



Case Number:	Civil Appeal 14 of 2013
Date Delivered:	20 Aug 2013
Case Class:	Civil
Court:	Court of Appeal at Nyeri
Case Action:	Judgment
Judge:	Alnashir Ramazanali Magan Visram, Martha Karambu Koome, James Otieno Odek
Citation:	Nderitu Gachagua v Thuo Mathenge & 2 others [2013] eKLR
Advocates:	-
Case Summary:	<p>An Election Petition can be filed earlier than the period prescribed in both the Constitution and the Elections Act</p> <p>Nderitu Gachagua v Dr. Thuo Mathenge and 2 others</p> <p>Civil Appeal No. 14 of 2013</p> <p>Court of Appeal at Nyeri</p> <p>By Alnashir Visram, Martha Koome, J. Otieno-Odek JJA,</p> <p>On August 20, 2013</p> <p>Reported by Emma Kinya Mwobobia & Obura Paul Michael</p> <p>Brief facts:</p>

This was an interlocutory appeal from the ruling of the High Court at Nyeri on the competence of a Gubernatorial Election Petition filed therein. The fulcrum of the appeal was that the Election Petition filed in the High Court was incompetent on grounds that it was filed prematurely before the publication of the election results through a gazette notice dated 13th March 2013. That the declaration of the results not having taken place until 13th March, 2013, the Petition was incompetently before the High Court, and that the Petitioner had no cause of action.

However the High Court judge after having declared he had no jurisdiction to handle the matter, invoked the court's inherent jurisdiction and went ahead to hear the matter.

The appellant brought to the attention of the Court of Appeal the inconsistencies between the Elections Act and the Constitution with regard to the time frame within which an Election Petition can be filed. Whereas the Constitution did not provide for the filing of an Election Petition after gazettement of election results, the Elections Act provided for it.

Jurisdiction- *inherent jurisdiction- High Court's inherent jurisdiction- where the High Court Judge initially declared he had no jurisdiction to hear a matter, only to later invoke it's inherent jurisdiction and hear the same- when can inherent jurisdiction be invoked?- Constitution of Kenya 2010, article 159*

Statute- *statute Interpretation- statute interpretation on election petitions- where the time frame for filing an election petition was questioned- where the Constitution provided for 28 days after declaration of results, while the elections Act provided for 28 days after publication of election results in the Kenya Gazette- appellant alleged a conflict between the two laws- whether the Elections Act was in conflict with the Constitution in the circumstances- Constitution of Kenya 2010, article 87(2)- Elections Act, sections 76(1), 77*

Issues:

1. Whether there was a conflict between Article 87(2) of the Constitution and section 77 of the Elections Act on one hand, and section 76(1)(a) of the Elections Act with regard to the time frame within which an Election Petition can be filed.
2. Whether an Election Petition should be filed after the publication of election results by the Independent Electoral and Boundaries Commission (IEBC) in the Kenya gazette.
3. Whether the High Court judge erred in entertaining the petition despite his finding that he had no jurisdiction to hear the same petition.
4. Whether a court which had no jurisdiction over a matter can invoke its' inherent jurisdiction to entertain the same.

Article 87 of the Constitution of Kenya 2010, provides:

87 (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

(3) Service of a Petition may be direct or by advertisement in a newspaper with national circulation.

Section 76(1)(a) of the Elections Act provides:

76 (1) A petition

a) to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of

presentation.

Held:

1. The jurisdiction to declare an Act of Parliament inconsistent with the Constitution went with interpretation of the Constitution; and that the constitutionality of an Act of parliament had to be construed *vis-a-vis* the Constitution. Therefore, in considering whether Section 76(1)(a) of the Elections Act was inconsistent with Article 87(2) of the Constitution the starting point had to be, of necessity, the interpretation of various provisions of the Constitution to discern the intention of the framers of the same in respect of Article 87.
2. The construction of the Constitution was governed by various principles:
 - a. It ought to be interpreted in a manner that promotes its purpose, values and principles; advances the rule of law and contributes to good governance.
 - b. The spirit and tenor of the Constitution which embodies the ideals, aspirations and values of the Kenyan citizens must preside and permeate the process of interpretation. In this regard it is to take into account the language of the various provisions of the Constitution.
 - c. It ought to be given a purposive interpretation so that the objectives of Article 87 are realized.
 - d. A court should always take into account the principle of harmonization whenever it interprets provisions of the Constitution. Where the Constitution contains several provisions relating to an issue these provisions must be looked at as a whole.
 - e. It compels a broad and flexible approach to interpretation.
3. Article 87(2) of the Constitution established the broad parameters of electoral disputes, and donated the power to the legislature to enact detailed legislation establishing

mechanisms for the timely settling of electoral disputes. This the legislature had done through the enactment of the Elections Act. The intention of the framers of the Constitution was that an Election Petition challenging election results ought to be filed within 28 days after declaration of the election results by the IEBC.

Therefore, the Constitution provided a time line within which an Election Petition ought to be filed, and left it entirely to the Legislature to determine the medium and form of the declaration envisaged therein.

4. It was the intention of the framers of the Constitution that the medium and form of declaration of election results by the IEBC should be provided for in the Elections Act.
5. The intention of the Elections Act was similar to the intention of Article 87 of the Constitution that was the establishment of mechanisms suitable for timely resolution of electoral disputes.
6. The intention of framers of the Constitution in establishing time frame within which an election petition ought to be filed was to address the mischief of litigants who filed petitions late and not those who filed early. The court took judicial notice of the fact that historically, and from time immemorial, majority of the Election Petitions were based on a common complaint – that they were filed too late, or served too late. That there has never been a case where the complaint was that it was filed too early. The court was not informed of any prejudice occasioned to any of the other parties. On the contrary they had heads-up and more time to respond.
7. The High Court Judge misdirected himself by holding that he had no jurisdiction to entertain the Petition simply because it was filed five days too early. However, he again misdirected himself further by invoking his inherent jurisdiction to save the Petition. This was because jurisdiction of the court flowed from the Constitution and statute and the court could not arrogate to itself jurisdiction it didn't have.
8. The High Court all along had jurisdiction to deal with the Petition, and need not have,

	<p>and could not have, invoked its inherent jurisdiction either under the Civil Procedure Act or Article 159 of the Constitution.</p> <p><i>Orders:</i></p> <p><i>Appeal dismissed, cross appeal allowed.</i></p> <p><i>Each party to bear his own costs.</i></p>
Court Division:	Civil
History Magistrates:	-
County:	Nyeri
Docket Number:	-
History Docket Number:	H.C Election Petition No. 1 of 2013
Case Outcome:	Dismissed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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IN THE COURT OF APPEAL

AT NYERI

CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL NO. 14 OF 2013

BETWEEN

NDERITU GACHAGUA APPELLANT

AND

DR. THUO MATHENGE 1ST RESPONDENT

RETURNING OFFICER NYERI COUNTY 2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 3RD RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nyeri

(Wakiaga, J.) dated 10th June, 2013

in

H.C Election Petition No. 1 of 2013)

JUDGMENT OF THE COURT

1. Before us is an interlocutory appeal from the ruling of the High Court (Wakiaga, J.) dated 10th June, 2013 wherein a preliminary objection challenging the competence of an Election Petition filed therein and the jurisdiction of the High Court to entertain the same was partly upheld.

2. The genesis of this appeal is that in preparation of the concluded gubernatorial elections, the 3rd respondent received nomination papers from the various candidates who wished to vie for the Governorship seat in the 47 Counties. The 1st respondent who was vying for the Nyeri County Governor's seat together with his running mate, Dr. Geoffrey Kamau Kibui, submitted their nomination papers to the 3rd respondent. The 3rd respondent vide the gazette notice dated 17th February, 2013 published the names of all the candidates and their running mates who were vying for the Governorship seat in the 47 Counties. However, the 3rd respondent erroneously listed one Geoffrey Gitonga Ndegwa as being the 1st respondent's running mate as opposed to Dr. Geoffrey Kamau Kibui.

3. Thereafter, the 1st respondent made numerous requests to the 2nd and 3rd respondents to correct the

above mentioned error. This was not done, and on the election date, 4th March, 2003, the ballot paper erroneously showed Mr. Geoffrey Gitonga Ndegwa as the 1st respondent's running mate.

4. The 1st respondent is convinced that he lost the Governorship seat for Nyeri County because of the above mentioned error by the 3rd respondent. According to him, the voters believed that he had intentionally misled them that Dr. Geoffrey Kamau Kibui was his running mate during his campaign so as to get their votes. He also believed that the 3rd respondent had discriminated against him because firstly, it refused to correct the error despite being notified of the same in good time; and secondly, the 3rd respondent failed to suspend the elections in Nyeri County after it discovered the error on the election date unlike what it did in five other wards in Nyanza County where it had discovered similar errors.

5. Consequently, the 1st respondent filed an Election Petition (the Petition) in the High Court on 8th March, 2013 seeking *inter alia* declarations that the appellant was not duly elected; that the gubernatorial elections in respect of the Nyeri County Governor's seat was null and void; and that the position of the Nyeri County Governor be declared vacant and fresh elections therein be held. Subsequently, on 18th March, 2013 the 1st respondent filed a Notice of Motion application seeking an interlocutory injunction restraining the 3rd respondent from gazetting the appellant as the duly elected Governor of Nyeri County.

6. In response, the appellant and the 2nd and 3rd respondents objected to the High Court's jurisdiction to entertain the Petition which they argued was filed prematurely on 8th March, 2013, well before the publication of the gubernatorial election results through the gazette notice dated 13th March, 2013. They maintained that the Petition was filed contrary to the provisions of **Article 87(2)** of the **Constitution** and **Section 76(1)(a)** of the **Elections Act, 2011** which only granted jurisdiction to the High Court to deal with Election Petitions once the election results had been declared by the 3rd respondent. It was their case that the declaration of the results not having taken place until 13th March, 2013, the Petition was incompetently before the High Court, and that the Petitioner had no cause of action. Upon filing of the preliminary objection to that effect, the High Court (Wakiaga, J.) gave directions that the same be heard and determined, prior to the hearing of the Petition.

7. The appellant and the 2nd and 3rd respondents in addition to the oral submissions made by their respective counsel, filed written submissions in support of the preliminary objection at the High Court. The appellant argued that the Petition was incompetent and unsustainable having been filed before gazetting of the gubernatorial election results by the 3rd respondent. It is not in dispute that the said results were gazetted on 13th March, 2013. Nor is it in dispute that the Petition was filed on the 8th March, 2013, five days before gazetting.

8. The appellant argued that by virtue of the provisions of **Article 87(2)** of the **Constitution** and **Section 76(1)(a)** of the **Elections Act**, an Election Petition challenging the results of an election could only be filed after formal declaration of the results by the 3rd respondent; that no such formal declaration could be deemed to have taken place except through publication of the results in the Kenya Gazette; that any declarations of the results, such as those made by the County Returning Officers were simply announcements of provisional results in accordance with **Regulation 87(10)** of the **Elections (General) Regulations, 2012**; that the certificate issued to elected candidates by the County Returning Officer under **Regulation 87(3)(c)** of the **Elections (General) Regulations** was only indicative of the bearer's election and that it was not in any way a confirmation of the election results; and that the process of tallying, announcement of provisional results and issuance of certificates by the County Returning Officer merely formed part of the process leading to the ultimate declaration of results by the 3rd respondent, through the Kenya Gazette.

9. The appellant urged that the Petition having been filed five days ahead of the publication of the

results in the Kenya Gazette, the same ought to be struck out as no cause of action had accrued; and that the High Court had no jurisdiction to hear the same.

10. The appellant argued that **Section 76(1)(a)** of the **Elections Act** was enacted to complement **Article 87(1)** of the **Constitution** which placed an obligation on Parliament to enact legislation establishing mechanisms for timely settling of electoral disputes. It was the appellant's contention that the 1st respondent would not suffer any prejudice if the Petition was struck out since a similar petition being Petition No. 2 of 2013 had been properly filed before the High Court. The appellant urged the High Court to strike out the Petition.

11. The 2nd and 3rd respondents supported the appellant's case, arguing that the Petition having been filed five days ahead of the declaration of results, was incompetent, fatally defective, unconstitutional and in breach of the provisions of **Article 87(2)** of the **Constitution** and **Section 76(1)(a)** of the **Election Act**. They submitted that an elected candidate is constitutionally recognized as a holder of the office only after publication of the election results in the Kenya Gazette; and that it is only then that his/her election can be challenged in court.

12. The 2nd and 3rd respondents argued that in the context of **Articles 87(2) & 88(4)(e)** of the **Constitution** the High Court acquired jurisdiction to entertain Election Petitions challenging election results only after the results had been declared by the 3rd respondent. Before such declaration the jurisdiction to settle electoral disputes lay with the 3rd respondent. They submitted that there was no remedy that could cure the defective Petition and that it ought to be struck off.

13. The 1st respondent, in opposition to the preliminary objection maintained that the Petition was properly before the court. He submitted that the **Constitution** had not placed any requirement that an aggrieved party await for the gazetting of the election results before filing an Election Petition challenging the said results. According to him, **Regulation 4(1)** of the **Elections (General) Regulations** vests the power to declare election results on the County Returning Officer, as an agent of and on behalf of the 3rd respondent. That declaration having been made by the County Returning Officer on 6th March, 2013 the same was tantamount to a declaration by the 3rd respondent in the context of **Article 87(2)** of the **Constitution** and **Section 77** of the **Elections Act**; and that the certificate issued to the elected candidate under **Regulation 87(3)(c)** of the **Elections (General) Regulations** by the County Returning Officer indicated the election of the person named therein and amounted to a formal declaration of the results.

14. The 1st respondent argued that there was conflict between the provisions of **Article 87(2)** of the **Constitution** and **Section 77** of the **Elections Act** on one hand which provide that an aggrieved party can file an Election Petition challenging election results within 28 days after declaration of election results by the 3rd respondent; and **Section 76(1)(a)** of the **Elections Act** on the other hand which provides that an Election Petition challenging election results can only be filed within 28 days after publication of the election results in the Kenya Gazette. According to the 1st respondent what was published in the gazette notice was the declaration of persons elected as Governors, and not the "declaration of results", that having been made by the County Returning Officer on 6th March, 2013.

15. The 1st respondent maintained that the Petition was filed in conformity with **Article 87 (2)** of the **Constitution**; and that he would suffer prejudice and be rendered without redress if the same was struck out.

16. In its ruling dated 10th June, 2013 the High Court (Wakiaga, J.) upheld the appellant's argument that the Petition may only be filed within 28 days after the publication of the election results in the Kenya

Gazette. The High Court held *inter alia* that **Article 87(1)** of the **Constitution** provided the guiding principle on the presentation of Election Petitions to the court and that **Section 76(1)(a)** of the **Elections Act** gives effect to the said **Article 87(1)**; therefore there is no contradiction or inconsistency between **Article 87(1)** of the **Constitution** and **Section 76(1)(a)** of the **Elections Act** in regard to the period within which an Election Petition ought to be filed in court; and that the declaration of election results by the 3rd respondent in the context of the **Constitution** and the **Elections Act** is through the publication of the results in the Kenya Gazette. The learned Judge also made a finding that the Petition was prematurely filed and as a result the court lacked jurisdiction to entertain the same. However, the learned Judge invoked the inherent powers of the court to save the Petition which he believed raised weighty issues which ought to be determined. It is from this decision that this current appeal and cross appeal have been filed by the appellant and the 1st respondent respectively.

17. We are of the considered view that the issues raised both in the appeal and cross appeal can be summarized as follows:-

I. ***Within what time frame should an election petition be filed" When does that time begin and end" Are there inconsistencies/contradictions between the provisions of Article 87(2) of the Constitution and Section 77 of the Elections Act on one hand and Section 76(1)(a) of the Elections Act on the other hand in respect of when time within which to file an Election Petition begins to run"***

II. ***Did the learned Judge err in finding that the Petition was incompetently before him on account of having been filed prematurely"***

III. ***Did the learned judge err in entertaining the Petition despite his finding that he had no jurisdiction to hear the same"***

18. At the hearing of this appeal Mr. Njoroge Regeru appeared with Miss E. Karani for the appellant, Mr. Kioko Kilukumi appeared with Miss Lucy Mwai for the 1st respondent and Mr. H. Gachugi appeared for the 2nd and 3rd respondents. Mr. Regeru's principal argument before us was that the High Court having (correctly) found that it had no jurisdiction to deal with a Petition that had been prematurely filed, it was incumbent upon the learned Judge to down his tools, and strike out the Petition. He relied on the cases of **Samuel Kamau Macharia & another –vs- Kenya Commercial Bank Ltd & 2 others – Application No. 2 of 2011** and this Court's decision in **The Owners of Motor Vessel 'Lillian s' –vs-**

Caltex Oil Kenya Ltd (1989)KLR 1.

19. Supporting the High Court's decision on the issue of jurisdiction, Mr. Regeru argued that there was no conflict between **Article 87(2)** and **Section 76(1)(a)** of the **Elections Act**; that while **Article 87(2)** of the **Constitution** provided the broad framework on when a Petition challenging election results could be filed, **Section 76(1)(a)** of the **Elections Act** actualized the aspirations of the Kenyan citizens embodied in the said article by providing detailed provisions on when, time within which an Election Petition could be filed begins to run; and that in the context of **Article 87(2)** of the **Constitution** and **Section 76(1)(a)** of the **Elections Act** time begun to run once the election results were published in the Kenya Gazette dated 13th March, 2013.

20. He argued that the intention of the legislature in enacting **Section 76(1)(a)** of the **Elections Act** was to ensure certainty and finality of election results through gazettelement. He submitted that the learned Judge despite correctly holding that the court lacked jurisdiction over the Petition was then under an obligation to strike it out.

21. Mr. Regeru concluded by saying that the learned Judge having found he had no jurisdiction misdirected himself by saving the Petition on the grounds that it raised weighty issues of public interest. He submitted that an Electoral dispute is neither civil nor criminal in nature but is a special jurisdiction governed by the **Elections Act**, which must be strictly construed and applied. According to Mr. Regeru, the issues of equity and public interest are irrelevant and had no role in election disputes. In support of the aforesaid contention, Mr. Regeru relied on the decision of the Supreme Court of India in ***Joyti Basu & others –vs- Debi Ghosal & others* 1982 AIR 983, 1982 SCR(3) 31**. He also relied on the High Court decision in ***Centre for Open Governance (AFRICOG) –vs- Ahmed Issack Hassan & IEBC- Petition No. 152 of 2013***, arguing that rules of equity and public interest could not grant the High Court jurisdiction which was not granted by statute; that jurisdiction must be expressly given; and that the fact that there exist triable issues is irrelevant when the court has no jurisdiction to entertain the suit. He urged us to allow the appeal.

22. Mr. H. Gachugi, learned counsel for the 2nd and 3rd respondents, associated himself with the submissions made by Mr. Regeru in support of the appeal. He reiterated that the learned Judge having found that he had no jurisdiction should not have proceeded to hear the same. He argued that the Petition could only have been properly filed before the High Court after the publication of the election results by the 3rd respondent in Kenya Gazette on 13th March, 2014. According to Mr. Gachugi, the High Court assumed jurisdiction over electoral disputes from 13th March 2014, the date of gazettelement of the results, and that prior to that date the said jurisdiction vested in the IEBC, the 3rd respondent. He referred to the High Court decision in ***Ferdinand Ndung'u Waititu –vs- IEBC & others – Election- Petition No. 1 of 2013***.

23. Mr. Kilukumi's principal argument before us rested on the meaning, and effect, of **Article 87 (2)** of the **Constitution** which provided that election petitions be filed within 28 days of "declaration of the results" by the 3rd respondent; that the said results were indeed "declared" by the 3rd respondent, through its agent, the County Returning Officer, on 6th March, 2013; and that, therefore, the filing of the Petition on 8th March, 2013 was not premature, and that the High Court had indeed the jurisdiction to entertain the Petition. He relied on **Regulation 4(1)(c)** of the **Elections (General) Regulations** which provides that the County Returning Officer shall declare and announce the results. He referred to the definition of the term 'declaration' in the ***Black's Law Dictionary, 8th Edition*** which defines it as a formal statement, proclamation, or announcement, especially one embodied in an instrument. According to the foregoing definition, Mr. Kilukumi argued that Form 36 which was filled in by the County Returning Officer after announcement of results was a legal instrument which embodied declaration of results by

the 3rd respondent. Therefore, according to him, gazettement of the results was simply a formalization of the declared election results.

24. Mr. Kilukumi submitted that the publication of election results in the Kenya Gazette under **Regulation 87(4) (b)** of the **Elections (General) Regulations** is a notice showing the names of persons elected. In referring to the decision of this Court in **John Michael Njenga Mututho –vs- Jane Njeri Wanjiku Kihara & 2 others – Civil Appeal No. 102 of 2008**, he argued that the declaration of election results is not just limited to listing the people who were elected but entailed the enumeration of the total votes cast in favour of every candidate. Therefore, he argued that Form 36 which is filled by the County Returning Officer is an instrument of declaration which indicates the details of votes cast in each polling station and the aggregate results. He relied on **Sulieman Said Shahbal –vs- IEBC & 3 others– Election Petition No. 8 of 2013** wherein the High Court (Ochieng, J.) held that gazettement did not constitute a declaration of election results because it only declared persons who were elected to respective offices.

25. Mr. Kilukumi submitted that **Section 76(1)(a)** of the **Elections Act** was inconsistent with **Article 87(2)** of the **Constitution** because it postpones the date within which a Petition must be filed to after publication of results in the Kenya Gazette. In relying on **Gideon Mwangangi Wambua –vs- IEBC & 2 others- H.C Election Petition 4 of 2013 consolidated with H.C Election Petition 9 of 2013**, he argued that **Section 76(1)(a)** of the **Elections Act** could aid a mischievous IEBC which could, theoretically, delay publication of the results in the Kenya Gazette as no time frame was provided for the said gazettement.

26. Relying on the Supreme Law of the Land, Mr. Kilukumi argued that the plain reading of **Article 87 (2)** imposed no obligation on a petitioner to await the gazettement of the results, once the same had been declared by the County Returning Officer. He asked whether the 1st respondent could be punished for filing the Petition early in reliance on **Section 77** of the **Elections Act**.

27. Supporting the learned Judge in his decision not to strike out the Petition, Mr. Kilukumi argued that **Article 159(2) (d)** of the **Constitution** placed a duty on the court to determine disputes without undue regard to technicalities; that to strike out the Petition would leave the 1st respondent without any redress. He submitted that the High Court had original and unlimited jurisdiction, donated by the **Constitution**. In relying on the decision of the Supreme Court of India in **Youaraj Rai –vs- Chander Bahadur Karki- Civil Appeal No. 8250 of 2004 consolidated with Civil Appeal Nos. 8253 & 8255 of 2004**, Mr. Kilukumi argued that the 1st respondent's cause of action arose as soon as the 3rd respondent through the County Returning Officer of Nyeri declared that the appellant was elected on 6th March, 2013. He urged us to allow the cross appeal.

28. In reply to Mr. Kilukumi's submissions, Mr. Regeru reiterated that in accordance with **Regulation 87(10)** of the **Elections (General) Regulations** the election results tallied and declared by the County Returning Officer were only provisional results, and that it was only the gazettement of the same that made them final.

29. We have considered the Record of Appeal, grounds of appeal, able submissions by counsel, authorities provided by counsel and the law. This being the 1st appellate court, we are tasked with the duty to analyze and re-evaluate the evidence and facts that were before the High Court and arrive at our own conclusions. See **Selle vs. Associated Motor Boat Company (1968) E.A & Jivanji vs. Sanyo Electrical Company Ltd. (2003) KLR 425**.

30. We shall first deal with the issue of whether **Section 76(1)(a)** of the **Elections Act** is inconsistent

with **Article 87(2)** of the **Constitution**; and when time within which to file an Election Petition begins to run. It was the 1st respondent's case that **Section 76(1)(a)** of the **Elections Act** is inconsistent with **Article 87(2)** of the **Constitution** in as far as the same extended time within which a Petition could be filed to after publication of election results in the Kenya Gazette. **Article 87** of the **Constitution** provides:-

'87 (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission. (Emphasis added)

(3) Service of a Petition may be direct or by advertisement in a newspaper with national circulation.'

It is pursuant to **Article 87(1)** that the legislature enacted the **Elections Act**; wherein **Section 76(1)(a)** provides as follows:-

'(1) A petition

a) to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of presentation.' (Emphasis added)

It is the requirement of publication of the election results in the Kenya Gazette which the 1st respondent contends is inconsistent with **Article 87(2)** which only requires declaration of the results by the 3rd respondent.

31. In ***Ssemwogerere & others –vs- Attorney General (3) (2004)2 EA 247***, the Supreme Court of Uganda held that the jurisdiction to declare an Act of Parliament inconsistent with the Constitution goes with interpretation of the Constitution; and that the constitutionality of an Act of parliament must be construed *vis-a-vis* the Constitution. Therefore, in considering whether **Section 76(1)(a)** of the **Elections Act** is inconsistent with **Article 87(2)** of the **Constitution** the starting point must be, of necessity, the interpretation of various provisions of the **Constitution** to discern the intention of the framers of the same in respect of **Article 87**.

32. It is trite law that the construction of the **Constitution** is governed by various principles. Firstly, it ought to be interpreted in a manner that promotes **Article 259** of the **Constitution** which partly provides:-

'(1) This Constitution shall be interpreted in a manner that-

a) Promotes its purpose, values and principles

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

c) Permits the development of the law and

d) Contributes to good governance.'

(2)

(3) Every provision of the Constitution shall be construed according to the doctrine of interpretation that the law is always speaking

33. Secondly, the spirit and tenor of the **Constitution** which embodies the ideals, aspirations and values of the Kenyan citizens must preside and permeate the process of interpretation. In ***Njoya & 6 others -vs-Attorney General & 3 others 2 KLR (EP)***, this Court held,

'The Constitution is not an Act of Parliament but the supreme law of the land. It is not to be interpreted in the same manner as an Act of Parliament. It is to be construed liberally to give effect to the values it embodies and the purpose for which its makers framed it.'

In the persuasive Namibian case of ***S -vs- Acleson , 1991 (2) S.A 805, Mohamed .A. , J held,***

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

Further, in determining and understanding the spirit of the Constitution we ought to take into account the language of the various provisions of the Constitution. In ***Kashava Menon -vs- State of Mombay (1951) S.C.R. 228***, the court held as follows:-

'A court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view.'

See also the Supreme Court of Kenya decision in ***Samuel Kamau Macharia & another -vs- Kenya Commercial Bank & 2 others- Application No. 2 of 2011***.

34. Thirdly, the **Constitution** ought to be given a purposive interpretation so that the objectives of **Article 87** are realized. In ***Re the matter of the Interim Independent Electoral Commission (2011) eKLR***, the Supreme Court adopted the finding of the Namibian Supreme Court in the case of ***Minister of Defence, Namibia -vs-Mwandinghi, 1992 (2) S.A 355*** at page 362 as follows:-

'The Namibian Constitution must therefore be purposively interpreted to avoid the 'austerity of tabulated legalism.'

In the case of **Ndyanabo- vs- Attorney General [2001] 2 EA 485** the Court of Appeal of Tanzania held as follows:

"The Constitution is a living instrument, having a soul and consciousness of its own it must be construed in line with the lofty purpose for which its makers framed it. A timorous and unimaginative exercise of the judicial power of Constitutional interpretation leaves the Constitution a stale and sterile document."

See also this Court's decision in **Equity Bank Ltd. -vs- West Link MBO Ltd. - Civil Application No. Nai. 78 of 2011.**

35. Fourthly, a court should always take into account the principle of harmonization whenever it interprets provisions of the **Constitution**. Where the **Constitution** contains several provisions relating to an issue these provisions must be looked at as a whole. In **Olum -vs- Attorney General of Uganda (2002) 2 EA 508**, the Court of Appeal of Uganda held,

'The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordination of any one provision to the other.'

A similar principle was enunciated by the United States Supreme Court in the case of **Smith Dakota -vs- North Carolina 192 v 268 (1940)** where the court held,

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

See also the case of **Community Advocacy & awareness Trust & 8 others -vs- Attorney General & 5 others- High Court Petition No. 243 of 2011.**

36. Lastly, in **Re the matter of the Interim Independent Electoral Commission (supra)**, the Supreme Court held,

'Interpreting the Constitution is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.'

See the case of **Minister for Home Affairs & another. -vs- Fisher & another (1979) 3 ALL ER**

37. The above principles are deeply embedded in our minds as we address the issues of

interpretation before us, and as we attempt to arrive at a just determination of the matters before us. It is our considered view that **Article 87(2)** of the **Constitution** establishes the broad parameters of electoral disputes, and donates the power to the legislature to enact detailed legislation establishing mechanisms for the timely settling of electoral disputes. This the legislature has done through the enactment of the **Elections Act**. Further, a reading of **Article 87(2)** reveals that the intention of the framers of the **Constitution** was that an Election Petition challenging election results ought to be filed within 28 days after declaration of the election results by the 3rd respondent. Therefore, the Constitution provides a time line within which an Election Petition ought to be filed, and left it entirely to the Legislature to determine the medium and form of the declaration envisaged therein.

38. Taking into consideration the language used in **Article 87(1)** which provides,

'Parliament shall enact legislation to establish for timely settling of electoral dispute.' (*Emphasis added*'),

we are of the view that it was the intention of the framers of the Constitution that the medium and form of declaration of election results by the 3rd respondent should be provided for in the **Elections Act**. Having expressed ourselves as above, what then is the medium and form of the declaration of election results envisaged by the Act"

It was the 1st respondent's case that the declaration of results envisaged by **Article 87(2)** was through the announcement of results by the returning officer and issuance of a certificate indicating the election of the bearer in Form 38 under **Regulations 4(1), 83, & 87(3)** of the **Elections (General) Regulations**. On the other hand, the appellant and the 2nd and 3rd respondents argued that declaration of election results as per the Constitution was through publication of the same in the Kenya Gazette. This now brings us to the bone of contention arising from the provisions of **Section 76(1)(a)** of the **Elections Act** set out above, that is, whether the requirement of publishing the election results in the Kenya Gazette is inconsistent with **Article 87(2)** of the **Constitution** and **Section 77** of the **Elections Act** which is a replica of **Article 87(2)**.

39. Consequently, we must consider the constitutionality of **Section 76(1)(a)** of the **Elections Act** *vis-à-vis* **Article 87(2)** of the **Constitution**. In doing so we are called upon to interpret **Section 76(1)(a)** in order to establish whether the same is in harmony with the intention of the **Act** and **Article 87(2)** of the **Constitution**. The cardinal rule for construction of a statute is that it should be construed according to the intention expressed in the statute itself. *Halsbury's Laws of England, 4th Edition (Reissue), Butterworths, 1995, Vol. 44(1), Para 1372* states:-

'The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole and in its context.....'

The intention of the Act is similar to the intention of **Article 87** of the **Constitution** that is the establishment of mechanisms suitable for timely resolution of electoral disputes. According to *Halsbury's Laws of England (supra), Para 1484*;

*“It is one of the linguistic canons applicable to the construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act...” (See *Amalgamated Society of Engineers –vs- Adelaide Steamship* (1920) 28 CLR 129).*

Therefore, does **Section 76(1)(a) (a)** of the **Elections Act** conform with the intention of the Act and the Constitution" In determining the foregoing we have to consider the **Elections Act** as a whole in order to establish the mode and medium of declaration of results under the Act.

At this stage we find it necessary to consider some of the provisions in the **Elections Act** relating to declaration of election results. **Section 39** of the **Elections Act** provides,

‘(1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.

2. Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional and final results in the order in which the tallying of the results is completed.’

From the above provision it is still not yet clear what is the intended medium and form of declaration of election results by the 3rd respondent under the Act. By virtue of **Section 109** of the **Elections Act** which empowers the 3rd respondent to formulate regulations for the better carrying out of the purposes and provisions of the Act, the **Elections (General) Regulations** were made. The said Regulations provide, *inter alia*, for the mode of declaration of the result of an election. Part XIII of the Regulations provides for counting of votes and declaration of results. Regulation **83** of the Regulations whose marginal note reads *“Tallying and announcement of election results”* provides in part as follows;

‘83. (1) immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present—

(a) tally the results from the polling stations in respect of each candidate, without recounting the ballots that were not in dispute and where the returning officer finds the total valid votes in a polling station exceeds the number of registered voters in that polling station, the returning officer shall disregard the results of the count of that polling station in the announcement of the election results and make a statement to that effect

(b) in the case of an election, publicly announce to persons present the total number of valid votes cast for each candidate in respect of each election in the order provided in regulation 75(2);

(c) complete Form 34 and 35 set out in the Schedule in which the returning officer shall declare, as the case may be, the—

(i) Name of the respective electoral area;

- (ii) Total number of registered voters;*
- (iii) Votes cast for each candidate or referendum side in each polling station;*
- (iv) Number of rejected votes for each candidate in each polling station;*
- (v) Aggregate number of votes cast in the respective electoral area; and*
- (vi) Aggregate number of rejected votes; and*
- (d) Sign and date the form and*
- (i) Give to any candidate, or agent present a copy of the form; and*
- (ii) Deliver to the Commission the original of Form 34 and 35 together with Form 36 and Form 37 as the case may be.'*

Regulation 87 provides,

'(1)

(3) The county returning officer shall upon receipt of the results from the returning officers (from the various constituencies) contemplated under regulation (1)-

(a) Tally and announce the results for the presidential elections, elections for the county governor, senator and county woman representative to the National Assembly; and

(b) Submit all the results received from the returning officers, together with the results tallied under this regulation to the Commission; and

(c) Issue the persons elected pursuant to the results announced under paragraph (a) with certificates indicating their election in Form 38 set out in the schedule.

(4) Upon receipt of a certificate under sub- regulation (1), the chairperson of the commission shall-

(a).....

(b) In the case of the other elections, whether or not forming part of a multiple election, publish a notice in the Gazette, which may form part of the composite notice showing the name or names of the person or persons elected.

(9) The returning officer shall on completion of the tallying submit provisional results to the Commission.

10. The County returning officer shall on completion of the tallying of the results at the county level, electronically submit the tallied provisional results to the Commission.

40. From the above provisions we find that the returning officer's duty is limited to 'announcement of results' and that the declaration of results by a returning officer expressed in various provisions of the Regulations can only be read *ejusdem generis* to the act of 'announcement' of results and not declaration of results as envisaged under **Article 87(2)** of the **Constitution**. These provisions include, **Regulation 4(1)** of the **Elections (General) Regulations** which provides one of the duties of the County returning officer as the declaration and announcement of the tallied election results; and **Regulation 83(1)(c)** of the **Elections (General) Regulations** which requires the returning officer in filing forms 34 and 35 to declare the results of the election. We say so because firstly, a literal interpretation of **Regulation 87(9) & (10)** of the **Elections (General) Regulations** reveals that the tallied results both at the constituency and county level which are forwarded to the 3rd respondent by the returning officer are provisional. Secondly, on the issue of declarations made by the returning officer in Forms 35 and 36 we concur with the following finding by Githinji, J.A in **Hassan Ali Joho & another –vs- Sulieman Said Shahbal- Civil Appeal No. 12 of 2013,**

'Further, it is clear that the declaration in Form 35 and 38 which the returning officer is required to complete is preceded by a public announcement of the total number of votes cast for each candidate in respect of each election. It seems therefore the declaration in Form 35 and 36 is merely a return of /or written record of the provisional election results and not a declaration of election results.'

Thirdly, from the provisions of the **Article 87(2)** of the **Constitution**, the **Elections Act** and its Regulations there under, it is clear that it is only the 3rd respondent who is tasked with the duty of declaring final results and not the returning officer.

41. Having found that declaration of results can only be done by the 3rd respondent, the next issue for consideration is what is the medium of declaration envisaged under the Constitution and the Elections Act" It is not in dispute that **Article 87(2)** of the **Constitution** has placed an obligation on the 3rd respondent to declare election results. Election results are obtained at end of the election period which period is defined under **Section 2** of the **Elections Act** as follows:-

' 'election period' means the period between the publication of a notice by the Commission for a presidential, parliamentary or county election under sections 14,16,17 and 19 and the gazettment of the elections results.'

From the foregoing definition we are of the considered view that the medium of declaration of election results by the 3rd respondent is through gazettment. We find that the requirement of publication of election results in the Kenya Gazette under **Section 76(1)(a)** of the **Elections Act** is not inconsistent with **Article 87(2)** of the **Constitution**. This is because firstly, the Gazette is an official document of the Government of Kenya in which official matters including official notices by the government are published. Any notice published in the Gazette is deemed as notice to the general public and one is barred from pleading ignorance of the same. **Section 69** of the **Interpretation and General Provisions Act**, Chapter 2, Laws of Kenya provides:-

' The production of a copy of the Gazette containing a written law or notice, or of copy of a

written law or notice purporting to be printed by the Government printer shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of the written law or notice.'

Secondly, we cannot help but note that throughout the Constitution any notices, laws and official communication by the Government are communicated to the public through gazette. Thirdly, we agree with the finding of this Court (differently constituted) in ***Hassan Ali Joho & another –vs- Sulieman Said Shahbal (Supra)*** that the requirement of gazette of the election results is required amongst other things to give the declared results a seal of certainty, finality and legality.

The 1st respondent argued that the kind of results contained in the Gazette dated 13th March, 2013 did not constitute election results contemplated under the Constitution. According to him, this is because the notice therein only showed the names of the elected people and did not give detailed results of the election unlike Form 36 and 37. Looking at **Regulation 87(4)(b) of the Elections (General) Regulations, 2012** we are of the considered view that the form of election results envisaged to be declared through publication in the Gazette is the name or names of the persons elected. Therefore, the declaration of election results made by the 3rd respondent in the Gazette dated 13th March, 2013 was valid.

42. Based on the foregoing, we are of the considered view that **Section 76(1)(a) of the Elections Act** is not inconsistent with **Article 87(2) of the Constitution**. Consequently, time within which to file an Election Petition as envisaged under **Article 87(2)** begun to run after 13th March, 2013 when the results were published in the Gazette.

43. The final issue that falls for our determination is the fate of the Petition herein that was filed on 8th March, 2013 before gazette of the election results. The learned Judge (Wakiaga, J.) in the ruling dated 10th June, 2013 found that the Petition was filed prematurely and that as a result the High Court lacked jurisdiction to entertain it. However, the learned Judge proceeded to invoke the court's inherent power and saved the Petition. The appellant and the 2nd and 3rd respondents argued that the learned Judge should have put down his tools and struck out the Petition once he made a finding that he lacked jurisdiction. The 1st respondent, on the other hand maintained that the High Court had jurisdiction and that the learned Judge had misdirected himself in finding the contrary.

44. So did the High Court have jurisdiction to entertain the Petition which had been filed before the declaration of the results in the Kenya Gazette" We are of the considered view that the High Court indeed had jurisdiction to entertain the Petition herein. We say so for three different reasons. Firstly, **Section 2 of the Elections Act** defines an election court as follows:

"election court" means the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163(3) (a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165(3) (a) of the Constitution. (emphasis added)

Article 165 (3) (a) of the Constitution grants the High Court original and unlimited jurisdiction in criminal and civil matters. In fact, it is the only court that has original jurisdiction to deal with election petitions, other than Presidential election disputes. Can it simply fold its hands, and deny a petitioner redress only because such a petitioner came too early for redress, or because someone else (in this case IEBC, the 3rd respondent) has jurisdiction to deal with disputes before the publication of the results" Indeed,

Article 88 (4) (e) grants the 3rd respondent jurisdiction to deal with electoral disputes before the declaration of the results. However, that does not take away the High Court's original and unlimited jurisdiction to deal with any matter brought before it. It does not "exclude" or "limit" the High Court's jurisdiction. So, both the 3rd respondent and the High Court enjoy concurrent jurisdiction over disputes prior to the declaration of the results, and the High Court enjoys exclusive jurisdiction after the declaration of results. The Supreme Court in **Hermanus Phillipus Steyn –vs- Giovanni Gnechhi Ruscone – Application No. 4 of 2012** adopted the definition of concurrent Jurisdiction under the **Black's Law Dictionary** which provides as follows,

'Jurisdiction which might be exercised simultaneously by more than one court over the same subject matter and within the same territory, a litigant having the right to choose the court in which to file an action.'

In addition,, **Article 88(4) (e)** of the **Constitution** prohibits the 3rd respondent from dealing with Election Petitions which can only be heard by the High Court. **Section 75 (1)** of the **Elections Act** provides that a question as to the validity of a county election shall be determined by the High Court. Therefore, only the High Court had the jurisdiction to deal with the dispute presented in the Petition before the Court.

Secondly, and more importantly, the petitioner herein was clearly seeking multiple remedies. He filed his Petition early, prior to the gazettement of the result, primarily to challenge the right of the appellant to be gazzetted - to seek an injunction to restrain the 3rd respondent from gazetting the appellant. In such a situation, he had no alternative but to file the Petition before the results were gazetted, as the whole objective of his Petition would have been defeated. In any event, the 3rd respondent had no jurisdiction to grant an injunction, and would have certainly not been expected to grant the same against itself. So, would the petitioner be expected to remain without a remedy" We do not think so, keeping in mind all the principles of interpretation of Laws that we have outlined before in this judgment. A just, purposive, and meaningful approach to interpretation of Laws requires that we do not drive any citizen away from the seat of justice. In other words, that we find ways of leaning towards, and not against, a broader approach to determine issues of jurisdiction.

Thirdly and finally, we are of the considered view that the intention of framers of the Constitution in establishing time frame within which an election petition ought to be filed was to address the mischief of litigants who filed petitions late and not those who filed early. In **R-vs- Drug Mart (1985) LRC 65**, the Supreme Court of Canada held at paragraph 116,

'The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum and must therefore...be placed in its proper linguistic, philosophic and historical contexts.'

See also **S –vs-Zuma (CCT 5/94) (1995)**, wherein the Constitutional Court of South Africa emphasized that in taking the purposive approach in interpreting the Constitution, regard must be paid to the legal history, traditions and usages of the country concerned. We take judicial notice of the fact that historically, and from time immemorial, majority of the Election Petitions were based on a common complaint – that they were filed too late, or served too late. That was the mischief the framers of our Constitution attempted to redress. To the best of our knowledge, there has never been a case where the complaint is that it was filed too early. This is probably the first such case, and in our absurdity, we are now complaining about people coming to Courts too early, rather than late. What possible prejudice

would an early bird inflict upon his opponent" We were not told of any prejudice occasioned to any of the other parties. On the contrary they had heads-up and more time to respond. We find that the learned Judge misdirected himself by holding that he had no jurisdiction to entertain the Petition simply because it was filed five days too early.

We wish to address the issue of whether a court which has no jurisdiction over a matter can invoke its inherent jurisdiction to entertain the same. ***Halsbury's Laws of England 4th Edition, Vol. 10, paragraph 314***, defines jurisdiction as,

'By 'jurisdiction' is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.'

We are of the considered view that the learned Judge had misdirected himself by invoking his inherent jurisdiction to save the Petition despite finding that he had no jurisdiction over the same. This is because jurisdiction of the court flows from the Constitution and statute and the court could not arrogate to itself jurisdiction it didn't have. In the ***matter of the interim independent Electoral Commission (Supra)***, the Supreme Court held,

'Where a Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.'

See also the case of ***The Owners of Motor Vessel 'Lillian s' –vs- Caltex Oil Kenya Ltd (supra)***. As it turns out, and as we have concluded, the High Court all along had jurisdiction to deal with the Petition, and need not have, and could not have, invoked its "inherent jurisdiction" either under the Civil Procedure Act or **Article 159** of the **Constitution**.

45. The upshot of the foregoing is that we allow the cross appeal and dismiss the appeal herein. Given that we have upheld some arguments, and rejected others, in respect of all the parties before us, on the three distinct issues, we find it just that each party bears its own costs. We so order.

Dated and delivered at Nyeri this 20th day of August 2013

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL



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