate and post graduate education; accreditation letter from the Commission of Higher Education; affidavits sworn by his lecturers at Kampala University, James Openson Nyakweba, Wairimu Bilhah Kiragu, and letters proving their appointments; affidavits and academic transcripts of his fellow students, Ahmed Mohamed Isaak and Yussuf Shueb Abdullahi; affidavits of the former Academic Registrar, Mr. Evans Kerosi Somoni and the current academic registrar, Mr. Ssegawa Hamza; and a clearance form as testimony of his successful completion of his studies at Kampala University. Also annexed are letters of the appellant's appointment as the Kenyan Ambassador to Saudi Arabia and as Minister; an affidavit on his names; and a decision of the IEBC's Dispute Resolution Committee dismissing, for want of prosecution, Abdirahman Mohamed Abdille's complaint challenging his nomination.

[90] The affidavits of his lecturers claim that the appellant—Registration No. 2009AU/KU/BBA/222HCT—was their student in that University until he graduated in 2012. That of his fellow student Isaak claims the appellant was his classmate. He did not say he attended classes with him. In his affidavit, Abdullahi claims he did some common subjects with the appellant. In the copy of his affidavit sworn on 7th May, 2018 annexed to that of the appellant, Ssegawa, the current Academic Registrar, claims that records in the University show that the appellant was, vide admission letter Reg. No. 09AU/KU/BBA/222HCT dated 29th July, 2009, admitted to Kampala University where he studied and graduated with a Bachelor of Business Administration Degree on 1st March, 2012. Although his name was not on the graduation list, it appeared in the Dean's list of December, 2011.

[91] In response to the appellant's said affidavit, on 11th October 2018, the 1st respondent swore an affidavit which he filed the following day. He deposed that the photo-copies of the purported affidavits annexed to the appellant's affidavit filed on 8th October 2018, having not been independently filed, offend the rules of evidence and are therefore of no probative value; that in response to his Advocates' letter, the current Academic Registrar of Kampala University wrote on 8th October, 2018 that the appellant has never been a student in that University; that between 2007 and 2013, the appellant had no passport, his earlier one having expired; that the ID Card No. 0039325 the appellant gave as his, does not exist in the records of the Registration of Persons' records; that according to the Parliamentary Departmental Committee on Defence and Foreign Relations report (which he annexed) for the vetting of the appellant on 3rd September, 2014 for the position of the Ambassador, the appellant said he had no degree; that in the appellant's statutory declaration during the 2017 vetting for the gubernatorial seat he stated that his highest qualification was a Bachelors' degree; that the affidavits of Kerosi and Nyakweba cannot be relied upon as both of them left Kampala University several years ago and had therefore no records to support their claim that the appellant was a student there; that none of the lecturers says what he or she taught the appellant or what made them remember him; and that the appellant's said affidavit contains new evidence and not additional evidence which creates a new case altogether not in tandem with this Court's order allowing additional evidence.

[92] On 26th October, 2018, the 1st respondent swore a further affidavit to which he annexed the appellant's Passport issued on 22nd May, 2007 and expired on 22nd May, 2017, the appellant's ID No. 0039325 and a letter dated 22nd October, 2018 from the Ugandan Ministry of Internal Affairs that Uganda has no record of the appellant's travel into or out of Uganda between 2009 and 2012.

[93] Jacob Onyango Orinda; Yussuf Shueb Abdullahi; Dr. Tomithy Sato; and Habiba Hussein Abdi also swore and filed affidavits at the instance of the 1st and 2nd respondents in response to the appellant's said affidavit sworn on 7th October, 2018 and filed on 8th October, 2018. Mr. Jacob Onyango Orinda swore that between 2008 and 2009, he was the Deputy Academic Registrar at Kampala University in charge of admission of students from Kenya, Rwanda and South Sudan; that upon admission, students names were entered in the Admission Book and each student signed against his name; that the appellant's name does not appear in the Admission Book; that only 196 students were admitted to Kampala University in 2009 and there was no student bearing the Registration No. 2009/AU/KU/BBA/222HCT in 2009; that at any rate, the appellant did not qualify for admission to pursue a Bachelor of Business Administration; that the appellant's name did not appear on the 2012 graduation list; and that a dean's list has never been used for graduation since 2012.

[94] Dr. Timothy Sato, the Assistant Academic Registrar-In-Service Programmes Coordinator at Kampala University swore that his office is the custodian of records of students in the In-Service Programmes; and that upon receipt of the respondents' advocates' letter of 5th October 2018, he pored through the University records and annexed copies of the Manual Record of Admission of 2009, the 2012 graduation booklet, Accounts Office records, and Record of Collection of Certificates for 2012 none of which has the appellant's name.

[95] In his affidavit sworn on 4th October and filed on 15th October 2018, Habiba Hussein Abdi deposed that he knows the appellant very well, having been his neighbor for many years and served under him; that he undertook a Bachelor of Education (Early Childhood Development) at Kampala University between 2010 and 2012; that he never saw him at Kampala University during that

period; and that his name is in the 2012 graduation booklet but the appellant's is not. In his affidavit sworn on 11th October 2018, Yussuf Shueb Abdullahi withdrew the one sworn on 18th May, 2018 and annexed to that of the appellant.

[96] In response to the replying affidavits filed by the respondents, the appellant caused Ssegawa Hamza, the current Academic Registrar of Kampala University to swear an affidavit on 16th October, 2018 allegedly to set the record straight. In that affidavit, Hamza disowned as a forgery the letter annexed to the respondent's affidavit alleging that the appellant was never a student at Kampala University and swore that Orinda left the Kampala University two years ago and had no access to records to confirm the appellant was never a student there; that the purported manual and collection of certificates records annexed to Sato's affidavit relates to the School of Education only; that contrary to Sato's allegations, the appellant paid his fees and other costs; that the appellant's degree certificate and transcripts are genuine and authentic; that the appellant cleared late and his name appeared in the dean's list of those cleared to graduate; and that the appellant had met the admission criteria and was admitted to Kampala University.

[97] The affidavits by Prof. Badru Kateregga, the Founding Vice Chancellor of Kampala University and Professor Evans Kerosi filed on 19th November, 2018 without leave of the Court were, by Order of this Court made on 21st November 2018, expunged from the record.

[98] Reacting to Ssegawa Hamza's affidavit of 16th October 2018, on 22nd October 2018, both Orinda and Sato swore and filed further affidavits in which they both stood by their earlier affidavits and added that they are ready to take the witness stand to be cross-examined. Sato swore that upon receipt of the respondent's Advocates' letter of 5th October 2018, at Hamza's request, he assisted him in poring through the University records which did not have the appellant's name and on that basis, Hamza wrote the letter dated 8th October, 2018 which he now purports to disown; that he is still the Assistant Academic Registrar and In-Service Programme Coordinator on a full time basis; that the In-Service Programme offers various courses and not education only; that as the In-Service Programme Coordinator he has records for all courses offered in the Programme including Bachelor of Business Administration; that the Dean's List is a document signed and submitted by the Dean of the School and not by the Academic Registrar; that the Dean's list produced by the Academic Registrar is a falsehood authored and signed by the Registrar; that if the appellant was cleared between 10th and 13th December 2011 as per the Clearance Certificate he produced, there was no reason why his name does not appear on the graduation booklet printed about 3 months later; that the criminal investigations Prof. Kateregga referred to in his affidavit (that has since been expunged from the record) relate to pressure he has put him under to disown his earlier affidavit; that he has recorded a statement on the issue at Langata Police Station and he is ready to stand in court and defend his averments.

[99] In his further affidavit, Orinda confirmed the averments in Sato's further affidavit and stands by what he had stated in his earlier affidavit concluding that Hamza the Academic Registrar is a liar.

[100] Having considered the grounds of appeal, the issues raised by the interested party, the respondents' Notice of Affirmation of the Court of Appeal decision, and the rival submissions tendered by the parties, I find that seven issues arise for our determination in this appeal: *whether or not this Court has jurisdiction to entertain this appeal; whether or not the appellant had the requisite academic qualification to vie for the position of Wajir Governor; whether or not the High Court, as the election court, had jurisdiction to entertain pre-election nomination disputes notwithstanding the provisions of Article 88 (4) (e) of the Constitution and Section 74 of the Elections Act; whether or not the two Superior Court floundered on the burden and standard of proof in electoral disputes; whether or not the conduct of the election was fraught with illegalities and irregularities which undermined its integrity and affected its results; whether the Deputy Governor's Election can stand on its own; and whether or not the Court of Appeal abdicated its duty when it determined the appeal on only one ground and refused to consider the others.*

(i) Whether the Supreme Court Has Jurisdiction to Entertain this Appeal

[101] The appellant contended that the issue of his academic qualification having been the fulcrum of this appeal, this Court has jurisdiction under Article 163(4)(a) of the Constitution to determine this appeal. Moreover, he further argued, the High Court having found that the election "*was not conducted in accordance with the Constitution and the election law*," that is a further ground upon which this Court should assume jurisdiction and determine this appeal.

[102] On their part, the respondents and the interested party contended that the issue of the appellant's lack of academic qualification under Section 22 of the Election Act to vie in the Election did not involve constitutional interpretation of application.

[103] The academic qualification of a university degree as a criterion for eligibility to contest in a gubernatorial election, though expressly provided for in Section 22(1)(b)(ii) of Elections Act, has its anchourage in the Articles 180(2) and 193(1)(b) of the Constitution. Article 180(2) of the Constitution provides that "*to be eligible for election as county governor, a person must be eligible for election as a member of the county assembly*…." With regard to the eligibility for election as a member of a county assembly, Article 193(1)(b) requires that an MCA "*satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament.*" So Section 22(1)(b)(ii) of Elections Act is clearly a derivative of the Constitution.

[104] I agree with the appellant that the issue of his academic qualification for election as the governor for Wajir County was central in the proceedings before the two Superior Courts. It was raised in paragraphs 21, 28 and 29 of the petition before the High Court and formed part of the failures the High had in mind when it stated at paragraph 208 of its judgment that the Wajir County gubernatorial election "*was not conducted in accordance with the Constitution and the law*…." This decision was based *inter alia* on the High Court's finding that the secrecy of the ballot was breached thus violating Article 81(e)(1) of the Constitution.

[105] Those are clearly issues of constitutional interpretation and application. On my part, I have no doubt that this Court has jurisdiction to determine this appeal.

(ii) Whether a University Degree is a Prerequisite for Gubernatorial Election

[106] It is incontestable that Article 180(2) of the Constitution requires an aspiring governor to be qualified to be a member of the County Assembly (MCA). On its part Article 193(1)(b) delegated to Parliament to legislate on the educational qualification of an MCA. Pursuant to that mandate, Parliament enacted Section 22(1)(b)(ii) of the Elections Act, which prescribed a university degree as the minimum requisite academic qualification for one to contest MCA and gubernatorial seats.

[107] Counsel for the appellant submitted that although the appellant has a Bachelors' degree in Business administration and even a Masters in International Diplomacy, by dint of Section 22(1A) of the Elections Act, introduced by Section 8 of the Election Laws (Amendment) Act No. 1 of 2017, the requirement of a university degree qualification prescribed by Section 22(1)(b)(ii) of the Elections Act as the minimum academic qualification for election as MCA and/or Governor was deferred to the first election after the 2017 general election. Is this correct" I do not think so.

[108] A closer look at Section 22 of the Elections Act, shows that the deferment in the application of that section to the general election after the 2017 general election related only to the candidates for the Parliamentary and MCA positions. This is because the original Section 22(2) of the Elections Act No. 24 of 2011 required aspiring candidates for the positions of "*President, Deputy President, County Governor or Deputy County Governor*…" to be holders of "*… a degree from a university recognized in Kenya*." Act No. 48 of 2012 added sub-section 22(2A) which reads: *"For the purposes of the first election under the Constitution, section 22(1)(b) and section 24(1)(b), save for the position of the President, the Deputy President, the Governor, shall not apply for the elections of the offices of Parliament and county assembly representatives."*

[109] This is the section which was amended by Act No. 1 of 2017 to require candidates for MCA positions to be holders of degrees from universities recognized in Kenya. That same Act, that is, Act No. 1 of 2017, also inserted, immediately after subsection (1), the controversial sub-section (1A) with the said deferment. It is important to note that despite the said 2017 amendment, subsection (2) of Section 22 still maintains the university degree requirement for positions of the President, Deputy President, County Governor and Deputy County Governor.

[110] It is clear from all these amendments that the requirement of a university degree for positions of President, Deputy President, County Governor and Deputy County Governor has never changed since the enactment of the Elections Act No. 24 of 2011. To suggest therefore that the deferment related to the academic requirements in the whole of Section 22 would mean that even the contestants for the positions of President and Deputy President need not have been degree holders which is ridiculous. For ease of reference, I wish to reproduce verbatim Section 22 of the Elections with the said amendments.

"22(1) A person may be nominated as a candidate for an election under this Act only if that person—

(a) is qualified to be elected to that office under the Constitution and this Act; and

(b) holds—

(i) in the case of a Member of Parliament, a degree from a university recognized in Kenya; or

(ii) in the case of member of a county assembly, a degree from a university recognized in Kenya.

(1A) Notwithstanding subsection (1), this section shall come into force and shall apply to qualifications for candidates in the general elections to be held after the 2017 general elections.

(1B) The provisions of this section apply to qualifications to nomination for a party list member under Section 34.

(2) Notwithstanding subsection (1)(b), a person may be nominated as a candidate for election as President, Deputy President, county Governor or deputy county Governor only if the person is a holder of a degree from a university recognised in Kenya.

(2A) For the purposes of the first elections under the Constitution, Section 22 (1)(b) and Section 24(1)(b), save for the position of the President, the Deputy President, the Governor and the Deputy Governor, shall not apply for the elections of the offices of Parliament and county assembly representatives."

[111] It is clear to me that the said 2012 and 2017 amendments to Section 22 of the Elections Act specifically targeted the positions of members of Parliament and MCAs and not those of President, Deputy President, County Governor or Deputy County Governor, and for good reason.

[112] It is common knowledge that in November 2000 the Constitution of Kenya Review Commission (CKRC) was established to spearhead constitutional reforms in the country. During the constitutional review process, the CKRC collected and collated views from the public. An overwhelming majority of members of the public called for prescribing educational qualifications as a prerequisite to contest for various positions. The Taskforce on Devolved Government, which was set up in March 2010 to recommend structures for devolved government, considered the question of educational qualifications, and the views that were presented to it for elected representatives, and specifically the office of county governor. In its final report of 2011, that Taskforce observed that in the light of the important functions of implementing both county and national legislations as well as managing and coordinating the functions of the County administration and its departments that the County Executive, headed by the governor, will be required to perform "*…the requirements of competence and suitability, … can only be operationalized through educational and professional qualifications."*

[113] It is on the basis of these recommendations that Article **193(1)(b)** read together with Section 22(1)(b)(ii) of the Elections Act prescribe the academic qualification of a university degree for election to a gubernatorial position. As stated above, the 2012 and 2017 amendments did not change this requirement for election as County Governor. I therefore find that the academic qualification of a university degree is a prerequisite for election to the position of County Governor and even Deputy County Governor that applied in the 2013 and 2017 general elections and, unless specifically amended, will apply in future elections.

[114] Before I go into the major ground in this appeal, I would like to dispose of the ground that the Superior Courts floundered on the burden and standard of proof.

(iii) Whether or not the two Superior Courts Floundered on the Burden and Standard of Proof in Electoral Disputes

[115] On the burden and standard of proof, counsel for the appellant argued that since the 1st and 2nd respondents had dismissed the appellant's academic certificates as fraudulent forgeries, they bore the burden of proving that allegation to the required standard of beyond reasonable doubt but they failed to do so. Counsel accused the Superior Courts of erroneously shifting, under Section 112 of the Evidence Act, the burden of establishing the authenticity of those certificates to the appellant. In response, counsel for the 1st respondent defended the Superior Courts' position that the 1st respondent established a *prima facie* case that questioned the appellant's academic qualifications which shifted the burden to the appellant to rebut and prove otherwise.

[116] It is trite law that the legal burden of proving allegations in an election petition always remains with the petitioner. See ***Raila Odinga & 50 Others v. Independent Electoral and Boundaries Commission & 3 Others*** SC Petition No. 5 of 2013; [2013] eKLR and ***Moses Wanjala Lukoye v. Bernard Wekesa Sambu & Others*** [2013] eKLR. However, once the respondent establishes a prima facie case challenging the petitioner's case, the evidential burden of proof shifts to the petitioner to rebut the challenge. As was held in the case of ***Mrao Ltd v. First American Bank of Kenya ltd & 2 Others,*** Civil Appeal No. 39 of 2002; [2003] eKLR, a prima facie

case is made out when, "*on the material presented to …[it] a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter*."

[117] In this case, it is the 1st respondent who alleged that the appellant's degree certificates were not genuine. By dint of Section 107 of the Evidence Act, he bore the burden of proving that allegation. I do not think that the use of the term "forgery" connoted a criminal or quasi-criminal intent requiring proof beyond reasonable doubt. It was an ordinary challenge of the authenticity of the appellant's said certificates which, as is the law in electoral disputes, required proof to a standard higher than that of a balance of probabilities but below beyond reasonable doubt. See ***Raila 2013***.

[118] I concur with the Superior Courts that the 1st respondent placed before court evidence that the petitioner's name was not on the list of graduands of Kampala University for the 1st March, 2012 graduation. There was also evidence that in the minutes of the Departmental Committee of Defence and Foreign Relations, on the vetting of the appellant for an ambassadorial position, it was stated that although the appellant had *"… joined Kampala University to pursue a Bachelor's degree in business Administration and Post Graduate Diploma in Internal (sic) Relations. He is yet to graduate."* That, with the appellant's self-declaration that as at May 2017, his highest academic achievement was a Bachelor of Business Administration, cast doubt on the authenticity of the appellant's certificates and successfully shifted the burden of proof to the appellant but he failed to prove the contrary.

[119] Having disposed of the issue of the burden and standard of proof and having established that a minimum of a degree from a university recognized in Kenya is a prerequisite for election to the position of County Governor in Kenya, I now wish to deal with one of the major issue in this appeal which is whether or not the appellant had that academic qualification to contest the Wajir gubernatorial seat.

(iv) Whether the appellant possessed the requisite Academic Qualification to vie for the position of County Governor

[120] IEBC had produced before the trial court copies of the appellant's Bachelor of Business Administration Degree certificate dated 1st March, 2012; his academic transcript; and a Master of Diplomacy & International Relations degree certificate dated 12th March, 2015 all from Kampala University; and an accreditation letter by the Kenyan Commission of Higher Education dated 11th January 2013.

[121] At the pre-trial conference on 9th October, 2017 the parties recorded a consent that "*documents on record are admitted and need not be strictly proved*." The appellant and his legal advisers claimed that that consent lured them to believe that the appellant's academic qualification was no longer an issue hence the appellant's failure to appear before the trial court to testify and be cross-examined on the authenticity of his said academic certificates. That turned out to be his undoing.

[122] Both Superior Courts disregarded that consent Order and instead made caustic observations on the appellant's failure to present himself for cross-examination. Bearing in mind that a fair hearing or trial is a non-derogable right under our Constitution, in our ruling of 28th September 2018, we found that the appellant had, by the confusion created by the consent order, been denied a fair opportunity to present his case. We accordingly allowed his application to adduce additional evidence "*to remove any vagueness or doubt over the status of his academic qualification*…."

[123] I have already summarized the additional evidence adduced by both sides. While the appellant has marshalled all the evidence he could to show that he was admitted to Kampala University where he successfully studied and was awarded a Bachelor of Business Administration in March 2012 and a Master of Diplomacy & International Relations degree in 2015, the respondents have on their part endeavored to demonstrate that the appellant did not even travel to Uganda during the material time leave alone undertake any studies in that university. Has the additional evidence placed before us cleared the doubt cast on the appellant's academic qualification" On my part I do not think it has.

[124] On 3rd September, 2014, the appellant appeared before the Parliamentary Departmental Committee on Defence and Foreign Relations for vetting as to his suitability to serve as Kenya's ambassador to Saudi Arabia. That Committee's report annexed to the 1st respondent's affidavit sworn on 11th and filed on 12th October 2018 states that the appellant "*joined Kampala University to pursue a Bachelor's degree in Business Administration and Post graduate Diploma in International Relations. <u>He is yet to graduate</u>*." [Emphasis supplied].

[125] I reject the contention by counsel for the appellant that the phrase in the report that the appellant was "yet to graduate"

referred to the graduation in the post graduate diploma in international relations. That contention does not flow from the above quotation and/or from the report as a whole. This is because prior to the appellant's appearance before the said Parliamentary Committee for vetting on 3rd September 2014, the Clerk of the National Assembly had advertised in the Daily Nation of 26th August 2014 a notice requiring various nominees for various positions to appear for vetting on various dates. That notice required all candidates to go to the vetting sessions with the "*originals of their identity cards, academic and professional certificates and [other] supporting documents and testimonials*."

[126] Besides the appellant, two other candidates, Mr. Richard Opembe and Lucy Chelimo were also vetted on the same day—on 3 rd September 2014—for the position of ambassadors to Ireland and Canada respectively. In respect of Mr. Opembe, the Committee's report records that held "*a Diploma in Sales and Marketing from Trans World Tutorial*" while in respect of Ms Chelimo the report states that she had "*joined Kenyatta University where she earned her Bachelor of Science degree in Environmental Science*…."

[127] From the advertised notice, it is clear that each candidate must have appeared with his certificates. If one did not, one had to offer an explanation for that failure. The report on Mr. Opembe and Ms Chelimo left no doubt about their respective qualifications. As observed, the report states that Mr. Opembe was a holder of a Diploma while Ms Chelimo was a holder of a degree. For the report to be that categorical, they must have produced their certificates as required. It follows and I agree with counsel for the 1st and 2nd respondents that the reason why the report in respect of the appellant reads "*He is yet to graduate*" is because he did not produce any certificate.

[128] The National Assembly had a special sitting on 10th September 2014 to adopt the report on the vetting of nominees for appointment to diplomatic positions. A report of that special session, also annexed to the 1st respondent's said affidavit, makes it quite clear that a nominee's academic qualification was an important criterion for approval of his or her appointment. If the appellant had a university degree, he would have been too happy to flash it rather than risk disapproval of his appointment.

[129] Evidence was tended before the trial court that in support of his application for nomination to vie in the Wajir gubernatorial contest in the 2017 general election, the appellant swore a statutory declaration in which he stated that his highest qualification was a Bachelors' degree. That contradicted his avowed contention that he had a Masters degree which overqualified him for the gubernatorial position.

[130] Further, it is common ground that the names of the students from Kampala University who graduated on 1st March, 2012 were published in the graduation booklet for that year and that the appellant's name was not in it. The appellant claimed he was cleared after the booklet had been published and that is why his name appeared on the Dean's List of the other students who were allowed to graduate. That explanation is untenable for two reasons. One, to his own affidavit of additional evidence sworn on 7th October 2018, the appellant annexed a clearance form showing that the last department in Kampala University to clear him was Accounts and that was on 13th December 2011. I agree with the 1st and 2nd respondents that the graduation booklet cannot have been published before that date which is more than two months prior to the graduation date. Secondly, on my part I entertain doubt on the authenticity of the Dean's List as it was signed by the Academic Registrar and not the Dean himself or herself. This is of course besides the unresolved dispute as to whether or not the Dean's List is as graduation list.

[131] I do not need to be labour the point. On these facts and with no evidence of payment of tuition fees to the university, far from clearing my mind, the additional evidence adduced, including the letter dated 22nd October 2018 from the Ugandan Ministry of Internal Affairs that the appellant did not travel to Uganda between 2009 and 2012, has, in my humble view, beclouded the issue of the authenticity of the appellant's degree certificate even more. As was stated in the Nigerian case of ***First Bank of Nigeria Plc v. May Medical Clinics & Diagnostics Centre & Another,*** Suit No. SC.184/1995, when the only evidence before court on an issue is the applicant's affidavit(s) the averments of which are diametrically at variance with those in the respondent's affidavit(s), "*the court …must not pick and choose or believe one and reject the other…. it is only by resorting to viva voce evidence that the court will resolve the conflict on the facts*."

[132] We did not allow adduction of *viva voce* evidence because this is a second appeal and the appellant had sought leave to adduce evidence to "*ascertain the truth*" and put the doubt on the legitimacy of his certificates "*beyond dispute*". In other words, as we stated in our ruling of 28th September 2018, the additional evidence was intended "*to remove any vagueness or doubt over the status of his academic qualification*…." Consequently, I have no option but to affirm the concurrent Superior Courts' findings that the appellant did not possess the requisite academic qualification to contest in the election and that his election was therefore null and void.

(v) Whether Election Courts Have Jurisdiction to Entertain Pre-election Nomination Disputes

[133] With regard to the appellant's academic qualification to vie in the election, the appellants and the 3rd and 4th respondents contended that Article 88(4)(e) of the Constitution and Section 74(1) of the Elections Act vest IEBC with the exclusive jurisdiction to resolve pre-election nomination disputes. The appellant contended that once IEBC has resolved such dispute, the High Court, as the election court, has no jurisdiction to entertain or reopen it.

[134] In this case, the appellant contended that one Abdirahman Mohamed Abdille, an agent of the 1st and 2nd respondents (but did not offer any proof of that agency), challenged the appellant's nomination to vie in the election on account of lack of the requisite academic qualification. A committee of IEBC **established under Section 109 of the Elections Act and the Rules of Procedure of Settlement of Disputes made thereunder dismissed that dispute for want of prosecution. In the circumstance, the appellant argued, the matter was res judicata and the election court had no jurisdiction to entertain the issue. In support of this argument that the election courts have no jurisdiction to entertain pre-election nomination disputes, the appellant cited to us the cases of *Sammy Ndung'u Waity v. Independent Electoral and Boundaries Commission & 3 Others* [2018] eKLR,** and ***Silverse Lisamula Anami v. IEBC & 2 Others*** (Kisumu) Election Petition Appeal No. 7 of 2018; [2018] eKLR, in all of which the **Court of Appeal held that the Election Court has no jurisdiction to entertain pre-election disputes. In the case of *Hon. Silverse Lisamula Anami & Another v. IEBC & 2 Others*** (Kisumu) Election Petition Appeal No. 7 of 2018, **the Court added that litigation will be open-ended and the timelines set in the Constitution and the election law will be defeated if Election Courts are allowed to handle such disputes.**

[135] Counsel also cited to us several other authorities, some of which I will consider shortly. In particular, they referred us to **the case of *Josiah Taraiya Kipelian Ole Kores v. Dr. David Ole Nkedienye & 3 Others*** [2013] eKLR in which the trial Judge in this matter had held that the High Court has no jurisdiction to entertain a pre-election dispute like the eligibility of a candidate to vie in an election, an issue Article 88(4)(e) of the constitution and Section 74(1) of the Elections Act have reserved for IEBC.

[136] The 1st and 2nd respondents on the other hand contended that a nomination dispute relating to a candidate's qualification and/or eligibility to vie, is part of the electoral process which goes to the root of an election which the election court has jurisdiction to determine. Counsel for the 1st and 2nd respondents also cited to us several authorities in support of that argument. I will shortly also consider some of them.

[137] It is indisputable that Article 88(4)(e) vests IEBC with jurisdiction to determine, *inter alia*, "*disputes relating to or arising from nominations*." Section 74(1) of the Elections Act as well as Section 4(e) of the IEBC Act add their voices to that position in more or less the same wording. There are other pre-election disputes which the Political Parties Disputes Tribunal (PPDT) established by Section 39 of the Political Parties Act has jurisdiction to resolve which do not concern us in this appeal.

[138] A survey through the judgments of this Court and other Superior Courts reveal a divided opinion on the election courts' jurisdiction to entertain pre-election day nomination disputes. The decisions supporting the appellants' school of thought that the election courts have no such jurisdiction, express the view that pre-election nomination disputes are, by dint of Article 88(4)(e) of the Constitution and Section 74(1) of the Elections Act, the preserve of IEBC. They include the trial Judge's own decision in ***Josiah Taraiya Kipelian Ole Kores v. Dr. David Ole Nkedienye & 3 Others*** [2013] eKLR. Others are ***Ndung'u Waity v. Independent Electoral and Boundaries Commission & 3 Others*** [2018] eKLR, and ***Hon. Silverse Lisamula Anami & Another v. IEBC & 2 Others*** (Kisumu) Election Petition Appeal No. 7 of 2018 (UR).

[139] Those against that view are equally numerous. They include ***Kennedy Moki v. Rachel Kaki Nyamai & 2 Others*** [2018] eKLR; ***Mwihia & Another v. Ayah & Another*** **[2008] 1 KLR (EP) 450** and ***Wamboko v. Kibunguchi & Another*** **[2008] 2 KLR 477; *Karanja Kabage v. Joseph Kariambegu Nganga & 2 Others,* Election Petition No. 12 of 2013; (2013) eKLR; and *Hon. Mohamed Abdi Mohamud v. Ahmed Abdullahi Mohamad & 3 Others,* Nairobi Election Petition Appeal No. 2 of 2018.**

[140] I agree with the appellant that other bodies and institutions like IEBC and the PPDT which the Constitution has vested with jurisdiction to resolve certain electoral disputes should be accorded their space. As I have stated, Article 88(4)(e) has vested IEBC with jurisdiction to determine pre-election "*electoral disputes relating to or arising from nominations*". Section 40 of the Political Parties Act has vested the PPDT with jurisdiction to determine inter and intra-party disputes. In terms of Article 259 of the Constitution, such provisions have to be given a robust construction. As the custodian of the Constitution, this Court is obliged to give Article 88(4)(e) a sound, contextual and progressive construction that not only promotes the purposes, values and principle enshrined in the Constitution but also advances the rule of law. In this regard, I would like to debunk the appellant's notion that

Article 88(4)(e) has vested IEBC with exclusive jurisdiction to determine pre-election "*electoral disputes relating to or arising from nominations*".

[141] In my view, a contextual interpretation of Article 88(4)(e) divides into two categories the pre-election nomination disputes therein referred to. The first category comprises of the disputes which are founded under the general rubric of the constitutional qualification or eligibility criteria to contest in an election as set out in Article 99 for Member of Parliament; Article 137 for President; and Article 193 for member of the County Assembly.

[142] The second category includes intra-party nomination disputes contemplated by Section 31 of the Elections Act such as whether or not one was properly selected under the "*rules of the political party concerned relating to members of that party who wish to contest*" in a given election which the PPDT may or may not have resolved under Section 41 of the Political Parties Act; and disputes under Section 34 of the Elections Act as to whether one's name should or should not be on a political party list. This category of disputes are not founded on any constitutional criteria and do not therefore go to the root of an election. In my view, IEBC has exclusive jurisdiction to determine this category of disputes. It should therefore determine them with finality subject to any appeals in accordance with the procedure set out in the Elections Act and the election courts should not entertain them.

[143] In my humble view, however, an exception has to be made with regard to the first category of disputes which are founded on the constitutional qualification or eligibility criteria for several reasons.

[144] First, as I have already found, the issue of one's academic qualification to contest a gubernatorial seat is a requirement expressly stated in Section 22(1)(b)(ii) of the Elections Act but anchored in the Constitution. Article 180(2) of the Constitution provides that *"[t]o be eligible for election as a County Governor, a person must be eligible for election as a member of the county assembly*" (MCA). As regards the eligibility for election as an MCA, Article 193(1)(b) of the Constitution provides that an aspiring candidate must satisfy, *inter alia, "any educational, moral and ethical requirements prescribed by… [the] constitution or an Act of Parliament…."* That is why, in my view, at paragraph 231 of its Judgment **in *John Harun Mwau & 2 Others v. IEBC & 2 Others*, Consolidated Petitions No. 2 & 4 of 2017; [2017] eKLR,** this Court observed that the nomination process is deeply rooted in the Constitution.

[145] Pursuant to this provision, Parliament enacted the Elections Act, Section 22(1)(b)(ii) of which prescribes a university degree as the prerequisite minimum academic qualification for one to contest as an MCA. **It reads:**

"***a person may be nominated as a candidate for an election under this Act only if that person …holds, in the case of a Member of Parliament … or … member of county assembly, a degree from a university recognized in Kenya***."

[146] Any disputes that questions one's qualification or eligibility to vie in an election is invariably a challenge of the integrity or validity of that election. Needless to say that such dispute goes to the root of an election. As such, even though Article 88(4)(e) vests IEBC with jurisdiction to handle this category of disputes, a purposive reading of other provisions of the Constitution would show that the election courts are also vested with jurisdiction to entertain them. I shall illustrate.

[147] I believe there is no contestation that the Constitution has vested the election courts with the overarching jurisdiction to determine the validity of elections. This is clear from Article 140 which vests the Supreme Court with jurisdiction to determine presidential election petitions; Article 105(1)(a) that vests the High Court with jurisdiction to determine petitions challenging the validity parliamentary elections; Section 75(1) of the Elections Act that vests the High Court with jurisdiction to determine "[*a*] *question as to the validity of an election of the County Governor*…."; and Section 75(1A) of the Elections Act that vests the Subordinate Courts with jurisdiction to determine petitions challenging MCA elections.

[148] I concur with the Court of Appeal's decision in ***Kennedy Moki v Rachel Kaki Nyamai & 2 Others*** [2018] eKLR, that elections are a process. Suffice it to add that, as expressed by this Court in the ***Matter of the Principle of Gender Representation in the National Assembly and the Senate*** [2012]eKLR at para 100, nominations or determinations of qualification to run are part of the "*continuum*" consisting in "*a plurality of stages*" that make up an election. So before the election Court certifies under Section 83 of the Elections Act that the election was conducted in accordance with the constitutional principles on elections, it must satisfy itself that the constitutional criteria for such an election have been met at every stage.

[149] Besides the constitutional imperative that an aspiring candidate must satisfy the qualification and/or the eligibility criteria for

the election he or she wishes to participate in, a challenge of an election founded on any of the constitutional criteria I have referred to, invariably invokes the principles of free and fair elections under Article 81(e) and conducted in a simple, accurate, verifiable, secure, accountable and transparent manner as required by Article 86 of the Constitution. Because they challenge the validity, credibility, fairness and/or integrity of elections, there is no gainsaying that such petitions raise issues which go to the root of such election. These type of disputes belong to the election Courts. As the Court of Appeal stated in ***Kennedy Moki v. Rachel Kaki Nyamai & 2 Others*** [2018] eKLR "*where the Constitution provides for two or three methods of resolving disputes, none can exclude the other; and therefore in such cases, the decision of the forum that has Constitutional finality in resolving the dispute and cause of action prevails*." And there is good reason for this holding.

[150] In the case of ***George Mike Wanjohi v. Steven Kariuki & 2 Others, SC Petition No. 2A of 2014,*** [2014] eKLR, this Court was categorical on the election court's overarching jurisdiction in the determination of the validity, credibility, fairness and/or integrity of elections.

"By the design of the general principles of the electoral system, and of voting, in Articles 81 and 86 the Constitution, it is envisaged that no electoral malpractice or impropriety will occur that impairs the conduct of elections. This is the basis for the public expectation that elections are valid, until the contrary is shown, through a recognized legal mechanism founded in law or the Constitution. Any contests as to the credibility, fairness or integrity of elections, belongs to no other forum than the Courts." [Emphasis supplied]

[151] The issue in ***Wanjohi case*** was not a pre-election nomination dispute. The Returning Officer cancelled the election result declaration Form 38 he had issued to the 1st respondent on the ground that it had been issued in error and issued a fresh one to the appellant as the winner of that election. The issue in that case was therefore whether or not, having declared the election result and issued the winner thereof with Form 38, a returning officer was *functus officio* or he still retained power to cancel that form and issue a fresh one to another candidate. In concurrence with the Court of Appeal, this Court decreed that "*[t]he Returning Officer having declared the 1st respondent as the winning candidate, and duly issued [him with] the Form 38, became functus officio*."

[152] Apart from the qualification and/or eligibility to contest in an election, it is also not in dispute that the conduct of the election itself, that is, the voting method used, the manner of counting and tabulation as well as collation of the votes cast and the structures and mechanisms put in place to eliminate electoral malpractices as required by Article 86 of the Constitution, more often than not, form grounds upon which the validity and integrity of elections are challenged. The Election Offences Act No. 37 of 2016 provide other grounds.

[153] Section 76(2), (3) and (4) of the Elections Act gives corruption, illegal practices and allegations of payment of money or other acts as well as commission of election offences, as some of the grounds upon which an election can be challenged. Besides corruption, other election offences set out in the Election Offences Act No. 37 of 2016 include bribery (Section 9); undue influence, duress and intimidation (Section 10); and use of force or violence (Section 11), to name just but a few. These are clearly acts that impinge on free and fair elections under Article 81(e)(ii) of the Constitution. These are acts which are used to gauge the integrity of an election and the Election Offences Act recognizes that most of them are committed during campaigns in the election period, long before the election day.

[154] In contrast with IEBC, whose jurisdiction in electoral dispute resolution is limited to pre-election nomination disputes, the election court, as the trial Judge in this matter correctly observed, actually audits the entire electoral process to determine the validity or integrity of the election concerned. This is why I said earlier on that the election courts have overarching jurisdiction to determine electoral disputes.

[155] The second reason why, in my view, IEBC should not have exclusive jurisdiction to determine all pre-election nomination disputes has to do with its mandate. Given IEBC's core mandate, Article 88(4)(e) must be understood to vest it with jurisdiction to determine pre-election nomination disputes in a summary manner and determine the candidates whose names are to appear on the ballot papers in good time for the election. IEBC's primary function or mandate, as is clear from Article 88(4) of the Constitution and Section 4 of the IEBC Act, is the management of elections as well as referenda and not the settlement of electoral disputes. Its added function of settlement of electoral disputes under Article 88(4)(e) of the Constitution is collateral or ancillary to its said primary function. It does not even have enough time for this additional function. Look at the following scenario.

[156] Sixty days prior to any general election, IEBC runs a frenetic schedule of activities. The Elections Act, (Sections 14(1), 16(1), 17(1) and 19(1)), requires IEBC to "*publish a notice of the holding of the election in the Gazette and in electronic and print media*

of national circulation…at least sixty days before the date of the election." After that publication, the PPDT has 30 days to resolve intra-party nomination disputes before the political parties present the names of their respective candidates for election to the six electoral positions. That leaves IEBC with only 30 days to complete the nomination process of one Presidential position; 47 gubernatorial positions; 47 senatorial positions; 290 parliamentary positions; 47 women representative positions; about 1860 MCA positions; and party lists for several other positions. All these activities are besides IEBC's role of ensuring that the Voters Register is revised and up-dated and the tendering for and printing of the ballot papers is completed in good time. That is why, under Section 74(2) of the Elections Act, IEBC has only ten (10) days to settle pre-election nomination disputes. It is common knowledge that it employs a summary procedure in the determination of those disputes.

[157] The third reason is that most of the nomination disputes filed before IEBC under Article 88(4)(e) actually challenge IEBC's own earlier decisions. This matter before us provides the best example. IEBC had approved the appellant for nomination. However, Abdirahman Mohamed Abdille filed a dispute challenging IEBC's decision but the same was dismissed for want of prosecution. In such situation, especially where the matter has not been determined on merit and is not res judicata, how can the election court's jurisdiction be ousted"

[158] Back to the central issue in this appeal, having considered the rival submissions and the authorities both sides cited in support of their respective contentions, I find that, contrary to the appellant's contention, academic qualification being a mandatory prerequisite for eligibility to vie in a gubernatorial election grounded in the Constitution, it is a matter that goes to the root of a gubernatorial election that forms one of the grounds upon which such election can be challenged. Support for this proposition can be found in the case of ***Kennedy Moki v. Rachel Kaki Nyamai & 2 Others*** [2018] eKLR, in which the Court of Appeal stated that "*qualification and eligibility of a candidate to vie and contest in an election, is an issue of substance that goes to the root of the election, and an election court has jurisdiction to hear and determine the dispute."*

[159] That the issue of qualification and/or eligibility, as a prerequisite for nomination to contest in an election is a matter that goes to the root of any election is not a novel concept. The above cited cases for and against the jurisdiction of the Election Court to entertain pre-election nomination disputes are cases decided after the promulgation of the 2010 Constitution. However, under the old Constitution, as early as 1970, the East African Court of Appeal had observed in ***Thande v. Montgomery*** **(1970) EA 341,** and the Kenyan High Court in ***Mwihia & Another v. Ayah & Another*** **[2008] 1 KLR (EP) 450, 456-458 that** nominations were part of the election process which could be challenged before the election court after election. In ***Moi v. Mwau,*** **[2008] 2 KLR 90,** the Court of Appeal termed nominations an integral part of the election process that can affect the validity of a presidential election and concluded that it is therefore a substantive issue that should properly be raised and urged in an election petition. The position appears to be the same in Uganda. In the case of ***Abdul Balingira Nakendo v. Patrick Mwondha,*** Election Petition No. 09 of 2007, [2008] U.G. SC 2 (22nd January, 2008) the Ugandan Supreme Court held that a question of a candidate's academic qualification goes to the root of the election in question and the election court has jurisdiction to determine it.

[160] It would, in my view, be tragic if, through a slip or even fraudulent process, a person who is not a Kenyan citizen and does not meet the other criteria set out in Article 137 of the Constitution is elected President of this country; it would be tragic if, a person who does not meet the criteria set out in Article 99 of the Constitution is elected to Parliament; and it would be tragic if, a person who does not meet the criteria set out in Article 193 of the Constitution, is elected as MCA. It would be even more tragic if the election court, leave alone this Court, were to interpret Article 88(4)(e) as a fetter of its hands to determine any pre-election nomination dispute and let such an obvious illegality to stand.

[161] In a nutshell, I am saying that IEBC has unquestionable jurisdiction under Article 88(4)(e) to determine pre-election nomination disputes. It has exclusive jurisdiction to determine with finality, subject to appeal or judicial review, all intra-party nomination disputes. However, a holistic, and as required by Article 259, harmonized interpretation of Articles 81, 88, 86, 99, 105, 137, 140 and 193 of the Constitution read together with Sections 75 and 83 of the Elections Act, leaves me in no doubt that the election courts also have jurisdiction to determine pre-election nomination disputes which go to the root of an election, especially those that IEBC had not determined on merit like the one giving rise to this appeal.

[162] Section 83 of the Elections Act provides principles to guide election courts in determination of election petitions. As at 8th August 2017 when the election in this case was held, it provided that:

"***No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that***

the non-compliance did not affect the result of the election." [Emphasis supplied]

[163] If, to determine the validity or integrity of an election, the election court is required and has jurisdiction to consider election principles laid down in the Constitution, how can its jurisdiction to consider imperative constitutional provisions be ousted" I have no hesitation in finding that, in this case, the High Court, as the election Court, had jurisdiction to determine the validity of pre-election nomination dispute that questioned the appellant's education qualification to contest in the Wajir County gubernatorial election.

(vi) Whether the Deputy Governor's Election can stand on its own

[164] That brings me to the case for the interested party, the deputy governor. His contention is that the position of Deputy Governor is elective. Upon being satisfied that he possessed the requisite minimum academic qualification of a university degree, IEBC cleared his nomination and he successfully contested in the election. In the circumstances, he urged that even if we uphold the Superior Courts' findings that the appellant was not qualified to vie in the election, that will not affect his election. That will only create a vacancy which, in terms of Article 182 of the Constitution, he said he is able and competent to fill.

[165] I have no difficult in disposing of this contention as untenable. The vacancy in the position of a governor referred to in Article 182 of the Constitution arises after a successful and unchallenged election or after the same is duly upheld, in case of an election petition challenging it. In this case, having upheld the nullification of the governor's election, with due respect I find that the interested party's contention has no legs to stand on.

(vii) Whether this Court has Jurisdiction to Determine Issues the Court of Appeal Left Unresolved on the Doctrine of Mootness

[166] The remaining issue is whether or not we should go into the merits of the trial court's finding that the conduct of the election fouled the constitutional principles on elections and impeached its result, an issue the Court of Appeal declined to consider on the basis of fetters Section 85A puts on its hands and the doctrine of mootness.

Scope of Section 85A of the Elections Act

[167] The appellant criticized the Court of Appeal's interpretation of Section 85A of the Elections Act as restrictive. He argued that the phrase "matters of law only" in that Section should be given a broad interpretation to include constitutional issues that come into play in any electoral dispute under consideration. I agree with this argument. In any given case, there are, more often than not, legal issues, constitutional, statutory and/or common law, which arise for determination or should guide the determination of the case. I therefore agree with counsel for the appellant that the phrase "matters of law only" encompasses not only matters of statute and common law but extends to the constitutional provisions which come into play in any given matter.

[168] In the case *of* ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others*** [2014] eKLR this Court pronounced itself elaborately on the import and scope of the phrase "matters of law only" in Section 85A of the Elections Act. The phrase does not mean the Appellate Court has to steer clear of the evidence on record as the Court of Appeal, appeared to imply in this case. As this Court observed in that case, "*in considering 'matters of law', an appellate court is not expected to shut its mind to the evidence on record*." Instead, an Appellate Court has to consider the evidence on record to determine if the trial Court's "*conclusions of law drawn from the facts ….[are] reasonable and in accordance with the spirit and purpose of the Constitution of Kenya*."[1] Rather than go into the calibration of evidence and reach its own conclusions, an appellate court has to have a panoramic view of the evidence on record and determine if it speaks to legal the issues raised and/or involved in the case as the trial Court found.

[169] In our Ruling of 28th September 2018, we identified the appellant's academic qualification to vie in the election as the only issue for our determination in this appeal. The appellant protested that ruling arguing that the Court of Appeal's failure to consider all the grounds of the appeal and cross-appeal before it was a dereliction of its duty. He said despite the inelegance in the drafting of the memorandum of appeal, the Court of Appeal should, nevertheless, have deduced points of law therein raised and considered them. He urged us to do that. The 1st and 2nd respondents on their part also protested that ruling contending that the Court of Appeal's failure to consider all the grounds of the appeal and cross-appeal before it forms an important aspect of their case for the dismissal of this appeal.

[170] Before I decide whether or not I need to go into the issue, I would like to say something on the doctrine of mootness. I need to

say what the Court of Appeal found to be moot and downed its tools on it. I will start with how it arose in the case.

[171] The issue in the appeal before the Court of Appeal was the propriety of the nullification by the High Court of the appellant's election as the governor for Wajir County. The High Court based its nullification of that election on the appellant's lack of academic qualification to vie in the election and the illegalities as well as irregularities committed in the conduct of the election which impeached both its integrity and its result. The Court of Appeal found that the issue of the appellant's academic qualification, which was the capstone criterion on the eligibility to vie in the election, was also the fulcrum of the appeal before it. Upon that determination, on the basis of the doctrine of mootness, the Court of Appeal found it futile and a waste of its precious time to go into the merits of the other grounds for voiding the election.

[172] Mootness in court proceedings is not a novel doctrine. Way back in 1974, learned jurist **Don B. Kates Jr. William T. Barker** observed that given the huge backlogs bedeviling them, courts should not be burdened with litigation on "*non-existent or already resolved*" controversies. He added that "*[w]hen the matter is resolved before judgment, judicial economy dictates that the court abjure decision*."[2]

[173] The Black's Law Dictionary, Ninth Edition, defines a moot case as:

"A matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights."

[174] A case is therefore moot when it "…*seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy*." [3]

[175] This doctrine remains good law even in our own jurisdiction. In the case of ***the National Assembly of Kenya v. the Institute for Social Accountability & 6 Others,*** Appeal No. 92 of 2015; [2017] eKLR, our Court of Appeal, quite correctly in my view, dismissed the contention that mootness is an abstract doctrine and instead declared it as "*a functional doctrine founded mainly on principles of judicial economy and functional competence of the courts and the integrity of judicial system*."

[176] I have already determined that academic qualification to aspire for the position of governor is foundational and goes to the root of the validity of a gubernatorial election in this country. In the circumstances, I concur with the Court of Appeal's abjuration of a decision on other issues based on the doctrine of mootness.

[177] That would logically have been the end of my judgment in this matter but it cannot be for two reasons. One, as stated, the appellant has emphatically urged us to assume the jurisdiction of the Court of Appeal as mandated by Sections 20 and 21(3) of the Supreme Court Act as well as Rules 3(5) and 18 of the Supreme Court Rules, 2012 and determine the other grounds of appeal that the Court of Appeal ignored. The 1st and 2nd respondents have also urged us to affirm the nullification of the appellant's election not only on the appellant's academic disqualification but also on the other ground that his election was illegally and irregularly conducted.

[178] Secondly, even when a matter is clearly moot, the court handling it should nonetheless determine it for ease and expeditious disposal of the matter in even of appeal. The court should also determine such matter if it is of jurisprudential moment and national importance. In its decision in the said case of ***the National Assembly of Kenya v. Institute for Social Accountability,*** our Court of Appeal cited with approval the case of ***Philippines-Manilla in Greco Antonious Bedo B Belgila & 4 Others v. Honourable Executive Secretary Paquito N. Ochoa JR & 2 Others G*R No. 208566 consolidated with G-RNo. 208493 & 209251 in which the** Philippines Supreme Court had this to say on the doctrine mootness:

"Even on assumption of mootness, jurisprudence, nevertheless, dictates that 'the moot and academic principle' is not a magic formula that can automatically dissuade the court in resolving a case. The court will decide cases, otherwise moot, if, first, there is a grave violation of the Constitution; second, the exceptional character of the situation and paramount public interest is involved, third, when the constitutional issue raised requires formulation of the controlling principles to guide the bench, the bar, and the public; and fourth, the case is capable of repetition yet evading review." [4]

[179] I endorse the principles enunciated in this persuasive authority. In this case, there were allegations of illegalities in the conduct

of the election including vote padding and manipulation. It was contended that, if true, those allegations were not only a violation of the principle of the secrecy of the vote but also rendered the election results unverifiable and unaccountable. There is no doubt that these are important constitutional issues of immense public interest requiring a further voice from this Court. And for purposes of developing robust indigenous jurisprudence and formulating or expounding on controlling guiding principles, as obliged by Article 259 of the Constitution and Section 3(c) of the Supreme Court Act, I find that it is necessary to determine the issues the Court of Appeal omitted from its decision notwithstanding their mootness.

[180] There are other reasons why I think I should determine the issues the Court of Appeal left undecided. The issue of unconstitutional conduct of the election which the High Court found vitiated the election was prominent in the appellant's memorandum of appeal and the 3rd and 4th respondents' cross-appeal to the Court of Appeal. While in their written and oral submissions, the appellant and the 3rd and 4th respondents faulted the trial court for magnifying what, in their respective views, were minor irregularities as founding a cause to void the election, the respondents applauded the trial Court for finding that the conduct of the election fouled, in particular the constitutional principle of the secrecy of the vote.

[181] In its petition of appeal to this Court, the appellant has complained against the Court of Appeal's failure to consider all the 3rd and 4th respondents grounds of cross-appeal before it. The 3rd and 4th respondents grounds of cross-appeal the Court of Appeal declined to determine are the same ones of unconstitutional conduct of the election which the High Court found vitiated the election. As stated these are the grounds upon which the appellant urged us to assume the jurisdiction of the Court of Appeal and determine. The 1st and 2nd respondents on their part urged us to uphold the Court of Appeal's doctrine of mootness and decline to entertain them. In the alternative, however, the 1st and 2nd respondents argued that even if we consider on merit the grounds the Court of Appeal left unresolved, we shall reach the same conclusion as the trial court and affirm its nullification of the election.

[182] Sections 20 and 21(3) of the Supreme Court Act and Rule 3(5) of the Supreme Court Rules, 2012 provide for assumption by this Court of the Court of Appeal's jurisdiction to determine any issue it omitted or refused to determine. Section 20 of the Supreme Court Act, 2011 reads:

"***Appeals to the Supreme Court may, where the Court considers it necessary, proceed by way of a fresh hearing.***"

Section 21 on its part reads:

"(1) On an appeal in proceedings heard in any court or tribunal, the Supreme Court—

(a) may make any order, or grant any relief, that could have been made or granted by that court or tribunal; and

(b) may exercise the appellate jurisdiction of the Court of Appeal according to Article 163(4)(b) of the Constitution.

(2) In any proceedings, the Supreme Court may make any ancillary or interlocutory orders, including any orders as to costs that it thinks fit to award.

(3) The Supreme Court may make any order necessary for determining the real question in issue in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Supreme Court thinks fit to determine before final judgment in the appeal."

[183] Rule 3(5) of the Supreme Court Rules, 2012 reads:

"***Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders or give directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court***."

[184] As Justice Njoki observed in ***Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 Others*** [2014] eKLR, these provisions unequivocally mandate this Court to assume the jurisdiction of a Superior Court and in the interest of justice make any appropriate orders that Superior Court would or should have made.

[185] These are provisions this Court should sparingly invoke. They should be invoked in clear cases where an issue was squarely

raised in the Court of Appeal but that Court failed to resolve it. In addition, they should also be invoked when the interest of justice so demand.

[186] In this case, the period the Court of Appeal had to determine electoral dispute appeals has long expired. So this Court cannot remit the matter to the Court of Appeal to determine. In the circumstances, this Court's failure to assume the Court of Appeal's jurisdiction and determine the unresolved issues would leave the parties without a remedy on them. As such, and in the interest of justice, in spite of the finding in our Ruling of 28th September 2018 that the only issue in this appeal is the appellant's qualification or disqualification to vie in the election, for completeness and more importantly given the importance of this matter, I find it imperative to determine the issues the Court of Appeal left unresolved despite its mootness. However, this being an election matter, I hasten to add that in doing so I step into the shoes of the Court of Appeal and have to heed the injunction Section 85A imposes on appellate courts.

[187] Upon perusal of the Court record, I concur with the trial Court that literally all the witnesses who testified, including Ismail Muhumed Mohamed, IEBC's presiding officer at Abakore Boarding School, agreed that the level of illiteracy in Wajir County is quite high. That necessitated assisted voting. The record, including the scrutiny report, however, shows that only four Forms 32 were completed in respect of assisted voters in the 53 polling stations. That reaffirms the trial court's skepticism of the legitimacy of that record. PW2 also specified particular polling stations where he claimed presiding officers loudly asked and in response the illiterate voters equally loudly gave their choices of candidates. That flouted the secrecy of the vote as the trial court found. IEBC did not rebut that evidence.

[188] Among the irregularities found was the failure to sign the result declaration Forms 37A in several polling stations. I concur with the trial Court that the candidates' or their respective agents' failure to sign those forms is excusable under Regulation 79 of the Regulations, but that of the presiding or deputy presiding officer is not. The failure by the presiding or the deputy presiding officer to sign the result declaration form is not only a criminal offence under section 6 (j) of the Election Offences Act, but it also renders such Forms worthless. Forms with such irregularities were noted at Mathan Baqay, Meri Primary, Lahaley Primary, Dambas Primary, Tarbaj Library amongst many other polling stations.

[189] Another irregularity related to manipulation of election results. PW1 singled out 51 polling stations in four constituencies namely, Tarbaj, Wajir East, Wajir West and Eldas where he claimed there were striking coincidences of vote padding and manipulation with the result that votes obtained by all the candidates remained consistently similar in multiple polling stations in those constituencies. Without any rebuttal, that allegation lent credence to the respondents' claim and the trial Court's finding that that was testimony of electoral fraud.

[190] Upon evaluation of this evidence as the Court of Appeal should have done, I find that the trial Judge's conclusion that the conduct of the election fouled the Constitution and affected its result is well founded on the evidence on record. I also find that the Court of Appeal would have reached the same conclusion had it considered the other grounds. So even if I had found that the appellant had the requisite academic qualification to vie in the election, I would nonetheless have upheld the trial Court's finding that the conduct of the Wajir gubernatorial election violated the constitutional principles and affected the result of the election and accordingly upheld its nullification of the election.

[191] In the result, I find no merit in this appeal. As to costs, they ordinarily follow the event subject to the discretion of the court in the unique circumstances of each. In this case, I see no reason why I should deny the 1st and 2nd respondents their costs. Consequently, I would have dismissed this appeal with costs to the 1st and 2nd respondents. However, as the majority hold otherwise, the final Orders of the Court shall be as proposed by the majority.

G. THE DISSENTING OPINION OF LENAOLA, SCJ

[192] I have read the majority decision and with respect, while I agree with the background to the appeal, I am not in agreement with the decision and Orders as proposed by my learned sister and brothers.

[193] I have also read the dissenting opinion of the Chief Justice and President of this Court, Hon. D. K. Maraga. I agree with the rationale for his dissenting opinion and proposed Orders save for my comments herebelow.

[194] My separate and brief dissenting opinion seeks to reaffirm and clarify two issues; in what circumstances should an election

Court assume jurisdiction over a pre-election dispute and the extent of this Court's jurisdiction in considering matters that were not determined by the Court of Appeal. In addressing the first issue, it is my view that even though the IEBC and the election Courts have jurisdiction to adjudicate over disputes arising before an impugned election was conducted, such as those challenging the nomination or questioning the qualifications of candidates, the election Court will only assume such jurisdiction in exceptional circumstances. This is because in line with Article 88(4)(e) of the Constitution, the IEBC is the first adjudicative body for such disputes to be settled. The decisions emanating thereon are thereafter binding unless appealed to the High Court sitting as a judicial review Court or in exercise of its supervisory jurisdiction under Article 165(6) of the Constitution. However, where the dispute before the IEBC is not conclusively determined on merits, then it is my view that an election Court would be obliged to hear and determine such a dispute, if it forms the basis for questioning the validity of an election under Article 105(1)(a) of the Constitution.

[195] To my mind, the above reasoning is not only logical, reasonable and holistic but is also in tandem with our recent decision in ***Silverse Lisamula Anami v. Independent Electoral & Boundaries Commission & 2 Others*** SC Petition No. 30 of 2018, where we delimited the respective powers of an election Court. In particular, at paragraph 54, we rendered ourselves as follows:

"[T]he election Court in determining whether an election is valid, may look to issues arising during the pre-election period only to the extent that they have previously not been conclusively determined, on merits, by the IEBC, PPDT or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the Constitution. Where a matter or an issue has been so determined, then the election Court cannot assume jurisdiction as if it were an appellate entity since that jurisdiction is not conferred on it by the Constitution."

[196] In applying the above principle to the facts of this case, it is on record that a complaint had been lodged to the IEBC Dispute Resolution Committee by one Abdirahman Mohamed Abdille, questioning the suitability of the petitioner to run for the position of a County Governor on account of his academic qualifications. The said Committee did not determine the merits of that complaint and the election Court indeed observed that the said complaint was not prosecuted and that, "nothing was produced to show that a decision was made on it." It is also uncontested that the IEBC Dispute Resolution Committee dismissed it for want of prosecution.

[197] Faced with these facts therefore, it is obvious to me that the IEBC did not determine the issue of the qualification or otherwise of the Petitioner even though a complaint on that issue had been referred to it. In the instance, where an election related dispute is not prosecuted or heard on its merits, can it be said to have been settled within the meaning of Article 88(4)(e) of the Constitution and is therefore barred by the doctrine of *res judicata*" I think not and while the Supreme Court to my knowledge has not rendered itself on the question, in the case of ***Cosmas Mrombo Moka v. Co-operative Bank of Kenya Limited & Another*** **Civil Suit No. 7 of 2018;** [2018] eKLR, the High Court was called upon to determine whether a suit dismissed for want of prosecution was barred by the doctrine of *res judicata*. The learned Judge *(Otieno J.)* stated thus [paragraph 23]:

"I understand the law to be that a matter is heard and determined after the court has delved into the merits. Where, like in this case, the suit was dismissed for want of prosecution, before the parties ventilate their grievances, I am hesitant and very reluctant to hold that the matter has been heard and finally determined."

[198] That holding is in consonance with the House of Lords' decision in the case of ***Birkett v. James*** [1977] 2 All ER 801 where the Court held:

"[W]here all that the plaintiff has done has been to let the previous action go to sleep, the court in my opinion would have no power to prevent him starting a fresh action within the limitation period and proceeding with it with all proper diligence notwithstanding that his previous action had been dismissed for want of prosecution…. The court may and ought to exercise such powers as it possesses under the rules to make the plaintiff pursue his action with all proper diligence, particularly where at the trial, the case will turn on the recollection of witnesses to past events. For this purpose, the court may make peremptory orders providing for the dismissal of the action for non-compliance with its order as to the time by which a particular step in the proceedings is to be taken."

[199] A similar trajectory is also noted in the case of ***Securum Finance Ltd. v. Ashton and Another*** [1999] All ER (D) 594 a Chancery Division decision, where the Court emphasised that estoppel cannot arise in the absence of adjudication on merits. It thus held:

"The principles of *res judicata* ***seek to achieve finality in the litigation process where finality is appropriate. Where an action is dismissed for want of prosecution, there has necessarily been no adjudication on the merits and therefore there has been no***

determination of any issue in the case which can properly found an estoppel."

[200] From the above decisions, the principle of law that emerges, and I have no doubt that it also applies to *sui generis* electoral disputes, is that when a matter is dismissed for want of prosecution, then it cannot be said to have been conclusively heard on merits. Indeed, I fully agree with the submission that where an electoral question is not prosecuted and hence not determined on merits, a litigant would, in appropriate circumstances, be justified to commence fresh proceedings on the same question subject to other lawful considerations including limitation of time. In this case, the uncontested fact before us is that the complaint before the IEBC, questioning the academic qualifications of the Petitioner, was not prosecuted to conclusion. As a result, it cannot be said that the IEBC Dispute Resolution Committee determined that issue.

[201] Having therefore found that the complaint was not heard on merit, then the election Court would have the residual jurisdiction to determine the question of qualification of the Petitioner to finality. As such, I uphold the finding by the Chief Justice that the election Court properly assumed jurisdiction on that issue and for the same reason, the issue is properly before us having risen through a proper appellate mechanism.

[202] Concerning the issue of alleged irregularities and illegalities leading to certain findings by the election Court, the record shows that the Court of Appeal refrained from making a determination on those issues after it came to the conclusion that the Petitioner was not qualified to vie for the position of a County Governor. That finding notwithstanding, the Chief Justice has, in his opinion, found that it is in the interest of justice for the Supreme Court to make a determination on those issues. With respect, I disagree with the approach suggested by the Chief Justice.

[203] My position is that the appellate jurisdiction of this Court is only properly invoked when a matter, which was the subject of the Court of Appeal's determination, is brought before the Court. To demonstrate, Article 163 (4) provides that **"appeals shall lie from the Court of Appeal to the Supreme Court."** This means that under this provision, the contemplated appeals originate from decisions of the Court of Appeal. In that context, it is not in doubt that the present Appeal invokes the jurisdiction of this Court under Article 163(4)(a) of the Constitution which relates to appeals **"as of right in any case involving the interpretation or application of this Constitution."** Past jurisprudence of this Court with regard to situations when the Supreme Court ought to assume its appellate jurisdiction, particularly on appeals brought as of right, is very consistent and unshaken. In one of its earliest and much relied on decision, being the case of ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another*** **SC Petition No. 3 of 2012;** [2012] eKLR, this Court emphasised that [paragraph 28]:

"The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation." [Emphasis added.]

[204] In the above regard, when the Court of Appeal fails to consider and make a determination on a particular issue, can such an issue be said to be properly before this Court in exercise of its appellate jurisdiction" In such a case, what reasoning by the Court of Appeal is being questioned" My position and answer to these questions is that the appellate jurisdiction of this court is distinguishable from its original jurisdiction and each must be properly invoked. Therefore, in exercising its appellate jurisdiction, the issues of contestation must involve questions that were the subject of determination by the Court whose decision is being impugned. The Supreme Court of India in the case of ***Bolin Chetia v. Jogadish Bhuyan & Ors*** Appeal Civil Case No. 7376 of 2003 (11 March, 2005) thus correctly captured the meaning of the term "appeal" in the following words:

"In its natural and ordinary meaning, an appeal is a remedy by which a cause determined by an inferior forum is subjected before a superior forum for the purpose of testing the correctness of the decision given by the inferior forum."

[205] I agree and it follows that, if there is no determination by the Court of Appeal on an issue which is now before us, how then will the correctness of the "decision" by the superior Court be tested" With regard to the exercise of our jurisdiction under Article 163(4)(a) of the Constitution, how would a litigant fault the Court of Appeal on the basis of a particular interpretation or application of the Constitution" It is those lingering questions that lead me to the more persuasive conclusion that, in the absence of a determination by the Court of Appeal on a specific matter, no "appeal" can properly fall before the Supreme Court in exercise of its appellate jurisdiction save where the non-determination is itself the question placed before this Court in which case, the considerations would be completely different. This is because, the appellate jurisdiction of this Court is predicated upon specific findings by the Court of Appeal.

[206] I note in that context that in the case of ***Daniel Shumari Njiroine v. Naliaka Maroro*** SC Application No. 5 of 2013; [2014] eKLR we emphasised on the importance of the Court lawfully assuming jurisdiction when we held that [paragraph 35]:

"[W]e recognise that the Supreme Court will always strive to deliver justice to all. However, the Court will only do this in matters in which it is rightly seized of jurisdiction. It will not usurp jurisdiction where there is none, so as 'to do justice'. Justice as a concept also connotes rightful assumption of jurisdiction. Jurisdiction is given by law: the Constitution, or statute; and one cannot exercise what is not properly bestowed.

[207] I reiterate the above holding as properly applicable to the matter at hand. In addition, another issue requiring critical reflection and as a corollary to my opinion above, is the jurisdiction of this Court in considering matters which were not determined by the Court of Appeal but by the High Court. It is obvious that in such a case, the Supreme Court would in principle be disturbing the finding of the High Court, yet, a decision by the High Court is never directly the subject of appeal before this Court. It is in that regard uncontested that the appellate jurisdiction of the Supreme Court only lies against decisions of the Court of Appeal or any other Court and tribunal as is the expectation of Article 163(3)(b)(ii) and that is why this Court ought to assume jurisdiction only on matters which have transcended through the proper appellate mechanism. The jurisdiction to hear appeals from "any other Court or Tribunal" is not the subject of the present appeal and so, I will say nothing about the issue. In any event, in ***Michael Mungai v. Housing Finance Co. (K) Ltd & 5 Others*** SC Application No. 9 of 2015; [2017] eKLR this Court emphasised the basic principle that High Court decisions cannot be directly appealable to this Court by holding that [paragraph 14]:

"[A]ny matter that comes before this Honourable Court has to be focused and targeted. One must have a cognizable cause of action and a litigation trajectory that can be well traced within the judicial hierarchy in case of an appeal. A litigant cannot therefore, in a haphazard manner, request this Court to review or set aside the orders of the High Court directly. Such a request does not lie within the definite thread of a cause of action that has risen through the judicial hierarchy." [Emphasis added.]

[208] In conclusion therefore, and with respect, I disagree with the Chief Justice that this Court has jurisdiction to adjudicate on issues that were not determined by the Court of Appeal. Indeed, those matters were not canvassed before this Court and parties recognized – by direction of the Court – that only one single issue fell for determination by this Court and that is the question of the academic qualification of the Petitioner. Having said so, it is imperative that the Court of Appeal, and any other Court whose decisions are subject to appeal, must always determine all issues placed before them. To decline the obligation to do so would only lead to a situation such as the one explained above which does not augur well for the administration of justice.

[209] Consequently, save for the above comments, I concur with the decision of the Chief Justice and I am in agreement with the Orders he has proposed. However, as the Majority is of a contrary opinion, the final Orders shall be as proposed by the said Majority.

H. ORDERS OF THE COURT

[210] It is now time to issue Orders consequent upon our analysis.

(i) The Petition of Appeal dated 3rd May, 2018 is hereby allowed.

(ii) The Judgment of the Court of Appeal dated 20th April, 2018 is hereby set aside.

(iii) For the avoidance of doubt, the declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of Governor for Wajir County is hereby upheld.

(iv) The parties shall bear their own respective costs.

DATED and DELIVERED at NAIROBI this 15th Day of February, 2019.

…. **….**

D. K. MARAGA **M. K. IBRAHIM**

CHIEF JUSTICE & PRESIDENT **JUSTICE OF THE SUPREME COURT**

OF THE SUPREME COURT

..... **.....**

J. B. OJWANG **S. C. WANJALA**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

..... **.....**

NJOKI NDUNGU **I. LENAOLA**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

I certify that this is a

true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

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[1] See ***Timamy Issa Abdalla v. Swaleh Salim Imu & 3 Others*** [2014] eKLR.

[2] **Don B. Kates Jr. William T. Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory",** *California Law Review* 1974 Volume 62 | Issue 5.

[3] Diamond 1946 University of Pennsylvania Law Review 125, quoted in S Heleba, 'Mootness and the Approach to Costs Awards in Constitutional Litigation: ***A Review of Christian Roberts V Minister of Social Development*** **Case No 32838/05 (2010) (TPD) [2012] PER 62'**

[4] quoted in The National Assembly of Kenya v The Institute for Social Accountability (TISA), Appeal No. 92 of 2015 (eKLR) 201.