Case Number:	Election Petition Appeal 11 of 2018
Date Delivered:	19 Jul 2018
Case Class:	Civil
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Philip Nyamu Waki, James Otieno Odek, Fatuma sichale
Citation:	Apungu Arthur Kibira v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR
Advocates:	-
Case Summary:	**Effect of filing a notice of appeal at the wrong registry and failure to comply with legal stipulations on the form and content of the notice of appeal** **Apungu Arthur Kibira v Independent Electoral and Boundaries Commission & 2 others** **Election Petition Appeal No 11 of 2018** **Court of Appeal at Kisumu** **P N Waki, F Sichale & J Otieno-Odek, JJ A** **July 19, 2018** **Reported by Beryl A Ikamari** ***Electoral Law****-election petition appeal-notice of appeal-time allowed for filing a notice of appeal-*

extension of time allowed for the filing of a notice of appeal-whether the Court of Appeal could enlarge time allowed for the filing of a notice of appeal-Court of Appeal (Election Petition) Rules, 2017, rules 17(1), 3, 4(3) & 5.

***Electoral Law**-election petition appeal-notice of appeal-form and content of a notice of appeal-effect of failure to comply with legal requirements as to the form and content of a notice of appeal in an election petition- Constitution of Kenya 2010, article 159(2)(d); Court of Appeal (Election Petition) Rules, 2017, rules 6 & 8.*

***Electoral Law**-election petition appeal-notice of appeal-registry in which a notice of appeal ought to be filed-effect of filing a notice of appeal at the wrong registry-Constitution of Kenya 2010, article 159(2)(d); Court of Appeal (Election Petition) Rules, 2017, rules 6(3)(c) & 6(5).*

Brief facts

In the general elections held on August 8, 2017, the 3rd Respondent was declared as validly elected as Member of the National Assembly for Luanda constituency in Vihiga County. He garnered 15,117 votes while the Appellant who was his closest rival garnered 11,304 votes. There were a total of 6 candidates in the election. The Appellant challenged the election of the 3rd Respondent at the High Court but the High Court dismissed his petition and affirmed the election.

Against the High Court's judgment, the Appellant lodged an appeal by filing a notice of appeal. Contrary to the requirements of rule 6(1) of the Court of Appeal (Election Petition) Rules, 2017, the notice of appeal was filed at the High Court registry at Kakamega instead of the Court of Appeal registry at Kisumu. It took one month for the mistake to be noticed. The form and content of the notice of appeal was also not as required by the rules. In relation to the notice of appeal, there were various applications. The Appellant wanted it to be deemed as properly filed or for time to be enlarged for it to be filed and served afresh while the Respondents wanted it to be struck out.

Issues

1. Whether the Court of Appeal could enlarge time allowed for the filing of a notice of appeal.
2. What was the effect of failure to comply with legal requirements as to the form and content of a notice of appeal as stipulated in rule 6 of the Court of Appeal (Election Petition) Rules, 2017?
3. Whether the filing of a notice of appeal in election matters at a registry which was not the legally prescribed registry was a defect which was a jurisdictional issue that was incapable of being corrected.

Held

1. Election petitions and election petition appeals were *sui generis* and they were not on the same plane as ordinary civil suits. Electoral laws were to be interpreted strictly within the corners and confines of those laws as they entailed a special jurisdiction created by the Constitution and statutes and civil process was not applicable to electoral laws.
2. The jurisdiction of the Court in electoral issues was based on article 164(3) and 87(1) of the Constitution. Article 87(1) of the Constitution required Parliament to enact legislation to establish mechanisms for the timely settling of electoral disputes. Therefore, statutory provisions, regulations and rules relating to electoral disputes could be said to be normative derivatives of the Constitution.
3. Section 85A of the Elections Act restricted and confined the appellate jurisdiction of the Court of Appeal in electoral matters to matters of law only. A notice of appeal was declared by the Supreme Court to be a jurisdictional issue and not a technical matter of procedure. Article 159 (2) (d) of

the Constitution was not a panacea for all procedural infractions and it simply meant that a court of law should not pay attention to procedural requirements at the expense of substantive justice.

4. The issue relating to the filing of the notice of appeal was not a procedural technicality capable of being cured under article 159 of the Constitution. Under rule 17(1) of the Court of Appeal (Election Petition) Rules, 2017, the Court of Appeal had jurisdiction to extend or reduce time prescribed by the rules, except for timelines set by the Constitution and the Elections Act, 2011. The power to extend time under rule 17(1) of the Court of Appeal (Election Petition) Rules, 2017 when read together with rules 3, 4(3) and 5 of the same rules, meant that time could only be extended or reduced in relation to documents which the Court of Appeal had competence or jurisdiction to consider.
5. The notice of the appeal filed at the registry of the High Court at Kakamega, did not embody the prerequisites set out in rule 6 of the Court of Appeal (Election Petition) Rules, 2017 and it could not be said to be a notice of appeal. The document filed was a nullity as it purported to be a notice of appeal filed under the rules.
6. Under rule 8 of the Court of Appeal (Election Petition) Rules, 2017, there was a mandatory requirement that the record of appeal would contain, *inter alia*, the notice of appeal. The one on record was a nullity. Therefore, the record of appeal ought to be struck out.
7. Given the nature of findings in relation to the notice of appeal, there was no need to consider the merits of the main appeal. The appeal ought to be struck out as the notice of appeal was a nullity.

Per J Otieno Odek, JA [dissenting]

1. A notice of appeal occupied a central pace and without it, there was no appeal. The

notice of appeal was what would give the Court jurisdiction to hear an appeal.

2. The filing of a notice of appeal at the wrong registry did not *per se* go to the root and merits of an intended appeal. The filing of a notice of appeal at the wrong registry was an error that was curable at the discretion of the Court pursuant to rule 6(5) of the Court of Appeal (Election Petition) Rules 2017; the Court was enjoined under article 159(2)(d) of the Constitution to administer substantive and not procedural and technical justice.
3. The filing of a notice of appeal at a wrong registry and within the time stipulated for taking any action should not *per se* have rendered the notice and record of appeal null and void. There were considerations that the Court ought to take into account in deciding whether to strike out such a notice of appeal or not;

a. Whether the notice of appeal was filed and served within time.
b. Whether a reasonable person served with the notice of appeal understood what it meant. It must mean that the Appellant intended to appeal and had filed a notice of appeal.
c. Whether the Respondent or person served suffered any prejudice by having the notice of appeal filled at the wrong registry. If no prejudice was suffered, the notice of appeal filed at the wrong registry should not be null and void.
d. If the notice of appeal filed at an inappropriate registry was transmitted and received at the correct/appropriate registry, then the notice should not be incompetent, null and void.

4. The rule requiring a party to file a notice of appeal at a particular registry or court was merely directory. An error in designating or filing the notice at an inappropriate registry should not be fatal to the appeal. In filing the notice of appeal a clear intention to appeal the Trial Court's decision was expressed and there was no expressed

intention to abandon the appeal. The rule directing a party on where to file a notice of appeal was aimed at creating finality of the judgment at the Trial Court.

5. Striking out a notice of appeal on the basis that it had been filed at a wrong or inappropriate registry would annul, reverse and countermand the right to appeal. The net effect was denial of the right to appeal.
6. The fact that a court had power to extend time to file a notice of appeal *ipso jure* meant that unless extension of time was expressly prohibited by the Constitution or any other written law, the Court had discretion to extend time and excuse any non-compliance affecting the notice of appeal.
7. The Court of Appeal (Election Petition) Rules 2017 was operational and administrative in nature. The rules addressed the manner in which the Court of Appeal exercised its jurisdiction in election petition appeals. The Rules did not confer jurisdiction on the Court to hear election petition appeals. That was clear from regulation 3 of the Rules which stipulated that the object and purpose of the Rules was to facilitate the just, expeditious and impartial determination of election petition appeals in exercise of the Court's appellate jurisdiction under article 164(3) of the Constitution.
8. Rule 6 (3) (c) of the Court of Appeal (Election Petition) Rules simply stated that the notice of appeal shall contain a request that the appeal be set down for hearing in the appropriate registry. Appropriate registry was defined to be the Court of Appeal Registry. The place to file the notice of appeal was a directional issue not jurisdictional and it was in that context that rule 6 (5) vested discretion on the Court to determine the effect of non-compliance with any of the Rules.
9. For the following reasons the filing of the notice of appeal at an inappropriate registry would not make the notice incompetent:-

a. In election disputes, not every infraction or

non-compliance with a constitutional principle would lead to the invalidation of declared results.

b. Section 83 of the Elections Act clearly provided that not every infraction or non-compliance with the Elections Act and Regulations would lead to the nullification of results.
c. Rule 6(5) of the Court of Appeal (Election Petition) Rules, 2017 was to the effect that it was not automatic that non-compliance with rules would be fatal, the Court had jurisdiction to determine the effect of non-compliance.

10. The Court should strive to preserve the right of a party to a hearing based on merit. Any irregularity in the notice of appeal should be liberally construed to preserve the sufficiency of the notice.
11. There was a distinction between there being no notice of appeal or the notice being filed out of time which was a jurisdictional matter and a defective notice of appeal filed within time which was an irregularity issue. The legal effect of any irregularity or defect in or on the notice of appeal must be determined on a case by case basis taking into account the nature of the defect or irregularity, the delay in making an application to regularize the same, the prejudice if any to the opposing party, the sufficiency of any explanation given and any other relevant consideration. The issue with respect to the impugned notice of appeal was an irregularity and not a jurisdictional issue.

Appeal dismissed

Orders:-

1. *The notice of motion (for the extension of time for filing the notice of appeal or for the notice to be deemed to have been duly and properly filed) by the Appellant dated and filed on March 16, 2018 was dismissed.*

	2. *The notice of motion (for the striking out of the notice of appeal) by the 1st Respondent and the Returning Officer, Luanda Constituency, dated March 26, 2018 and filed on March 27, 2018 was allowed.* 3. *The notice of preliminary objection filed by the Appellant against the notice of motion dated March 26, 2018 was rejected.* 4. *The record of appeal dated and filed in the Court of Appeal at Kisumu on March 16, 2018 was struck out.* 5. *The costs of the applications and the struck out appeal shall be borne by the Appellant.*
Court Division:	Civil
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	Election Petition 6 of 2017
Case Outcome:	Appeal Struck out.
History County:	Kakamega
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: WAKI, SICHALE & OTIENO-ODEK, JJ.A)

ELECTION PETITION APPEAL NO. 11 OF 2018

BETWEEN

APUNGU ARTHUR KIBIRA.....APPELLANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE RETURNING OFFICER LUANDA

CONSTITUENCY, SYLVESTER OUMA.....2ND RESPONDENT

OMULELE CHRISTOPHER.....3RD RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kakamega (Janet Mulwa, J) dated 16th February, 2018

in

Election Petition No. 6 of 2017)

****

JUDGMENT OF WAKI, JA

The main appeal herein challenges the declaration of the 3rd respondent, Omulele Christopher **(Omulele)** as the elected Member of the National Assembly for Luanda constituency in Vihiga County during the general elections held on 8th August, 2017. There were six candidates in that election and the 3rd respondent garnered 15,117 votes, while the appellant, Apungu Arthur Kibira **(Apungu)** who was the nearest challenger, garnered 11,304 votes. The Independent Electoral and Boundaries Commission **(IEBC)** as well as the Returning Officer in that election are enjoined in the appeal. Before it could be heard, however, the parties raised several interlocutory issues but directions were given at the pre-hearing conference that the applications and the main appeal be heard together, and indeed they were on 10th May, 2018.

For good order, I must consider and determine the interlocutory applications *in limine* since, in their nature, they raise jurisdictional issues. Jurisdiction, as often stated, is everything; without it, the court has no power to make any further step and must down its tools. See *The Owners of the* **Motor Vessel Lilian 'S' vs Caltex Kenya Ltd [1989] KLR 1.**

There are no less than 13 different documents filed by the parties between 16th March, 2018 and 9th May, 2018, the eve of the hearing. There are also several volumes of authorities cited. All these will be considered where necessary and relevant.

The first in line is a notice of motion taken out by Apungu and filed on 16th March, 2018. It invokes ***Rules 3, 5*** and ***17 (1)*** of the ***Court of Appeal (Election Petition) Rules 2017*** **(CAR 2017)** and seeks the following orders:

"(b) The Applicant's Notice of Appeal dated 16th February, 2018 and lodged in the Superior Court's registry at Kakamega High Court on 19th February, 2018 be deemed as duly and properly filed and served in accordance with the Court of Appeal (Election Petition) Rules, 2017.

(c) Only by way of an alternative to prayer (b) above, time be enlarged to permit the Applicant to file and serve herein a fresh Notice of Appeal out of time from the decision of the High Court of Kenya at Kakamega (The Honourable Lady Justice JANET MULWA) given on 16th day of February, 2018 in Kakamega High Court Election Petition No. 6 of 2018."

IEBC replied to that application on 27th March, 2018 and filed its own motion on the same day seeking an order that ***"the record of appeal lodged by the appellant on 14th*** *(sic)* ***March, 2018 be struck out". Rule 19*** of CAR 2017 was invoked. In opposition to IEBC's application, Apungu filed a notice of Preliminary Objection **(PO)** asserting that the motion for striking out had been filed out of time, in violation of ***Rule 19 (2),*** without leave of the court. I will consider Apungu's motion first.

The background to the motion is that the judgment of the election court **(Janet Mulwa, J.)** was delivered on 16th February, 2018 dismissing his petition, affirming the election of Omulele, and awarding costs to IEBC and Omulele, capped at Ksh. 3 million and 2 million respectively, subject to taxation. He instructed his advocates on record to file a notice of appeal against the decision and the advocates did so on 19th February, 2018. They served the respondents on 23rd February, 2018. The notice of appeal, however, was not filed in compliance with the CAR 2017 which require under ***Rule 6 (1)*** that it be lodged in the Court of Appeal registry, within seven days of the decision appealed against. In this case, it ought to have been lodged in Kisumu but was instead filed in the High Court registry in Kakamega. Later, on 28th February, 2018, way after the expiry of the seven day period required for filing the notice, it was transmitted to the Kisumu Court of Appeal registry. About one month since the filing of the notice of appeal, the advocates realized their mistake and filed the motion now under consideration.

In the affidavit in support, sworn by Apungu on the basis of information given by his advocates on record, it is conceded that the notice of appeal was filed in the wrong registry. That, however, was attributed to a genuine mistake of counsel who relied on the wrong provisions of the law, to wit, the ***Elections (Parliamentary and County Elections) Petition Rules*** (LN. 116 &117) to the effect that the applicable rules were the ***Court of Appeal Rules 2010*** **(CAR 2010).** The advocates realized their mistake after carrying out some research, hence the motion filed on 16th March, 2018. Apungu believed that the non-compliance with the rules was unintended, inadvertent and excusable.

In written submissions filed by counsel for him, M/s Bruce Odenyo & Company, Advocates, refuge was taken under ***Article 159 (2) (d)*** of the Constitution and it was contended that the filing of the notice in the wrong registry was a mere procedural technicality which was curable under that Article. Furthermore, it was submitted, this Court has jurisdiction under ***Rule 17 (1)*** as read with ***Rule 5*** of CAR 2017 to extend the timelines to file a fresh notice of appeal. Counsel sought support in cases decided under ***Rule 4*** of CAR 2010 to make the point that the Court's Rules should be construed in a manner that facilitates the just, expeditious, proportionate and affordable resolution of disputes. Among the cases were ***Abok James Odera t/a A. J. Odera & Associates vs John Patrick Machira t/a Machira & Company Advocates [2013]; Deepak Chamanlal Kamani & Another vs Kenya Anti-Corruption Commission & 3 Others [2010] eKLR;*** *Hunter Trading Company Ltd vs Elf Oil Kenya Limited, Civil Application No. NAI. 6 of 2010***,** and ***Dorcas Indombi Wasike vs Benson Wamalwa Khisa & Another [2010] eKLR.*** Counsel also relied on the decision of Githinji, JA (sitting as a single Judge) in ***Andrew Toboso Anyanga vs Mwale Nicholas Scott Tindi & 3 Others [2017] eKLR*** and ***Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others [2015] eKLR*** for the proposition that in exercise of their discretion, courts should be guided by considerations of public factors such as political rights of citizens to a free and fair election, representation in Parliament, even as they consider issues of delay and prejudice to the other parties.

According to counsel, the purpose of a notice of appeal is merely to initiate an appeal and indicate who is aggrieved. He cited the case of ***Joseph Limo & 86 Others vs Ann Merz, Civil Application No. 295 of 1998***. Counsel further observed that the notice of appeal was filed during a period of transition from the general CAR 2010 to specialized CAR 2017 and pleaded to be excused for the error.

Finally, in oral submissions, learned counsel **Ms. Imbaya** reiterated the written submissions and emphasized that the applicant's counsel was not aware of the publication of CAR 2017 which came into effect 28th July, 2017. In her view, and on the authority of the ***Anyanga case*** (supra), and ***Article 159*** of the Constitution, this Court had the discretion to enlarge time for filing of the notice of appeal. The applicant's intention was clear that he wanted to file an appeal, the respondents knew about it, and there was no prejudice or malice.

In opposing the motion, IEBC and the Returning Officer, in their written response, observed the concession that the notice of appeal offended ***Rule 6 (1)*** of CAR 2017. In their view, it was thus null and void and incapable of initiating any appeal. It was particularly futile to seek an order for extension of time to file a fresh notice of appeal since it would entail a fresh filing of a record of appeal outside the constitutional timelines under ***section 85 A*** of the ***Elections Act*** as read with ***Article 87 (1)*** of the ***Constitution.*** With the passage of the timelines, they submitted, the Court had no jurisdiction to invoke ***Rule 17 (2)*** of CAR 2017.

In oral highlights, learned counsel for them, **Mr. D. Musyoki**, submitted that a notice of appeal was fundamental and where it was defective, no appeal could be founded on it. He also observed that the applicant was seeking to file an appeal outside the constitutional and statutory timelines which was not possible in law. Counsel distinguished the ***Anyanga case*** (supra), where Githinji, JA allowed extension of time, and pointed out that the notice sought to be extended in that case was properly filed in the right court, while in this case, no compliant notice of appeal is sought to be extended. The defect was thus incurable as the court lacks jurisdiction. As for ***Article 159 (2) (d)*** of the Constitution, counsel submitted that only *"undue regard"* was addressed and not regard to procedural rules. He asked us to dismiss the application.

So did Omulele through learned counsel **Mr. R. M. Tollo**. He filed grounds of opposition contending that there was no basis laid for extension of time; that there was unreasonable delay in filing the application after expiry of the time limit of 7 days on 23rd February, 2017; that ignorance of the law is not a defence; that allowing the application would be tantamount to enforcing an illegality; and that there were strict timelines set by the Constitution and the Elections Act, the noncompliance of which was fatal to an appeal. Mr. Tollo decried the applicant's plea that the notice of appeal was filed at a period when the rules of procedure were in transition to CAR 2017 and pointed out that the rules had been in operation for over 8 months before the notice of appeal was filed. He distinguished the ***Anyanga case***, where the notice of appeal was filed in October 2017, when one could have claimed that the rules were in transition.

I have given anxious consideration to this application. The only issue we are called upon to decide is whether the court has the jurisdiction to extend time for filing a notice of appeal in this matter. "***A court's jurisdiction flows from either the Constitution or legislation or both*"** and a court ***"cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."*** This was emphatically stated by the Supreme Court in ***Samuel Kamau Macharia and Another vs Kenya Commercial Bank and 2 Others [2012] eKLR***.

I predicate my analysis by making the categorical statement that matters election, election petitions and election petition appeals in particular, are *sui generis*. They cannot be placed on the same plane with ordinary civil appeals. Indeed, in tandem with the operational rules they are christened ***"Election Petition Appeals"***, not "Civil Appeals". That view was also held by this Court (differently constituted) in the case of ***Rozaah Akinyi Buyu vs Independent Electoral and Boundaries Commission & 2 Others [2014] eKLR*** which held that 'courts in Kenya and elsewhere have interpreted electoral law strictly within the corners and confines of the same as electoral law is a special jurisdiction created by the Constitution and statutes, and the civil process is not applicable to the same'. The court cited with approval the Indian Supreme Court case of ***Tyota Basu & Others vs Debi Ghosal & Others 26th February, 1982***, which pronounced itself on Indian electoral legislation *(Representation of the People Act, 1951),* and held as follows:-

".....An Election petition is not an action at Common Law, nor, in equity. It is a statutory proceedings to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statutory (sic) creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket."

And so it is that in ordinary civil appeals, this Court retains a wide discretion under ***sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act*** and of ***Rule 1 (2)*** of CAR 2010 to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The doctrines of equity reign large and that is the philosophy behind the decisions on extension of time made under ***Rule 4*** of CAR 2010 which were cited and relied on by the applicant here. The only limitation is that the Court's discretion be exercised judiciously.

As regards the jurisdiction of the court in electoral disputes, it is rooted in ***Article 164 (3)*** and operationalized through legislation enacted under ***Article 871 (1)*** of the Constitution which requires Parliament to *"enact legislation to establish mechanisms for timely settling of electoral disputes"*. The statutory provisions, regulations and rules relating to electoral disputes may therefore, in a

manner of speaking, be said to be 'normative derivatives' of the Constitution. ***Section 85 A*** of the **Elections Act** restricts and confines the appellate jurisdiction of the court to matters of law only. As regards the **"Notice of Appeal"** which is the focus of my analysis, it has been declared by the Supreme Court to be a jurisdictional issue and not a technical matter of procedure. The court so stated in the case of ***Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR,*** thus:

"***A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite. The California Supreme Court while reversing the Court of Appeal decision that had dismissed the appellant's notice of appeal as having been filed out of time in Silverbrand vs County of Los Angeles (2009) 46 Cal. 4th 106, 113 stated inter alia:***

"As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite. "Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal." (sic) The purpose of this requirement is to promote the finality of judgements by forcing the losing party to take an appeal expeditiously or not at all."

[Emphasis added].

The Supreme Court also, in the case of *Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others [2015] eKLR*, emphasized that without filing a notice of appeal, there can be no expressed intention to appeal.

The dichotomy in the treatment of notices of appeal filed under CAR 2010 and those filed under CAR 2017 was aptly captured recently by this Court in the case of ***John Munuve Mati vs Returning Officer Mwingi North Constituency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu [2018] eKLR*** when it stated:

"The 2010 rules regulates the filing of all appeals in this Court. In general appeals, there is no serious time constraint. Parties have as many as 14 days to file a notice of appeal and 60 days thereafter to file the record of appeal. Where a party has applied for proceedings and complied with rule 82, the record of appeal can be filed even three or five years later so long as there is a certificate of delay. That luxury is not available in an election petition appeal. By dint of section 85A of the Elections Act, an election petition appeal must be filed within 30 days from the date of the judgment of the High Court and heard and determined within 6 months from the date it was filed. This commitment to timely resolution of election disputes stems directly from the Constitution where Article 87 specifically mandates Parliament to enact legislation to establish mechanisms for timely settlement of electoral disputes. We believe that it was that appreciation that informed the decision of the Rules Committee to promulgate dedicated Court of Appeal rules to specifically regulate the filing of election petition appeals."

[Emphasis added].

What then is the place of ***Article 159 (2) (d)*** of the Constitution which was heavily relied on by the applicant in this matter" More than five years ago in 2013, it was declared by the Supreme Court that the Article was not a panacea for all procedural infractions and that it '*simply means that a court of law should not pay attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law." The Court stated thus:*

"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."

See ***Raila Odinga & 5 Others vs Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR.***

Rooting for a liberal construction of the Rules of procedure and the provisions of ***Article 159*** of the Constitution, the majority of this Court **(Ouko & Jamila Mohamed, JJ.A)** in the case of ***Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR*** stated as follows:

"*Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute*

or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.....Essentially the rules remain subservient to the Constitution and statutes. Article 159 (2) (d) of the Constitution, Section 14 (6) of the Supreme Court Act, Section 3A and 3B of the Appellate Jurisdiction Act, Sections 1A and 1B of the Civil Procedure Act and Section 80 (1) (d) of the Elections Act place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice."

Dissenting from that view, **Kiage, JA** expressed himself as follows:

"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

The Supreme Court subsequently adopted the view taken by Kiage, JA as the correct one.

So that, the issue before us is not one of a procedural technicality capable of being cured under ***Article 159*** of the Constitution. The observation of the Supreme Court in the case of ***Lemanken Aramat vs Harun Meitamei Lempaka & 2 Others [2014] eKLR*** is worth remembering that:-

"... the electoral process, and the electoral dispute-resolution mechanism in Kenya, is marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by the Constitution and the electoral law. The jurisdiction of the Court to hear and determine electoral disputes is inherently tied to the issue of time, and a breach of this strict scheme of time removes the dispute from the jurisdiction of the Court. This recognition is already well recorded in this Court's decisions in the Joho case and the Mary Wambui case".

Adverting now to the circumstances of the case before us, this Court has the jurisdiction to 'extend or reduce' the time prescribed by the Rules, except for timelines set by the ***Constitution*** and the ***Elections Act, 2011***. The power is in ***Rule 17 (1)*** of CAR 2017. That rule must be read together with the following rules:-

Rule 3 which provides:

"The object of these Rules is to facilitate the just, expeditious and impartial determination of election petition appeals in exercise of the Court's appellate jurisdiction under Article 164 (3) of the Constitution."

Rule 4 (3):

"Where there is a conflict between 2017 rules and Court of Appeal Rules 2010 on matters relating to election petition appeals the provisions of the (2017) rules shall prevail over the 2010 rules."

and ***Rule 5:***

"The effect of any failure to comply with these rules shall be a matter for determination at the Court's discretion subject to the

provisions of Article 159(2) (d) of the Constitution and the need to observe the timelines set by the Constitution or any other electoral law."

The combined effect of those provisions, in my view, must apply to documents which the Court has the competence or jurisdiction to consider. In that regard, the ***Anyanga case*** (supra) and the ***John Mati case*** (supra) were correctly decided as they considered the extension of time for filing a 'notice of appeal' which was properly before the Court. And that is the departure between those cases and the case before us.

The meaning of a *'notice of appeal'* is provided for in the rules as:

"...notice lodged in accordance with rule 6".

Rule 6 in full provides as follows:-

"6(1) A person who desires to appeal to the Court shall file a notice of appeal, which shall be lodged in quadruplicate in the registry.

(2) A notice of appeal shall be filed within seven days of the date of the decision appealed against.

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

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

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

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

(4) It shall not be necessary that the decree or order be extracted before lodging a notice of appeal.

(5) A notice of appeal shall be substantially in the Form EPA 1 set out in the schedule and shall be signed by or on behalf of the appellant."

[Emphasis added].

"Registry" is also defined to mean the *"**registry of the court and includes a sub registry.**"*

Now, the document filed in this matter, and headed **"Notice of Appeal"** looks like this:

"REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ELECTION PETITION NO. 6 OF 2017

THE ELECTIONS ACT, 2011

ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017

BETWEEN

APUNGU ARTHUR KIBIRA.....PETITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1st RESPONDENT

THE RETURNING OFFICER LUANDA CONSTITUTENCY,

SYLVESTER OUMA OMULO.....2ND RESPONDENT

OMULELE CHRISTOPHER.....3RD RESPONDENT

NOTICE OF APPEAL

TAKE NOTICE that the petitioner **APUNGU ARTHUR KIBIRA**, being dissatisfied with the decision of the Honourable Lady Justice JANET MULWA given at Kakamega on the 16th day of February, 2018 intends to appeal to the Court of Appeal against the whole of the said decision.

The address for of the appellant is care of his Counsel, M/s BRUCE ODENY & COMPANY ADVOCATES, REINSURANCE PLAZA, 4th FLOOR, OGINGA ODIGA STREET, P.O. BOX 3588-40100, KISUMU.

It is intended to serve copies of this notice on:-

MURIU, MUNGAI & CO. ADVOCATES	MUNYAO MULI & CO. ADVOCATES
MMC ARCHES	SHANKARDAS HOUSE
SPRING VALLEY CRESCENT	SUITE NO. 412
OFF PEPONI ROAD, WESTLANDS	4th FLOOR
P. O. BOX 75362 - 00200	P. O. BOX 20150 - 00200
NAIROBI	**NAIROBI**

DATED THIS 16th DAY OF February 2018

.....

BRUCE ODENY & COMPANY

(ADVOCATES FOR THE APPELLANT)

To:-

The Registrar of the High Court of Kenya at Kakamega. Lodged in

the High Court of Kenya at Kakamega this 19TH day of FEB, 2018."

Quite plainly, it answers to none of the prerequisites set out in ***rule 6*** and it cannot therefore be a 'Notice of Appeal". It even refers to appealing 'against the whole decision', including factual matters which do not lie in this Court. The applicant and his counsel admit as much and that is why they seek time for filing a fresh notice of appeal. Their plea that the rules were in transition and were hence easily overlooked cannot be a serious assertion as the rules had been in existence for more than eight months before the election petition was decided. I agree with the respondents that the document filed was a nullity as it purports to be a notice of appeal filed under the rules. It follows that no notice of appeal was filed in this matter and there is no jurisdiction granted to the court to consider the extension of time as sought. The court has no business crafting a jurisdiction it does not have, whatever amount of sympathy it may have on the applicant. It has to down its tools.

There is precedent in the conclusion I have reached in this matter. It is in two decisions made recently by this Court (two members of this bench appearing) in ***Lesirma Simeon Saimanga vs Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR*** and ***Musa Cherutich Sirma vs Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR.*** In both cases, the 'notices of appeal' were lodged in the High Court and the notices were deficient in compliance with ***Rule 6***. In both, the foundational centrality of a notice of appeal as declared by the Supreme Court was upheld. In both, the even-handedness of the rules of procedure and the inapplicability of ***Article 159 (2) (d)*** of the Constitution were re-emphasized. And in both, the purported notices of appeal were struck out. I find no reason to differ from those decisions, which I now apply to the application before us. It follows from the above reasoning that there is no merit in the application filed by the appellant and I would order that it be and is hereby dismissed.

With that holding, the second application by IEBC and the Returning Officer for striking out the record of appeal must succeed. This is simply because ***Rule 8*** of CAR 2017, which is couched in mandatory terms, requires that a record of appeal shall contain, *inter alia*, the notice of appeal. I have found the one purportedly filed was a nullity. The PO raised by the appellant is obviously misplaced since the application does not seek the striking out of the notice of appeal. There is no assertion that the application by IEBC was filed outside the time allowed by the rules for making an application for striking out a record of appeal. The PO is disallowed and the application to strike out is allowed.

Having decided the interlocutory matters in favour of the respondents, it would serve no purpose to delve into the merits of the main appeal which stands struck out by virtue of those findings. I would accordingly order that the record of appeal lodged in this Court on 12th March, 2008 be and is hereby struck out.

As Sichale, JA agrees, the following shall be the **Summary of final orders:**

1. The notice of motion by Apungu Arthur Kibira dated and filed on 16th March, 2018 be and is hereby dismissed.

2. The notice of motion by the Independent Electoral & Boundaries Commission and the Returning Officer, Luanda Constituency, Sylvester Ouma Omolo dated 26th March and filed on 27th March, 2018, be and is hereby allowed.

3. The notice of preliminary objection filed by Apungu Arthur Kibira against the notice of motion dated 26th March, 2018 be and is hereby rejected.

4. The record of appeal dated and filed in the Court of Appeal at Kisumu on 16th March, 2018 be and is hereby struck out.

5. The costs of the applications and the struck out appeal shall be borne by the appellant, Apungu Arthur Kibira.

Dated and delivered at Kisumu this 19th day of July, 2018.

P. N. WAKI

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF SICHALE, JA

I have had the advantage of reading the draft Judgment of Waki, JA and I am in full agreement with the reasoning and the result therein.

Dated and delivered at Kisumu this 19th day of July, 2018.

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR

DISSENTING JUDGMENT OF OTIENO-ODEK, J.A

1. I have had the opportunity to read the draft judgment of my Senior Brother Honourable Justice Waki JA. My brother has upheld the application by the 1st and 2nd respondents that the record of appeal filed in this matter is incompetent as it is based on a fatally defective Notice of Appeal. Consequently, the record of appeal been struck out. I dissent.

2. On 8th August 2017, the people of Luanda held election to elect Member of National Assembly for Luanda Constituency. While the appellant managed 11,304 votes, the 3rd respondent garnered 15,117 votes and was declared the duly elected Member of National Assembly. Dissatisfied with the result, the appellant filed an election petition before the Election Court sitting in Kakamega town. Upon hearing the parties, the learned trial judge, dismissed the petition vide judgment delivered at Kakamega dated 16th February 2018. Aggrieved, the appellant filed a Notice of Appeal dated 16th February 2018 at the Kakamega High Court. The Notice was filed at the Kakamega High Court Registry on 19th February 2018. A preliminary point was raised by the 1st and 2nd respondents that the Notice of Appeal was defective and incompetent as it was erroneously filed at Kakamega instead of being filed at the Court of Appeal Registry as required by **Rule 6 (1) of the Court of Appeal (Election Petition Rules) 2017**.

3. To advance the argument on incompetence of the Notice of Appeal, by Motion dated 26th March 2018, the 1st and 2nd respondents moved this Court to strike out the record of appeal on the ground that the record is grounded on the defective Notice of Appeal. The Notice of Appeal is alleged to be fatally defective as it was inappropriately filed at Kakamega High Court Registry instead of being filed at the Court of Appeal Registry. The 1st and 2nd respondents contend that the failure to file the Notice of Appeal in the appropriate registry rendered it defective, null and void; that record of appeal being grounded on a defective Notice of Appeal is incompetent.

4. In opposing the Motion, the appellant filed a Notice of Preliminary Objection dated 10th April 2018. He contended that the Notice of Motion violates the provisions of **Rule 19 (2) of the Court of Appeal (Election Petition) Rules 2017** and that the said Motion was filed out of time without leave of the Court.

5. The facts and submissions by counsel made in regard to the Notice of Motion are well captured in the judgment my Senior

Brother Justice Waki and I do not wish to rehash and regurgitate the same.

6. At the hearing of this matter, learned counsels Mr. B. Odeny and Mr. G.S. Imbaya appeared for the appellant. Learned counsel Mr. D. Musyoka appeared for the 1st and 2nd respondents while learned counsel Mr. Tollo R. M. appeared for the 3rd respondent.

7. Of relevance to the application to strike out the Notice of Appeal is the provisions of **Rules 6 (2)** and **6 (3) (c)** and **6 (5) of the Court of Appeal (Election Petition) Rules, 2017**. The Rules provide:

"6 (2): A notice of appeal shall be filed within seven days of the date of the decision appealed against.

6 (3) (c): A notice of appeal shall contain a request that the appeal be set down for hearing in the appropriate registry.

6(5): The effect of any failure to comply with these Rules shall be a matter for determination at the Court's discretion subject to the provisions of Article 159 (2) (d) of the Constitution and the need to observe the time set by the Constitution or any other law."

8. I am cognizant of the legal precept that a Notice of Appeal occupies a central place and without it, there can be no appeal. In **Abok James Odera T/A A.J. Odera& Associates, Nairobi Civil Appeal NO. 161 of 1999,** it was held that a Notice of Appeal is what gives this Court jurisdiction to hear an appeal. In **Boy Juma Boy & 2 Others p-v- Mwamlole Tchappu Mbwana & Another 2014 eKL*R*** this Court held that:

"… **The jurisdiction of this court as an appellate court can only be triggered through the filing of the notice of appeal. In the absence of such notice the court has no proper basis upon which its jurisdiction can be anchored.**"

9. In **Nicholas Kiptoo arap Korir Salat -v- IEBC & 7 Others, [2014] eKLR,** the Supreme Court stated that a "Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite."

10. I am aware of recent decisions of this Court where a Notice of Appeal has been held to be incompetent and the record of appeal has been struck out. In **Lesirma Simeon Saimanga -v- Independent Electoral and Boundaries Commission & 2 others [2018] eKLR**, this Court expressed *"…that our jurisdiction is invoked by the filing of a valid Notice of Appeal. It follows that an invalid Notice of Appeal cannot confer jurisdiction upon the Court."* In the **Lesirma case (supra),** the pertinent facts as stated in the Court's Ruling were as follows:

"Firstly, it is clear from the provision of Rule 6 of the Rules that a litigant who desires to file an appeal arising from an election dispute, has to file the Notice of Appeal in the Court of Appeal registry within 7 days of the date of the decision. In the definition section of the Court of Appeal (Election Petition) Rules, "registry' means the "registry of the court and includes a sub registry". In the same section, Court is defined as the Court of Appeal. It is admitted that the appellant herein did not file the Notice of Appeal in the Court of Appeal Registry, but instead filed it at the High Court Registry at Nyahururu. In addition, the notice was not in the format as provided in Rule 6(5) and it did not set out the grounds of appeal as contemplated therein…...That being the position, there is no valid appeal before us as it is only a proper Notice of Appeal that can give rise to the filing of an appeal." (Emphasis supplied)

11. I am also aware of **Musa Cherutich Sirma -v- Independent Electoral and Boundaries Commission & 2 others [2018] eKLR**, where in its Ruling dated 31st May 2018 this Court expressed itself as follows:

"A summary of the grounds in support of both motions is that judgment appealed from was delivered on 2nd March, 2018 where the petition was dismissed with costs; that the appellant in the appeal being dissatisfied by that decision proceeded to file a notice of appeal in the High Court at Kabarnet on 9th March, 2018. It is said that in doing so the appellant flouted the rules regarding election petition appeals as laid down in the Court of Appeal (Election Petition) Rules 2017 (hereafter "the rules"); that rule 6 of the rules is couched in mandatory terms in prescribing that notices of appeal with regard to election petitions shall be lodged in this Court; that there is no proper or any appeal therefore before this Court given that the notice of appeal was not filed in this Court; that election petitions is a creature of a special jurisdiction where ordinary civil process is inapplicable given the time lines prescribed and the rules that have been formulated to govern them as such strict

compliance with the regulations should not be an option or left to the discretion of litigants…….

As we have shown, and as confirmed by the Supreme Court of Kenya in Nicholas Kiptoo Arap Salat (*supra*), a notice of appeal is a primary document in an appeal without which an appellant cannot have or sustain the appeal. Needless to say, we are bound by decisions of the Supreme Court. Again, as we have shown earlier in this ruling, the rules define a notice of appeal as a notice lodged in accordance with rule 6 of the rules. That rule requires a person who desires to appeal from the decision of the High Court in an election petition to file a notice of appeal in the registry, and "registry" is defined as the registry of this Court. That notice shall, amongst other requirements, be in Form EPA1 which form is set out in the schedule and which we earlier on reproduced in full in this ruling. The applicants have urged us to strike out the record of appeal because according to them the notice of appeal contained in the record is irregular in form and substance. We have reproduced the notice that was filed by the 3rd respondent at the High Court of Kenya at Kabarnet……

We are satisfied that the record of appeal filed by the 3rd respondent which contains an invalid notice of appeal is irregular and incompetent and should be struck out. The appeal is accordingly struck out and we award costs of the application and of the appeal to the 1st and 2nd Respondents/Applicants as well as the 3rd Respondent/Applicant.

12. On my part, in the instant matter, I have considered the Notice of Motion and its supporting affidavit and the grounds in support thereof. I have also considered the replying affidavit and the Notice of Preliminary Objection filed in the matter. I have also read the draft judgment of my Brother and I hereby dissent. I have reviewed judicial decisions in which a Notice of Appeal filed at an inappropriate registry has been held to be incompetent. I am convinced that filing a Notice of Appeal at a wrong registry does not *per se* go to the root and merits of an intended appeal; the filing of a Notice of Appeal at a wrong registry is an error curable at the discretion of this Court pursuant to **Rule 6 (5) of the Court of Appeal (Election Petition) Rules 2017;** this Court is enjoined **by Article 159 (2) (d) of the Constitution** to administer substantive and not procedural and technical justice.

13. I am cognizant of the decision of this Court in **Japthet Muroko & another -v- IEBC & 2 others, Election Petition Appeal No. 1 of 2018 Consolidated with EP Appeal No. 3 of 2018,** where it was expressed that:

"Towards that end, we have absolutely no doubt that the court has inherent power to dismiss or strike out a petition where circumstances so demand. (See Chelaite v. Njuki & 2 Others (No.3) [2008] 2 KLR (EP) 209."

14. In my view, the filing of a Notice of Appeal at a wrong registry and within the time stipulated for taking any action should not *per se* render the Notice and Record of Appeal null and void. Before striking out a Notice of Appeal filed at an inappropriate registry, I believe that there are various considerations to be taken into account. First, whether the Notice of Appeal was filed and served within time. Second, whether a reasonable person being served with the Notice and reading it understands what it means. How would a reasonable person receiving the Notice take it to mean" If, in all the circumstances of the case and looking at the Notice as a whole, the person served would say to himself: of course it must mean that the appellant intends to appeal and has filed a Notice of Appeal; then, the purpose of the Notice has been achieved. If, on the other hand, a reasonable person served with the Notice would say, I cannot tell from the document itself whether the appellant intends to appeal and I shall have to make inquiries, then, the Notice is fatally defective. The third consideration is whether the respondent or person served has suffered any prejudice by the Notice being filed at a wrong registry. If no prejudice has been suffered, the Notice of Appeal filed at a wrong registry should not be null and void. I am fortified in this view by dicta in **Costellow -v- Somerset County Council (1993) IWLR 256, 263** where Sir Thomas Buigham, M. R. expressed that a litigant should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent. Fourth, if the Notice of Appeal that was filed at an inappropriate registry was transmitted and received at the correct/appropriate registry, then the Notice should not be incompetent, null and void. In the instant case, there is no evidence that the Notice of Appeal filed at Kakamega was never received at the appropriate Court of Appeal registry within the time stipulated for filing the requisite Notice of Appeal.

15. In arriving at this dissent, I am persuaded and guided by parity of reasoning from various judicial decisions. In **Karaba -v- Gitahi (2010) 1 KLR 321,** Warsame J. (as he then was) observed that the court has no jurisdiction to strike out an election petition; that striking out of pleadings is draconian which could only be resorted to when the jurisdiction of the court had been properly invoked. I am also persuaded by the Ruling of Githinji, JA in **Andrew Toboso Anyanga -v- Mwale Nicholas Scott Tindi & 3 others [2017] eKLR** where the learned Judge considered the application of **Rule 6 (5) of the Court of Appeal (Election) Petition Rules, 2017**. The Judge expressed himself as follows:

"[12] *On the question of delay, this is a case where the applicant filed a notice of appeal a day after the impugned decision of the*

election court and served the notice of appeal timeously. The notice of appeal was however, filed under the wrong provisions of the law. The notice of appeal so filed served the fundamental purpose of a notice of appeal - that is to give the respondents notice that the litigation was not over and that the applicant would appeal against the decision. The notice of appeal is still on record as it has not been struck out. The purpose of the application is to enable the applicant to file a complaint notice. In practical terms, the period of delay should be computed from the time the applicant evinced an intention to appeal and not when he filed a complaint notice though out of time.

The filing of a notice of appeal under the wrong rules is a mere procedural technicality in terms of Article 159(2) (d) of the Constitution which should not deny the applicant a right to file an appeal. The circumstances of this case clearly demonstrate that the applicant's advocate acted under a genuine mistake of the operative procedural rules. This is excusable as this was a period of transition from the operative general Court of Appeal Rules to specialized Election Petition Rules.

[13] ***If the application is allowed, the timelines for hearing the election petition will not be greatly affected as the period stipulated for hearing the election petition appeals is six months.***

[14] ***It is not apparent that if the application is allowed, the respondents particularly the 1st respondent, would suffer any undue prejudice occasioned by the delay since a notice of appeal was served immediately after the decision of the election court. The respondents must have arranged their affairs in relation to the impugned election soon after they were served with the non-compliant notice of appeal. Any prejudice that may have been occasioned by this application can adequately be compensated by an award of costs.***

[15] ***I am satisfied that, in the circumstances of this case, the Court should exercise its discretion in favour of allowing the application.***

Accordingly, I allow the application and extend time for filing and serving the notice of appeal as prayed."

16. More recently, I am persuaded by dicta from the Supreme Court in **Raila Amolo Odinga & another -v- Independent Electoral and Boundaries Commission & 2 others [2017] eKLR**. In the **Raila 2017 case**, an application was made to strike out documents and annexures that were filed and/or served out of time contrary to Rule 10 as read together with Rule 12 of the Supreme Court (Presidential Election Petition) Rules 2017. In declining to strike out the documents, the Supreme Court in a Ruling dated 27th August 2017 expressed itself as follows:

"[8] It is the applicant's contention that failure to serve the said documents and annexures in time will seriously prejudice his ability to respond to the contents therein, thus undermining his right to a fair hearing. The applicant's assertion is not an idle one. Indeed, the Rules of this Court must be adhered to by all litigants at all times to ensure the orderly and expeditious conduct and disposal of disputes that come before it. However, in view of the findings and conclusions we have made, and in the interests of justice to all parties in this petition, we are inclined to invoke our inherent jurisdiction in favour of retaining the documents and annexures in question on the Court record…." (Emphasis supplied)

17. Further, I am further persuaded by the Supreme Court dictum in **Independent Electoral & Boundaries Commission -v- Jane Cheperenger & 2 others [2018] eKLR.** The Court in *extenso* expressed itself as follows:

"[18] The impugned Court of Appeal decision which is the subject of this appeal was delivered on 20th December, 2013. Ordinarily and in accordance with Rules 31 and 33 of the Supreme Court Rules, 2012, where a party is aggrieved by a decision of the Court of Appeal and desires a further appeal to the Supreme Court, such a person should file a Notice of Appeal within 14 days after the delivery of the Court of Appeal decision. The Notice of Appeal signifies an intention to appeal. Upon the filing of the Notice of Appeal, the intending appellant should file his petition and record of appeal within 30 days. In this case, the petitioner did not file the Notice of Appeal within time necessitating it to approach this Court on 16th September, 2014 seeking an extension of time to file the said Notice of Appeal……

[24] We however acknowledge that the petitioner's submissions were filed out of time. Whereas this would have given Mr. Ndettoh a basis, if at all, for objecting, it is not upon Mr. Ndettoh to decide on the punitive measure to befall upon a party who fails to comply with the directions of the Court, as every other party has a respective individual obligation to honour Court's directions. We underscore the importance of complying with Court Orders and directions given especially with

regard to filing and service of documents within the requisite time. That notwithstanding, we take cognizance of Rule 53 of the Supreme Court Rules, 2012 which gives us power to *extend the time limited by the Rules, or by any decision of the Court.* **To this extent therefore, the late filing of submissions is not patently incurable."** (Emphasis supplied)

18. I am further persuaded by the recent decision of this Court in **John Munuve Mati -v- Returning Officer of Mwingi North Constituency & Others, Nairobi Election Petition Appeal No. 5 of 2018** where this Court dismissed an application to strike out a Notice of Appeal for want of service. In declining to strike out the Notice of Appeal, this Court expressed itself as follows:

"…...noting that it is at the discretion of this Court to determine the effect of non-compliance with Rules, we have considered the effect of the Appellant's failure to file the Notice of Appeal within seven days as required by Rule 6 (2). No evidence was adduced that any party has been prejudiced by non-compliance with Rules 6 (2) and 6 (5) of the Court of Appeal (Election Petition) Rules. Guided by the need to ensure that justice is administered without undue regard to technicalities, we hereby exercise our discretion and decline to strike out the notice of appeal dated 13th January 2018."

19. Now turning to the instant matter, in my considered view, the filing a Notice of Appeal at a wrong or inappropriate registry does not necessarily and automatically affect the competence and validity of the Notice. The rule requiring a party to file a Notice of Appeal at a particular registry or court is merely directory. An error in designating or filing the Notice at an inappropriate registry should not be fatal to the appeal. An intending appellant's intent is clear in filing the Notice of Appeal - the intention is to appeal the decision of the trial court. The intending appellant has no intention to abandon his appeal. The Rule directing a party on where to file the Notice of Appeal is not aimed at creating finality of the judgment of the trial court.

20. Striking out a Notice of Appeal on the basis that it has been filed at a wrong or inappropriate registry annuls, reverses and countermands the right to appeal. The net effect is denial of the right to appeal. The right to appeal, which an intending appellant has availed him/herself by filing a Notice of Appeal (albeit at an inappropriate registry) is a right not litigated by the appeal. The filing of Notice of Appeal preserves the intending appellant's right to appeal which he/she has already perfected by filing the Notice of Appeal within the requisite period.

21. Comparatively in the United States of America, it has been held that a notice of appeal shall be liberally construed in favor of its sufficiency. The notice need not specify the court to which the appeal is taken and shall be deemed to be an appeal to the Court of Appeal for the district. In **Luz v. Lopes (1960) 55 Cal. 2d 54, 59 [10 Cal. Rptr. 161, 358 P.2d 289]**, the California Supreme Court stated, "Under this rule, and prior to its adoption, it is and has been the law of this state that notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced." **(Accord, Vibert v. Berger (1966) 64 Cal. 2d 65, 67 [48 Cal. Rptr. 886, 410 P.2d 390]; Smith v. Ostly (1959) 53 Cal. 2d 262, 264 [1 Cal. Rptr. 340, 347 P.2d 684]; Kellett v. Marvel (1936) 6 Cal. 2d 464, 472-473 [58 P.2d 649].) (See also D'Avola – v- Anderson, California Court of Appeal 1996 [No. B093311. Second Dist., Div. Five. Jul 12, 1996.]**

22. The Malaysia Court of Appeal in **Redang Paradise Vacation SDN BHD – v- Yap Chuan Bin, Civil Appeal No. T-04 (W) 326-09/2016** expressed that cases now have to be heard on merits and cannot be dismissed for non-compliance of rules unless there are exceptional reasons to do so. The court further expressed itself as follows:

"it is not an option anymore for the courts to strike out a matter for non-compliance of the rules without giving an opportunity to the litigant to regularize the proceedings or to condone the irregularity by the fiat of the court. It is only in extremely rare cases where the non-compliance cannot be condoned at all, the court will be obliged to strike out the matter. Those are the cases where the respondent can demonstrate prejudice as well as can establish that the breach cannot be compensated by costs."

23. In the South African High Court case of **Cash Crusaders Franchising (PTY) Ltd. -v- Luvhomba Legal Axe CC & 5 Others, Case No. 1052/2012; 2970/2013**, it was expressed that it does not automatically follow that an irregular notice of appeal should be set aside. There must be substantial prejudice to the other party.

24. In my view, the filing of a Notice of Appeal at an inappropriate registry is not a jurisdictional question. It is directional. What is jurisdictional and mandatory is the timely filing of the Notice of Appeal. Unless the appealing party has filed a Notice of Appeal, an appellate court lacks jurisdiction over the appeal and must dismiss it. The fact that a court can extend time to file a Notice of Appeal *ipso jure* means that the unless extension of time is expressly prohibited by the Constitution or any other written law, the court has

discretion to extend time and excuse any non-compliance affecting the Notice of Appeal. I hasten to add that the jurisdiction of the Court of Appeal in election petition appeals is not conferred by the Election Petition Rules 2017. This Court's jurisdiction exists with or without the Election Petition Rules of 2017 and consequently, non-compliance with the Rules is a procedural and not a jurisdictional issue.

25. I am fortified in this view by dictum from the Supreme Court in **Samuel Kamau Macharia & another –v- Kenya Commercial Bank Limited & 2 others [2012] eKLR** where the Court expressed:

(70) ……The Supreme Court Act was enacted pursuant to the provisions of Article 163 (9) of the Constitution. Indeed, the Preamble to the Act states that it is "AN ACT of Parliament to make further provision with respect to the operation of the Supreme Court pursuant to Article 163(9) of the Constitution." What is the proper province of Article 163 (9) of the Constitution" Does the Article contemplate a situation where Parliament can confer further jurisdiction upon the Supreme Court" We hold that it doesn't. The Act contemplated by Article 163(9) is operational in nature. Such an Act was intended to augment the Rules made by the Supreme Court for the purpose of regulating the exercise of its jurisdiction. It is an Act that must confine itself to the administrative aspects of the Court. It is a law that addresses the manner in which the Supreme Court exercises its jurisdiction as conferred by the Constitution or any other legislation within the meaning of Article 163 (3) (b) (ii). Such an Act was never intended to create and confer jurisdiction upon the Supreme Court beyond the limits set by the Constitution….

26. Persuaded by the dictum from in **S. K. Macharia case (supra),** I am convinced that the Court of Appeal (Election Petition) Rules 2017 is operational and administrative in nature. The Rules address the manner in which the Court of Appeal exercises its jurisdiction in election petition appeals. By itself, the Rules do not confer jurisdiction on the Court to hear election petition appeals. This is clear from **Regulation 3** of the Rules which stipulate that the object and purpose of the Rules is to facilitate the just, expeditious and impartial determination of election petition appeals in exercise of the Court's appellate jurisdiction under Article 164(3) of the Constitution.

27. *Rule **6 (3) (c**)* of the **Court of Appeal (Election Petition) Rules** simply states that the notice of appeal shall contain a request that the appeal be set down for hearing in the appropriate registry. Appropriate registry is defined to be the Court of Appeal Registry. It is my view that the place to file the Notice of Appeal is a directional issue not jurisdictional and it is in this context that ***Rule 6 (5)*** vests discretion on this Court to determine the effect of non-compliance with any of the Rules. At this point, it is worth posing a rhetorical question. Can a court strike out a pleading on an issue upon which the court has discretion" J*urisdictional* failings are non-excusable. Jurisdictional mistakes cannot be waived. Because ***Rule 6 (5)*** of the **Court of Appeal Election Petition Rules** envisages non-compliance, it follows that the election petition rules are rules of procedure, they are not jurisdictional. Where non-compliance is not intended to delay, does not prejudice the adverse party, is not a flagrant breach of the rule and there is satisfactory explanation for non-compliance, exercising discretion to strike out an appeal negatively impacts on the right to a hearing.

28. In the instant matter, I am satisfied for the following reasons that the filing of the Notice of Appeal at an inappropriate registry does not make the Notice incompetent. First, in the context of election dispute resolution, not every infraction or non-compliance with a constitutional principle leads to invalidation of the declared results. (See paragraph 209 in **Raila Amolo Odinga & Another v. IEBC & Others SC Election Petition No. 1 of 2017**). Second, ***Section 83*** of the **Elections Act** is clear that not every infraction or non-compliance with Elections Act and Regulations leads to nullification of results. Third, even the Court of Appeal (Election Petition) Rules, 2017, Rule 6 (5) make it clear that it does not automatically follow that every non-compliance with the Rules is fatal - the Court has a discretion to determine the effect of non-compliance. If non-compliance with the Constitution and Elections Act does not necessarily lead to invalidation of elections results, why should non-compliance with procedural rules contained in the Court of Appeal (Election Petition) Rules 2017 lead to striking out an election petition appeal" On parity of reasoning, I am of the considered view that a court should exercise restraint before striking out a Notice and Record of Appeal. The Court should strive to preserve the right of a party to a hearing based on merit. Any irregularity in the Notice of Appeal should be liberally construed to preserve the sufficiency of the Notice.

29. Having said all the foregoing, a distinction must be drawn between instances where there is completely no notice of appeal or the notice is filed out of time which is a jurisdictional matter and a defective notice of appeal filed within time which is an irregularity issue. The legal effect of any irregularity or defect in or on the notice of appeal must be determined on a case by case basis taking into account the nature of the defect or irregularity, the delay in making an application to regularize the same, the prejudice if any to the opposing party, the sufficiency of any explanation given and any other relevant consideration. The reasons for my dissent in this matter is specific to the facts of this case particularly that the Notice of Appeal was filed within time at an inappropriate registry and no prejudice to the opposite party has been demonstrated. The impugned notice of appeal in this matter is

an irregularity not a jurisdictional issue.

30. Guided by the Ruling of the Supreme Court dated 27th August 2017 in **Raila Amolo Odinga & another -v- Independent Electoral and Boundaries Commission & 2 others [2017] eKLR** and noting that it is at the discretion of this Court to determine the effect of non-compliance with Rules, I have considered the effect of the appellant's failure to file the Notice of Appeal at the appropriate registry as required by ***Rule 6 (2)***. No evidence was adduced that any party has been prejudiced by non-compliance with ***Rules 6 (2)*** and ***6 (5)*** of the **Court of Appeal (Election Petition) Rules**. Guided by the need to ensure that justice is administered without undue regard to technicalities, I would exercise my discretion and decline to strike out the Notice of Appeal dated 16th February 2018 and filed at Kakamega High Court Registry. By the same token, I would extend the time for filling, serving and lodging the Notice of Appeal in respect of the Judgment and Decree of the High Court dated 16th February 2018 and further Order that the Notice of Appeal dated 16th February 2018, filed and lodged at Kakamega be deemed to have been filed, lodged and served within time. For the foregoing reasons, I dissent and now proceed to disposition of the main appeal.

DISPOSTION OF THE MAIN APPEAL

31. Aggrieved by the judgment of the trial court dismissing his election petition, the appellant lodged the instant appeal and filed a list of contested issues for determination by this Court as follows:

"(a) Whether the judgment of the trial court complied with the letter of the law.

(b) Whether the Court of Appeal should examine and evaluate the evidence on record.

(c) Whether the evidence emanating in the course of trial ought to be considered by this Court in its judgment.

(d) Whether the trial court misconstrued itself in interpreting the electoral laws.

(e) Whether the trial court was wrong in disregarding the appellant's exhibits.

(f) Whether the trial court erred in declining to order for recount and scrutiny of the ballots casts and

(g) Whether the costs awarded to the respondents was manifestly excessive and not supported by any known principles of law."

32. The respondents on their part filed the following as the contested issues for determination:

(a) Whether the grounds in the memorandum of appeal are in compliance with Rule 86 (1) of the Court of Appeal Rules, 2010, which require the grounds of objection to be concise and to specify the points which are alleged to be wrongly decided.

(b) What is the consequence of non-compliance with the Rule"

(c) Whether the learned judge was right in disregarding the evidence adduced and submissions made in respect of un-pleaded issues.

(d) Whether the learned judge applied the correct standard of proof in deciding the matter.

(e) Whether the costs awarded to the respondents were excessive."

33. I have reflected on whether to consider and determine the contested issues urged in this appeal. I recognize that this is a dissenting opinion. *Prima facie,* the grounds urged and cited above do not evince matters of jurisprudential moment. It would be an academic journey and an exercise in futility to waste precious judicial time considering contestations that are in vain. I would be pre-empting consideration and determination of the issues raised.

34. Notwithstanding the foregoing, it is apt to cite comparative jurisprudence relevant to some of the contested issues. In **Jjyoti**

Priya Malick -v- State of West Bengal, 2001, Cr. L.J. 3101, it was held that simply registering the case of violence with the police is not enough to prove that electoral violence had taken place. The Supreme Court of India in **Kalyan Kumar Gogoi -v- Ashutosh Agnihotri & another CIVIL APPEAL NO. 4820 OF 2007** observed that:

"The question as to whether the infraction of law has materially affected the result of the election or not, is purely a question of fact. No presumption or any inference of fact can be raised that the result of the election of the returned candidate must have been materially affected. The fact that such infraction had materially affected the result of the election must be proved by adducing cogent and reliable evidence."

35. The Supreme Court of India in **Damodar Lal -v- Sohan Devi & Others, CA No. 231 of 2015** explained that a wrong reading of evidence alone does not render a decision perverse and that if there is some evidence on record which is acceptable and which could be relied upon, the conclusions of the trial court cannot be treated as perverse and its findings cannot be interfered with. It was explained:

"Even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity."

36. In the instant matter, I hesitatingly down my tools and shall not consider the merits of the appeal as this would be an exercise in vain. As I have expressed above, it is my considered opinion that the Notice and Record of Appeal filed in this matter are properly before this Court and this Court should hear the main appeal on merit. Given that I am in the minority, the judgment of the Court is as pronounced by the majority.

Dated at Kisumu this 19th day of July, 2018.

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR