REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

AT NAIROBI

(Coram: Wanjala & Njoki, SCJJ)

PETITION NO. 14 OF 2013

LAW SOCIETY OF KENYA……..……..APPLICANT

-VERSUS-

1. **THE CENTRE FOR HUMAN RIGHTS AND DEMOCRACY**

2. **RICHARD ETYANG'A OMANYALA**

3. **BISHOP FRANCIS RANOGWA OZIOVA**

4. **THE JUDGES AND MAGISTRATES VETTING BOARD**

5. **THE ATTORNEY-GENERAL**

6. **JUDICIAL SERVICE COMMISSION**

7. **HON. JUSTICE MOHAMMED IBRAHIM**

8. **HON. JUSTICE ROSELYN NAMBUYE**

9. **HON. JUSTICE JEANNE GACHECHE**

10. **HON. JUSTICE RIAGA OMOLLO**

11. **HON. JUSTICE SAMUEL BOSIRE**

12. **HON. JUSTICE JOSEPH NYAMU**

13. **KENYA MAGISTRATES AND JUDGES ASSOCIATION.....RESPONDENTS**

(An application for leave to exclude from the Record of Appeal certain documents that are already part of the Record of Appeal in Supreme Court Petition No. 15 of 2013 and for consolidation of the two appeals while appealing to the Supreme Court against the judgment and order of the Court of Appeal of Kenya at Nairobi (Hon. Kiage, Murgor, Sichale, Mohammed & Odek JJA) dated and delivered on 18th October, 2013).

R U L I N G

A. **INTRODUCTION**

[1] This is an application by the Law Society of Kenya (LSK), seeking an Order for consolidation of three Petitions of Appeal, namely, **Petition No.13A of 2013, Petition No. 14 of 2013 and Petition No. 15 of 2013,** and further to be excused from filing a Record of Appeal but instead to rely on the Record of Appeal filed in Petition no. 13 A by the 4th respondent herein. The applicant also seeks to appeal (vide Petition No. 14), against the judgment and order of the Court of Appeal in Nairobi **Civil Appeal No. 308 of 2012.**

B. **BACKGROUND**

[2] This application traces its origin to the High Court in 2012, when several petitions challenging the decisions of the Judges and Magistrates Vetting Board (JMVB) had been filed. These were: **H.C.J.R. No. 295 of 2012**, filed by **Hon. Lady Justice Jeanne Gachehe** against the JMVB and the Judicial Service Commission (JSC); **Eldoret H.C. Constitutional Petition No. 11 of 2012**, filed by the Centre for Human Rights and Democracy and 2 others; **Nairobi H.C. Constitutional Petition No. 433 of 2012**, filed by Justice Riaga Omollo against the JMVB, the Attorney-General and the JSC; and **Nairobi H.C. Constitutional Petition No. 438 of 2012**, by Justice Joseph G. Nyamu against the JMVB, the Attorney-General and the JSC.

[3] The petitioners had challenged the decisions of the JMVB pursuant to which four judges of the Court of Appeal and one judge of the High Court had been found unsuitable to continue serving in the Judiciary, on the basis of the provisions of Section 23 of the Sixth Schedule to the Constitution, 2010.

[4] The applicant herein, LSK, having been enjoined as an interested party in Petition No.11 of 2012, through a preliminary objection, challenged the jurisdiction of the High Court to hear and determine matters relating to the findings of unsuitability to hold office by the JMVB. The applicant argued that the jurisdiction of the High Court had been ousted by the provisions of Section 23(2) of the Sixth Schedule to the Constitution.

[5] The High Court **(Havelock, Mutava, Nyamweya, Ogola and Mabeya, JJ)** dismissed the LSK's preliminary objection, and ruled that the High Court had supervisory jurisdiction to deal with matters arising from the vetting process. Aggrieved by the decision of the High Court, the LSK appealed to the Court of Appeal. The Court of appeal **(Mohammed, Odek and Kiage, JJA, with Murgor, Sichale, JJA dissenting)** dismissed the appeal in its entirety.

[6] Aggrieved by this decision, the following parties filed appeals in the Supreme Court: JMVB **(Petition No. 13A of 2013)**; LSK **(Petition No. 14 of 2013)**; and the Attorney-General **(Petition No. 15 of 2013).** However, the applicant did not file a Record of Appeal to accompany its Petition of Appeal.

[7] On 5th December 2013, the applicant filed a Notice of Motion under certificate of urgency seeking, *inter alia*:

"3. **THAT** *the Honorable Court be pleased to grant the Applicant leave to rely on the Record of Appeal filed in the Court of Appeal in Nairobi* ***Civil Appeal No. 308 of 2012*** *and the Supplementary Record of Appeal filed by the 4th and 5th Respondents herein in their related appeal in Supreme Court* ***Petition No. 15 of 2013*** *between the same parties for the purpose of hearing and determination of its Petition dated 2nd December 2013 against the Court of Appeal's decision;*

"4. **THAT** *the Honorable Court be pleased to order consolidation of the said two appeals to the Supreme Court, namely this appeal via* ***Petition No. 14 of 2013*** *and the related* ***Petition No. 15 of 2013*** *and thereafter, excuse the Appellant/Applicant herein from having to duplicate the Record of Appeal."*

[8] The application came up for hearing before **Ojwang, SCJ on 11th December, 2013.** The Judge denied prayer number three in its entirety but set down prayer number four for an *inter-partes hearing* before a two judge bench.

[9] The matter was heard *inter-partes* on 25th February 2014 before **Wanjala and Njoki, SCJJ.**

C. **SUBMISSIONS**

[10] The application is supported by the 4th, 5th, and 6th respondents namely, the Judges and Magistrates Vetting Board, the Attorney-General, and the Judicial Service Commission. All the other respondents oppose the application.

[11] In support of the application, counsel for the applicant, Mr. Kanjama has filed written grounds stating that the applicant had filed a Petition of Appeal dated 2nd of December 2013 against the Court of Appeal's decision in Civil Appeal No. 308 of 2012. Counsel further avers that there is a related appeal by the 4th and 5th respondents involving the same subject-matter and raising similar issues. A complete Record of Appeal has been filed and the same served on all the parties. It is further stated by counsel, that the 5th respondent has also filed Supplementary Records of Appeal to accompany their Petition of Appeal.

[12] In the circumstances, Mr. Kanjama contends that to compel the applicant to reproduce the Record of Appeal and Supplementary Records of Appeal would occasion an avoidable expense, inconvenience and inordinately delay the hearing and determination of the appeal. Counsel urges the Court to dispense with a rigid construction of its rules of procedure, and allow the applicant to rely on the Record of Appeal filed by the 4th respondent in the interests of substantive justice.

[13] In support of the applicant's prayer for consolidation of Petitions No. 13A, 14 and 15, counsel submits that the substantive issues of law and fact in the said Petitions are similar, and arise from the same set of facts. Mr. Kanjama cites as persuasive authority in support of his submissions the following cases: ***Nyati Security Guards & Services v Municipal Council of Mombasa*** (2004) e KLR PP. 5-6; ***David Ojwang' Okebe & 11 Others v South Nyanza Sugar Company Limited & 2 Others (2009)*** *eKLR pp. 7-16 and* ***Joana Chepkurui Kibiwot v Micah Cheboi Kibiwot*** (2009) eKLR pp. 17 –v18.

[14] Mr. Mwenesi for the 9th respondent, Hon. Justice Gacheche, opposes the application. It is counsel's contention that the request by the applicant to rely on the Record of Appeal was rejected in its entirety by Hon. Justice Ojwang. In the circumstances, counsel submits, the applicant should have rectified the situation by filing the Record of Appeal before approaching the Court for consolidation. Mr. Mwenesi's argument is buttressed by the affidavit sworn in opposition to the application by Justice Gacheche in which she avers that there is no competent appeal, as the same does not conform to the

prescriptions of Rule 33 (1) of the Supreme Court Rules 2012. The effect of Justice Ojwang's denial of prayer number 3 of the application in Mr. Mwenesi's view, is that there is no appeal capable of being consolidated with any other appeal.

[15] In a somewhat unrelated contestation in this application, Mr. Mwenesi raises an issue that had arisen at both the High Court and Court of Appeal regarding the existence of the Judges and Magistrates Vetting Board. Counsel wonders whether this Court would be doing justice by allowing the appeals to continue when the very existence at law, of the JMVB is yet to be determined.

[16] The submissions by Mr. Mwenesi in opposition to the application are supported by Mr. Oduol for the 10th and 11th respondents. Counsel submits that the provisions of section 32(1) of the Supreme Court Act, 2011 require that within 30 days of filing the Notice of Appeal, the appellant must file a Petition of Appeal and a Record of Appeal. As the applicant has not filed a Record of Appeal, there is no competent appeal capable of being consolidated with any other in terms of the application. Both Mr. Mwenesi and Mr. Oduol also question the viability of the Notice of Appeal, Petition of Appeal, and Record of Appeal filed by the Attorney-General and which is sought to be consolidated with that of the applicant. Both Counsel contend that the Attorney-General appears to have purported to act on behalf of the Judges and Magistrates Vetting Board without authorization by the latter. They argue that since the Attorney-General has filed the appeal without authority, the same is incompetent and should be struck out.

[17] Senior Counsel, Mr. Ojiambo for the 12th respondent, while agreeing with the submissions of counsel for the 9th, 10th and 11th respondents, submits that the applicant has breached the mandatory provisions of Rule 33(1) of the Supreme Court Rules, 2012 which stipulates that *"an Appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing the Notice of Appeal (a) a petition of appeal; (b) a record of appeal; and (c) the prescribed fee."* In counsel's opinion, the failure to file the Record of Appeal means that there is no appeal capable of being consolidated with another. It is further contended by the Senior Counsel that Rule 37 of the Supreme Court Rules refers to the "institution of the appeal" and not the record of appeal. The appeal in his view comprises the petition, the record, and evidence of payment of the prescribed fee.

[18] Not even the provisions of Article 159 of the Constitution, argues Senior Counsel, can come to the rescue of the applicant, since substantive justice must be within the law and not outside it. The Court, counsel asserts, cannot make rules that it will not uphold. In support of the submissions by Mr. Ojiambo, is an affidavit sworn by the 12th respondent, Hon. Mr. Justice Nyamu.

[19] Senior Counsel Mr. Khaminwa, for the 1st respondent, on his part, associates himself with all the submissions in opposition to the application. It is his submission that the application is incompetent. Counsel observes that while the applicant was the appellant in the Court of Appeal, it failed to take any steps to institute an appeal against the decision of the Court of Appeal in terms of the mandatory prescriptions of Rule 32 of the Supreme Court Rules, 2012. On the contrary it is the 4th respondent, who was an interested party in Civil Appeal No. 308 of 2012, that has filed a Record of Appeal.

[20] In response to the submissions in opposition to the application, Mr. Kanjama argues that the Record of Appeal and the prescribed fee in Rule 33 (1) *are not the appeal*. They merely aid the Court to determine the appeal. It is the Petition of Appeal that establishes the cause of action. This is buttressed, counsel contends, by Rule 33(6) of the Supreme Court Rules, 2o12 which gives the parties discretion to file the Record of Appeal separately in time, from the Petition of Appeal. He submits that Rule 37 of the Supreme Court Rules, 2012 provides that if nothing is filed *within 30 days* then the appeal will be deemed dismissed; but since the applicant filed its Petition of Appeal on time, the appeal is still valid.

[21] Learned counsel urges that the Court should focus on substantive justice, shorn of undue regard to technicalities. He submits that the Court should also view as meritorious the case for expedition in the disposal of this matter.

[22] Mr. Kanjama contends that although Rule 33 of the Supreme Court Rules, 2012 requires the Record of Appeal to be filed simultaneously with the Petition of Appeal, Rule 33(6) lends credence to the interpretation that one may file a Supplementary Record of Appeal within 15 days, or after - with leave of the Court, or indeed, *not file at all - with leave of the Court.* Counsel states that he is, in the circumstances, seeking leave not to file the Record of Appeal.

[23] Counsel observes that the Court has already granted the 5th respondent's (i.e., Attorney-General) request to be excused from filing the whole record of appeal. Towards this end, the 5th respondent was allowed to file only a Supplementary Record of Appeal. In essence, Counsel contends, the failure to file a Record of Appeal simultaneously with the Petition of Appeal does not mean that there is no appeal.

[24] Regarding the denial of prayer No. 3 by Justice Ojwang, and its effect on prayer No. 4 which is being argued *inter partes*, Mr. Kanjama, submits that the two prayers are different in that, by prayer No. 3 the applicant had sought reliance on the Record of Appeal filed in the Court of Appeal in Civil Application No. 308 of 2012 and the Supplementary Record of Appeal filed by the 5th respondent. In prayer 4, the applicant is seeking: (i) an order for consolidation of the two appeals to the Supreme Court, to wit, Petitions 14 and 15; and (ii) to be excused from having to duplicate the Record of Appeal. Thus, the applicant is saying that if the Court consolidates the appeals, then it can be excused from filing a Record of Appeal, i.e. the dispensation would only arise after consolidation; and in consequence, the entire prayer No. 4 is available to be granted by this Court.

D. **ISSUES FOR DETERMINATION**

[25] The following issues have arisen for determination:

i. *whether the Order issued by Hon. Justice Ojwang on 11th December, 2013 denying the applicant's prayer number 3 in its entirety renders the application herein incompetent;*

ii. whether the applicant's failure to file a Record of Appeal together with the Petition of Appeal means there is no appeal capable of being consolidated with any other;

iii. whether the Petitions of Appeal Numbers 13A, 14 and 15 should be consolidated.

E. **ANALYSIS**

i. *The effect of the Orders of 11th December, 2013*

[26] In the application dated 5th December, 2013 the applicant sought *inter alia*:

***"3. THAT** the Honorable Court be pleased to grant the Applicant leave to rely on the Record of Appeal filed in the Court of Appeal in Nairobi Civil Appeal No. 308 of 2012 and the Supplementary Record of Appeal filed by the 4th and 5th Respondents herein in their related appeal in Supreme Court Petition No. 15 of 2013 between the same parties for the purpose of the hearing and determination of its Petition of Appeal dated 2nd December 2013 against the Court of Appeal's decision;*

***"4.THAT** the Honorable Court be pleased to order consolidation of the said two appeals to the Supreme*

Court, namely this appeal via Petition No.14 of 2013 and the related Petition Number 15 of 2013 and thereafter excuse the Appellant/Applicant herein from having to duplicate the Record of Appeal…"

[27] The matter came up for hearing on 11th December 2013. Ojwang SCJ dismissed prayer No. 3 in its entirety. The upshot of this Order was that the applicant could not rely on the Record of Appeal filed in the Court of Appeal in Nairobi **Civil Appeal No. 308 of 2012,** neither could they rely on the Supplementary Record of Appeal filed by the 5th respondent in the appeal in Supreme Court **Petition No. 15 of 2013**. The Honorable Judge then ordered that prayer number 4 should be heard *inter partes* on its merits before a two-Judge Bench, hence these proceedings.

[28] It is not difficult in our view to understand why the Judge declined to grant prayer number 3 in its entirety. Here was a party (the applicant herein) who had filed a Notice of Appeal and a Petition of Appeal against the judgment of the Court of Appeal in Civil Appeal No. 308 of 2012. The Rules of Court, more specifically Rule 33(1) of the Supreme Court Rules, require that a Petition of Appeal be accompanied with the Record of Appeal at the time of lodgement. The rationale of this rule is obvious, given the fact that this Court, or any appellate Court for that matter, would not be able to determine an appeal without reference to the Record of Appeal. The contents of the Record of Appeal include not just the pleadings in the lower Court, but the judgment of the Court against which an appeal is preferred.

[29] The Record of Appeal in Civil Appeal No. 308 of 2012, on which the applicant had sought to place reliance in its appeal to the Supreme Court would essentially have contained the pleadings at the High Court, including the submissions of the parties and judgment of that Court. Logically, therefore, such a record would not have contained the judgment of the Court of Appeal against which the Petition of Appeal had been filed. It is also likely that such a record would not have been an accurate reflection of the proceedings at the Court of Appeal. As Justice Ojwang observed while declining to grant the said prayer, the appeal to the Supreme Court was a different appeal, and had to be supported by a complete and up-to-date record of what had transpired at the Court of Appeal.

[30] In the premises, there was no basis upon which the Judge would have granted the Order sought by the applicant. Nor would it have been tenable for the Judge to grant part only of prayer No. 3, allowing the applicant to rely on the Supplementary Record of Appeal filed by the 5th respondent. The denial of prayer No. 3 did not however mean the end of the road for the applicant, as it was left to pursue prayer No. 4 *inter-partes,* before a two-Judge Bench. The application before us, therefore, solely seeks the grant of prayer No.4.

[31] We do not agree with the opposing respondents' contention that the denial of prayer No. 3 by Hon. Justice Ojwang renders the application before us incompetent. What the applicant seeks is an Order by this Court *consolidating the said two appeals* to the Supreme Court, namely the Petition No. 14 which is the applicant's appeal, and Petition No. 15, which is an appeal by the Attorney- General. The applicant further seeks to be exempted from having to duplicate and file afresh the Record of Appeal proper, a record that has *already been filed by the 4th Respondents.* It is to this prayer that we must now turn.

ii. Has the applicant filed a competent appeal capable of being consolidated"

[32] The parties are at odds as to what constitutes a competent appeal. The respondents, with the exception of the Judges and Magistrates Vetting Board, the Judicial Service Commission, and the Attorney-General, have argued that the applicant's failure to file a Record of Appeal as required by the provisions of Rule 33(1) of the Supreme Court Rules, 2012 renders the appeal incompetent. The crux of their argument is that an incompetent appeal is not capable of consolidation. Mr. Kanjama for the

applicant, on the other hand, argues that *"an appeal"* is *"the petition of appeal",* and that the Record of Appeal and the prescribed fee are not the appeal, but merely documents that facilitate the Court's determination of the appeal. He urged the Court to focus its mind on the object of substantive justice, without undue regard to technicalities.

[31] The applicant filed the Petition of Appeal within the prescribed time. No Record of Appeal was filed to accompany the petition. However, within the 15-day period provided for in Rule 33(6), for filing a Supplementary Record of Appeal, the applicant filed the present application seeking to be allowed to rely on the Record of Appeal filed by the 4th respondent - the rationale being that both *Petitions, 13A and 15,* were filed together with the same voluminous Record of Appeal and it, therefore, did not make sense for the applicant to replicate the same documents.

[34] Learned counsel, Mr. Kennedy Ochieng' for the 13th respondent, urged the Court to find that no appeal exists, because the applicant failed to comply with the deadlines set out by the Supreme Court Rules. In particular, counsel cited Rule 37(1) of the Supreme Court Rules, 2012 and argued that the applicant's failure amounted to a withdrawal of the appeal. Rule 37(1) provides:

"Where a party has lodged a notice of appeal but fails to institute the appeal within the prescribed time, the notice of appeal shall be deemed to have been withdrawn, and the Court may on its own motion or on application by any party make such orders as may be necessary."

Rule 33(1) of the Supreme Court Rules, 2012 thus provides:

"An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal –

a. ***a petition of appeal;***
b. ***a record of appeal; and***
c. ***the prescribed fee"*** (Emphasis added).

[36] The use of the word 'shall' in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the components of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the Petition of Appeal, the Record of Appeal, and the prescribed fee. So, it has been urged, what the applicant has filed with the Court is not a complete appeal.

[37] However, the question before us is not whether there exists an appeal in the form envisaged by Rule 33(1) of the Supreme Court Rules. Rather, what we must decide is *whether the Applicant has placed before this Court material with content sufficient to disclose a cause of action capable of being consolidated with another*. According to ***Black's Law Dictionary*** (8th Edition), to consolidate is *"to combine, through court order, two or more actions involving the same parties or issues into a single action ending in a single judgment or, sometimes, separate judgments.."* A consolidated appeal is defined by the said Dictionary as "*an appeal in which two or more parties whose interests were similar enough to make a joinder practicable, proceed as a single appellant."*

[38] It is not in dispute that the applicant has filed a Notice of Appeal and a Petition of Appeal. The Notice as its title indicates, is a signification of intent by the potential appellant, to challenge by way of appeal, the decision of a lower Court. The Petition of Appeal on the other hand is a statement of grievance, an *appeal cause* against the judgment of a lower Court. The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it.

[39] If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine *"the appeal"* on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed this is the gist of Rule 33(1) of the Supreme Court Rules.

[40] It follows, therefore, that in an application for consolidation, what are to be consolidated in an appeal are the Petitions of Appeal, for it is these that disclose the causes or grievances against the judgment of a lower Court. In this regard, the applicant is asking the Court to consolidate its grievance or cause, as disclosed in its Petition of Appeal, with that in Petition No. 15 - because they are similar in terms, not only of the nature of the grievance, but also of the issues they raise.

[41] In answer to the question as to whether there is a competent appeal before us, capable of being consolidated, we must respond *in the affirmative,* since the Petition of Appeal filed by the applicant discloses a clear grievance and cause of action, that can be practicably and jointly prosecuted together with that in Petition No. 15. The absence of the Record of Appeal is not a barrier to consolidation at this stage of the proceedings. It would have been a different matter if the applicant was the sole appellant in this matter and if it was asking the Court to proceed and determine the appeal on the basis of the Petition only.

iii. *Should Petitions No. 14, 13A and 15 be consolidated"*

[42] Before determining whether the Petitions should be consolidated, it is important to take note of the following facts:

a. *the applicant herein has filed a Petition of Appeal dated 2nd December, 2013 against the decision of the Court of Appeal in Nairobi Civil Appeal No.308 of 2012;*
b. *the applicant has not filed a Record of Appeal together with its Petition of Appeal;*
c. *there is a related appeal by the 4th and 5th respondents, together with a complete Record of Appeal, which has been served on all the parties in this matter;*
d. *the 5th respondent has also filed Supplementary Records of Appeal in Petition No. 15 of 2013, and the same have been served upon all the parties in this matter;*
e. *the applicant and the 4th and 5th respondents were parties in Civil Appeal No. 308 of 2012.*

[39] The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it. In the matter at hand, this Court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues. In addition, the Court must be satisfied that no injustice would be occasioned to the respondents if consolidation is ordered as prayed.

[44] What are the issues raised in Petitions No. 13A, 14 and 15" A perusal of the said appeals reveals that, running through them, is *one main issue* and this is, ***whether section 23(2) of the Sixth Schedule to the Constitution of 2010 ousts the jurisdiction of the High Court to review the decision of the Judges and Magistrates Vetting Board declaring a Judge (or Magistrate) as being unsuitable to continue serving as such.*** This was the central issue in Civil Appeal No. 308 of 2012. It remains the central issue in the three appeals that the applicant seeks to consolidate.

[45] In the circumstances, would it serve the interests of justice to consolidate the appeals in which *the parties are the same*, and *the central issue is the same* even if worded differently" The irresistible

conclusion is *in the affirmative*. We do not see what good would result from denying the applicant's prayer for consolidation, and allowing each of the appellants to appropriately canvas its cause. The alternative position would result in undesirable delays in concluding a matter of great public interest. It is obvious to us that, in the interests of all parties, the central issue in the appeals ought to be determined expeditiously and conclusively by this Court. Consolidation of the appeals, in our perception, would significantly advance that goal.

[46] In arriving at this conclusion, by no means do we underestimate the importance of Rule 33(1) of the Supreme Court Rules, which stipulates that an appeal is complete when it has the full package– a notice, a petition and a record. We agree with counsel for the other respondents, through learned counsel Messrs. Khaminwa, Ojiambo and Mwenesi, that the applicable rules must be complied with by those who seek justice from the Courts. Indeed, this Court has had occasion to remind litigants that *Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls.* All that the Courts are obliged to do, is to be guided by the principle that *"justice shall be administered* ***without undue regard to technicalities."*** It is plain to us that Article 159 (2) (d) is applicable on *a case-by-case basis (****Raila Odinga and 5 Others v. IEBC and 3 Others;*** Petition No. 5 of 2013*,* [2013] e KLR).

[47] We believe that the application before us is one such case, where the provisions of Article 159(2) (d) of the Constitution are applicable to save an appeal from waste occasioned by failure to observe one limb of a procedural rule. The Court's remit in this regard, which is dressed in a substantial scope for discretion, is well described in Rule 55 of the Supreme Court Rules, as follows:

"These Rules and the Practice Directions issued thereunder, shall bind all parties in all proceedings before the Court, provided that:

a. ***where any provision in these Rules or any relevant practice direction is not complied with, the Court may give such directions as may be appropriate, having regard to the gravity of the non-compliance, and generally to the circumstances of the case."***

[48] Having ruled that the three appeals should be consolidated, we also grant that part of the prayer in which the applicant seeks to rely on the Record of Appeal filed by the 4th respondent. The same indulgence has already been extended to the 5th respondent by the Hon. Justice Tunoi, and we see no reason to deny the applicant a similar dispensation. Contrary to the submissions by counsel for the 12th respondent, we do not think that any of the respondents will be prejudiced if the applicant is allowed to rely on the said Record of Appeal, since we have identified the one central issue running through all the appeals. No purpose in furtherance of the course of justice would be served, by compelling the applicant to file the same Record of Appeal.

F. **ORDERS**

[49] The foregoing analysis of the meritorious submissions of learned counsel leads us to certain Orders, which we now set out as follows:

i. ***Petitions of Appeal Numbers 13A, 14 and 15 are hereby consolidated.***

ii. ***The applicant herein is hereby allowed to rely on the Record of Appeal lodged in the Registry by the 4th respondent.***

iii. Petition No. 13A of 2013 is to serve as the Pilot File in these proceedings.

iv. ***The appellants are to file their written submissions within 7 days from the date hereof; and the submissions so filed are to be served upon the respondents within 7 days as from the date of filing.***

v. ***The respondents are to file their written responses within 7 days after service; and the responses so filed are to be served upon the appellants within 7 days of the date of filing.***

vi. ***The appellants are to file and serve any written responses within 7 days from the date of service.***

vii. ***This matter is to be mentioned on 24th April, 2014 before the Deputy Registrar of the Supreme Court, to confirm compliance and to fix hearing dates.***

DATED and **DELIVERED** at **NAIROBI** this **8th day of April, 2014.**

…… ……

S.C. WANJALA **S. N. NDUNGU**

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

I certify that this is a true copy of the original

REGISTRAR, SUPREME COURT