Case Number:	Civil Appeal 300 of 2013
Date Delivered:	29 Apr 2014
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Erastus Mwaniki Githinji, William Ouko, Agnes Kalekye Murgor
Citation:	Bashir Haji Abdullahi v Adan Mohamed Nooru & 3 others [2014] eKLR
Advocates:	Kilukumi for the 1st and 2nd Respondents. Njoroge Mungai for the 3rd and 4th Respondents.
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Petition No. 7 of 2013
Case Outcome:	Cross-Appeal allowed but appeal dismissed.
History County:	Nairobi
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OUKO & MURGOR, JJ.A.)

CIVIL APPEAL NO. 300 OF 2013

BETWEEN

BASHIR HAJI ABDULLAHI…….....APPELLANT

AND

ADAN MOHAMED NOORU……..……1ST RESPONDENT

BILLOW ADAN KEROW……..……....2ND RESPONDENT

EKONIT KOMOL JOHN

(The Returning Officer Mandera North Constituency)…….....3RD RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION....4TH RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Nairobi (**D. Onyancha, J.**) dated on the 2nd October, 2013 in*

Election Petition No. 7 of 2013)

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JUDGMENT OF THE COURT

[**1**] The appellant ***Bashir Haji Abdullahi, Adan Mohamed Nooru,*** the 2nd respondents and one ***Mohamed Dube*** vied for election as a member of National Assembly for Mandera North constituency in the general elections held on 4th March, 2013. After the elections the 1st respondent garnered a total of 19,055 votes, against the appellant's 14,156 votes. The 3rd candidate **Mohamed Dube** garnered 5 votes. Thereafter the 3rd respondent, the Returning Officer declared the 1st respondent as duly elected member of the National Assembly. The 2nd respondent **Billow Adan Kerrow,** who vied for the office of the Senator for Mandera North County in the same elections was also declared as duly elected as a Senator on 5th March 2013. The Returning Officer declared the results for Mandera North Constituency in form 36 as stipulated by **Rule 83(1)(d)** of Elections (General) Regulations, 2012.

[**2**] The Independent Electoral and Boundaries Commission (IEBC) ultimately issued a Gazette Notice No. 3159 on 13th March 2013 indicating *inter alia* names of all candidates elected in the 290 constituencies in the whole country including the name of the 1st respondent. On 8th April, 2013 the appellant filed an Election Petition No. 7 of 2013 in the High Court at Garissa challenging the validity of the election of the 1st respondent on the grounds of various electoral malpractices. According to the petition the 2nd respondent was joined in the petition because he was directly or intimately involved in the perpetuation of electoral offences during the election process either on his behalf or for the benefit of the

1st respondent.

[**3**] On 9th May 2013, the 1st respondent filed a notice of motion seeking an order to strike out the petition essentially on the ground that the petition was filed 34 days after the declaration of results in contravention of **Article 87(2)** of the Constitution [Article 87(2)]. That application was fully heard by the High Court and on 31st May 2013 ***Onyancha, J.*** in a full ruling dismissed the application with costs.

The application in essence raised the question of the interpretation of Article 87(2) in contradistinction to section 76(1) (a) of the Elections Act – No. 11 of 2011. Article 87 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."

On the other hand, section 76(1) of the Elections Act (**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 results of the election in the Gazette and served within fourteen days of the presentation"

[**4**] Mr. Kilukumi learned counsel for the 1st and 2nd respondents in this appeal and who also represented them in the High Court submitted in support of the application inter alia:

(i) The declaration of results is not equivalent to publication in the Kenya Gazette.

(ii) the Returning officer as agent of IEBC declares the results in form 36 at constituency level and issues a certificate of results of national assembly elections.

(iii) the Returning officer declared the results on 5th March, 2013 as pleaded in the petition and the last day for filing the petition expired on 2nd April 2013 and the petition filed 34 days after the declaration of results is incompetent.

(iv) The effect of section 76(1) (a) is to enlarge time for lodging a petition which enlargement of time is unconstitutional as it would affect the intention of timely settlement of electoral disputes provided by Article 87(1)

(v) Provisions of section 76(1) (a) of the Act are inconsistent with Article 87(3) and therefore null and void.

[**5**] ***Mr. Njoroge Mungai*** learned counsel for the 3rd and 4th respondents supported the application in the High Court and submitted, among other things, that the declaration of the results for purposes of Article 87(2) is by a Returning Officer as agent of IEBC and that the court should uphold the supremacy of the Constitution.

The application was opposed by the appellant who filed lengthy written submissions which were

highlighted by Mr. Muchiri at the hearing. Mr. Muchiri submitted in summary, among other things, that

i. The election results were declared by IEBC by Gazette Notice No. 3159 on 31st March 2013 and not by the Returning Officer on 5th March 2013 and that the petition filed on 8th April 2013 was filed within 26 days after the declaration of results.

ii. The Commission and the Returning Officer are distinct entities but the Commission as an independent body is the entity mandated to declare election results.

iii. As the Commission is by Article 88(e) required to settle election disputes prior to the declaration of election results, the court by Article 88(e) can only come in to scrutinize the legality or otherwise of the work of the Commission after the gazettment of the election results.

iv. The declaration of results by Forms 35 and 36 as used in respect of Returning Officer and Presiding Officer only refers to announcements of election results and not to the final confirmative declaration of election results.

v. The role of the Returning Officer is to collate and announce the results from the polling stations while the role of the Commission is to supervise and coordinate the functions of its officers and monitor and evaluate the elections including the declaration of the final results as relates to National Assembly elections.

[**6**] The learned Judge exhaustively considered the submissions of the respective counsel and the relevant provisions of Article 87(2); the Act and the relevant regulations made under the Act and ultimately came to the conclusion that the declaration of results by the Returning Officer amounted only to a provisional announcement of results which would be consummated only by the IEBC notice in the official Gazette. The learned Judge further held that section 76(1) of the Act was not inconsistent with Article 87(2) and concluded that the period for filing the election petition;

"began to run on the publication of the notice in the official Gazette on 13th March 2013. The period of 28 days ended on the 10th April 2013. The petition was filed on 8th April 2013 well within the prescribed period."

The learned Judge dismissed the application and thereafter heard the petition on the merits and dismissed it with costs on 2nd October, 2013.

The present appeal against the dismissal of the Petition was filed on 1st November 2013. Subsequently on 13th March 2014, the 1st and 2nd respondents filed a notice of cross-appeal against the decision of the High Court dated 2nd October 2013. By the cross-appeal they seek an order that the decision be varied or reversed to the extent and in the manner that the petition was filed out of time and therefore incompetent *ab initio.* The cross-appeal is based on three main grounds namely:

1. The learned Judge erred in law in failing to find that there was conflict 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.

2. The learned Judge erred in law in equating the phraseology "declaration of the election results'

used in the Constitution with the phraseology “publication of results in the election Gazette” used in section 76(1)(a) of the Elections Act.

3. The learned Judge erred in law in finding that the petition was filed within the time prescribed by Article 87(2) of the Constitution.

[**7**] By Rule 93(2) of the Court of Appeal Rules, a respondent is required to lodge the notice of cross-appeal within 30 days after service on the respondent of the memorandum of appeal and the record of appeal or not less than thirty days before the hearing of the appeal, whichever is the later. Further, by Rule 95(i) a respondent is required to serve the notice of cross-appeal on the appellant and persons directly affected by the appeal within seven (7) days of the filing. The 1st and 2nd respondents filed the notice of cross-appeal about three (3) weeks before the hearing of the appeal. However at the hearing of the appeal the respective counsel agreed that the appeal and the cross-appeal do proceed to hearing notwithstanding that the cross-appeal was filed less than thirty (30) days before the hearing date of the appeal

[**8**] The cross-appeal raises the issue of the inconsistency of section 76(1) (a) of the Act with Article 87(2) with regard to the time within which a petition to challenge the validity of an election of a member of parliament should be filed. The 1st and 2nd respondents contend that the learned Judge erred in holding that the petition was filed within the time prescribed by Article 87(2). The issues were raised through an application to strike out the petition which application was dismissed. In **Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, 2014 eKLR** (**Joho**) the Supreme Court said at paragraphs 30, 31 and 32 that a similar application to strike out the petition was in essence in the nature of a preliminary objection as it raised a pure point of law which, if successful, would have disposed of the petition. Although the cross-appeal is not directly against the order dismissing the application to strike out the petition, it raises the same point of law regarding the validity of the petition, the determination of which has triggered both the appeal and the cross-appeal. The same issue would have been raised as a preliminary objection to the appeal and if successful, could have disposed of the appeal. See **Wavinya Ndeti v The Independent Electoral & Boundaries Commission and 4 Others, Civil Appeal No. 323 of 2013** (unreported). The appellant in paragraph 14 of the further submissions filed on 11th April 2014 appreciates that the retrospective application of the Supreme Court’s decision in **Joho’s** case (which he heavily relied to support the cross-appeal) would deny the appellant the right to have the appeal determined on the merits. Thus, the appellant recognizes that the cross-appeal, if successful would determine the appeal. In determining the appeal the Court is required by section 3 of the Appellate Jurisdiction Act to give effect to the overriding objective of that Act and the Rules, which as Section 3A stipulates, is to facilitate the just expeditious, proportionate and affordable resolution of the appeals.

By Rule 4(1) of the Elections (Parliamentary and County Elections) Petition Rules 2013 – LN No. 54 of 15th March, 2013, (Elections Petition Rules) the same overriding principle applies in the resolution of election petitions and the High Court by Rule 4(2) is obliged to apply the principle.

In the light of the foregoing it is just that the legal issue raised in the cross-appeal which goes to the root of the validity of the proceedings under appeal and also to the jurisdiction of the Court to determine the appeal from those proceedings should be determined before the determination of the merits of the appeal if necessary.

[**8**] It is expedient to consider first the question whether the cross-appellants having failed to file an

appeal against the dismissal of the application to strike out the appeal can nevertheless raise the same matter by way of cross-appeal and whether by failing to file the appeal they waived their right to plead limitation.

The cross-appellants contend that deference in lodging an appeal was borne out of the fact that this Court had rendered several decisions that refused to entertain interlocutory appeals challenging the decision of the Election Court that does not touch on the validity or outcome of the election. They have in particular referred to the three cases **Ferdinand Ndungu Waititu v IEBC & 8 Others 2013 eKLR,** and **Peter Gichuki King'ara v IEBC & 2 Others 2013 eKLR** and **Benjamin Ogunyo Andama v Benjamin Andola Andayi & 2 Others 2013 eKLR**. In **Waititu's** case, the applicant therein moved the Court of Appeal to *inter alia* stay the proceedings of the Election Court pending appeal from an order of the Election Court limiting the right of cross-examination of a witness in election petition proceedings. The Court held that the conditions for grant of an order for stay of proceedings had not been satisfied and said:

"…under Rule 35 of Election Petitions Rules, no appeal lies to this Court from an interlocutory order, ruling or direction by an election court. A party aggrieved by such an order must await delivery of the final judgment by the High Court then file an appeal to this Court."

The **King'ara's** case concerned an appeal against an order of the High Court declining an order of scrutiny and recount. The Court made this important observation at paragraph 35:

"The nature of the jurisdiction of the Court of Appeal under Section 85(A) of the Elections Act is *omnibus ex-ante* ***jurisdiction exercisable*** *a posteriori* ***after the High Court has issued judgment and decree in an election petition. The appellate omnibus jurisdiction is consequential and is to hear and determine all contested and amalgamated points of law in an election petition whether such points of law arose in an interlocutory matter or in the judgment or decree of the High Court…. It is an all encompassing comprehensive blanket jurisdiction rather than piecemeal jurisdiction."***

The interlocutory appeal was dismissed, the Court holding that the jurisdiction to entertain interlocutory matters arising from an election petition is only exercisable after final judgment and decree of the High Court has been made.

The third case of **Andama** relates to an application in the Court of Appeal to, among other things, stay the proceedings of the High Court which were pending for judgment pending appeal against three interlocutory ruling made in the course of hearing the petition. Again, the application was dismissed on the ground that the Court has no jurisdiction to hear interlocutory appeals. The Court however made a finding which is relevant to the cross-appeal herein thus:

"However in our view, if an appeal is against a decision of the High Court allowing an interlocutory application seeking striking out a petition then this Court would have jurisdiction to hear it for an order striking out a petition is a final decision on the petition and an appeal from it is no longer interlocutory appeal but an appeal on a final decision on the petition. This, in our view is only where application for striking out the petition is allowed and the petition is ordered struck out."

In spite of those decisions the appellant submits that the Elections Act does not bar an appeal from an interlocutory application and that the contention that Elections Petition Rules do not contemplate appeals from interlocutory applications is without any basis as **Joho** decision arose from an interlocutory

application.

[**9**] It is not necessary to belabor the issue whether or not the Court has jurisdiction to entertain interlocutory appeals from decisions of the Election Court as the Court has already made several consistent decisions on the issue. The Court has essentially held that except in cases where the interlocutory decision finally deposes of the election petition, the Court has no jurisdiction to entertain an interlocutory appeal and a party aggrieved by an interlocutory decision should raise the issue as a ground of appeal on a matter of law in the resulting appeal. Suffice to emphasize that neither the Elections Act nor Rule 35 of the Elections Petition Rules expressly confers on the Court jurisdiction to entertain interlocutory appeals. Section 3(1) of the Appellate Jurisdiction Act only empowers the Court to hear appeals in cases in which an appeal lies to the Court of Appeal under any Law. It does not itself donate a right of appeal of whatever nature.

By section 80(3) of the Act the legislature recognized that interlocutory matters in connection with the appeal may arise in an election petition and gave the High Court power to deal with such mattes without providing an independent right of appeal from interlocutory decisions. In contrast, Order 43 of Civil Procedure Rules gives a right of appeal from orders in ordinary civil matters and categorizes the orders appealable as of right and orders appealable with leave of the court. The right of appeal given by section 85A is from the High Court in an ***election petition*** on a matter of law.

It is significant that section 85A is preceded by section 85 which provides that an election petition shall be heard and determined by the High Court within the period specified in the Constitution. It follows that the right of appeal given by section 85A is from the determination of an election petition by the High Court.

[**10**] It is true that in **Joho's** case the appeal was against the order of the High Court dismissing an interlocutory application to strike out the appeal despite its finding that the appeal was filed out of time stipulated by Article 87(2). There was a cross-appeal against the finding that the election petition was filed out of time. The Court dealt with the cross-appeal first, which decision disposed of the interlocutory appeal. The Court did not determine the appeal nor was the question of jurisdiction to entertain an interlocutory appeal raised or determined. It was submitted in **Joho's** case in the Supreme Court in reliance of the decision in **Andama** that the Supreme Court had no jurisdiction to entertain the appeal from the Court of Appeal because the decision appealed from arose from an interlocutory application. However, the Supreme Court did not determine whether or not the Court of appeal had jurisdiction to entertain the interlocutory appeal.

The question of waiver of the right of appeal does not arise. In ordinary civil suits a party aggrieved by a preliminary decree is entitled to appeal and if he does not do so he is precluded from disputing its correctness in any appeal which may be preferred from the final decree (see ***section 68 of the Civil Procedure Act***). There was no preliminary decree in this case. The right of appeal from an interlocutory decision of an Election Court subsists during the pendency of the election petition and continues until the final determination of the appeal which may be preferred. The appeal gave the 1st and 2nd respondent a right under the Court of Appeal Rules to file a cross-appeal on a matter of law in any matter connected with the election petition.

[**11**] We now turn to the consideration of the cross-appeal on merits. The present appeal against the dismissal of the election petition was filed on 2nd November, 2013. The 1st and 2nd respondents' application to strike out the petition essentially on the ground that it was filed outside the period stipulated by Article 87(2) was dismissed on 9th May 2013. The notice of cross-appeal against the final decision dated 2nd October 2013 was filed on 13th March, 2014. During the pendency of the appeal the

Supreme Court on 4th February 2014 delivered its decision in **Joho's** case (supra) in which it declared section 76(1) (a) of the Elections Act inconsistent with Article 87(2) in following terms:

"The appeal is allowed with the holding that section 76(1)(a) of the Elections Act 2011 is inconsistent with Article 87(2) of the Constitution of Kenya and to that extent, a nullity."

If the **Joho** decision is applicable to this appeal the effect would be that the appellant's petition which was filed 34 days outside the stipulated 28 days in Article 87(2) was time-barred and the cross-appeal would be successful.

[**12**] The appellant contends *inter alia,* that the declaration of inconsistency does not affect the appeal, that he filed the appeal within the 28 days stipulated by section 76(1) (a) of the Elections Act and the High Court had the jurisdiction to hear and determine the appeal; that the U.S Supreme Court has determined that absolute retroactive invalidity cannot be justified; that a proper interpretation of the Constitution and the judgment of the Supreme Court in **Joho's** case is that the decision will apply to all petitions filed after 4th February, 2014; that the appellant has a right to fair hearing under the Constitution and had expended considerable resources and lastly, that it would be against the provisions of the Constitution for the Supreme Court's decision to be applied retrospectively.

The appellant has cited several foreign authorities including **Chicot County Drainage District v Baxter State Bank 308 US 371, Chevron Oil Co. v Huson 404 US 97 v N. Narayanan Nair & Others v State of Kerala & Others AIR [1971] Ker 98 Scagell & Others v Attorney General & Others [1997] 4 LRC 98 and Shrwan Kumar & Another v Madan Lal Agarwal - Civil Appeal 10587 of 2013**.

[**13**] On the other hand, the 1st and 2nd appellant contend, among other things, that the Supreme Court by the declaration of inconsistency in essence stated what the law has always been and did not promulgate a new rule. Any law enacted in contravention of the constitution is null and void from the very beginning; retroactivity does apply to cases pending before courts and that the litigation in the appeal is far from finality.

The 1st and 2nd respondents relies on several authorities including **Behran Khushed Pesikaka v The State of Bombay AIR 1955 SC 123; Murphy v Attorney General [1982] IR 241, Director of Public Prosecutions v Cunningham [2012] 1 ECCA 64** and **Coleman v Mitmick 202 N.E. 2 d 577.**

[**14**] The appellant relies heavily on the American jurisprudence particularly as espoused in **Chicot and Chevlon** (supra) for the proposition that the Supreme Court's decision in **Joho** should not be applied retrospectively. In **Chicot**, the US Supreme Court held that an all inclusive statement of absolute retroactive invalidity cannot be justified. In **Chevron**, the US Supreme Court said that the doctrine of non-retroactivity has been recognized outside the criminal law in both constitutional and non-constitutional cases and further formulated three factors which the U.S courts consider when dealing with non-retroactivity question namely, firstly, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue on first impression whose resolution was not clearly foreshadowed, secondly, that the courts must weigh the merits and demerits of each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation and, thirdly, the courts must weigh the inequity imposed by retroactive application.

[**15**] The American jurisprudence was exhaustively considered by the Supreme Court of Ireland in **Murphy v The Attorney General** (Supra). In that case the Supreme Court declared certain sections of Income Tax Act, 1967 to be invalid having regard to the provision of the Constitution. Thereafter, the

Supreme Court was called upon to decide *inter alia* the date from which the declaration should operate, that is whether the declaration of unconstitutionality should apply prospectively or retrospectively. That question involved the interpretation of Article 15(4) (2) of the Constitution which provided:

"Every law enacted by the Oireachtast (*i.e. National Parliament)* ***which is in any respect repugnant to this Constitution or to any provision thereof shall, but to the extent only of such repugnancy be invalid."***

The Attorney General of that country urged the Supreme Court to follow the American precedents and as a matter of judicial choice apply the declaration of repugnancy prospectively. In deciding the question the Supreme Court had to construe the meaning and effect of the words **"shall …be invalid"** and more specifically whether the words meant "**void"** or **"voidable**". It was appreciated that if the word **"invalid"** meant **"void**" then the word was mandatory and the legislation must be construed as having had no force of law and as being void *ab initio*. On the other hand, if the word "**invalid"** meant **"voidable"** then the declaration of invalidity would operate prospectively from the date of judicial determination of the invalidity.

[**16**] The Supreme Court of Ireland observed that the American Constitution does not confer on the Federal Supreme Court power of judicial review of legislation; that such power came through judicial recognition and that in exercising that power, the US Supreme Court has a choice between retroactivity and prospectivity. In the words of Kenny, J. at p. 333 of the report:

"The constitution of United States does not contain any provision that laws passed by Congress which are repugnant to the constitution are invalid nor does it provide that the Federal Supreme Court has jurisdiction to declare Acts of Congress invalid. The Federal Supreme Court spelled the doctrine of judicial review out of the constitution and as it created the power it may declare its limits. We have no such power."

Having held that the American decisions including **Chicot** and **Chevron** were irrelevant to the interpretation of the Constitution, the Supreme Court construed the relevant provisions of the Constitution under consideration and ultimately held by majority *inter alia* that, the effect of decision of the Supreme Court was that the sections of the Income Tax Act declared unconstitutional were invalid *ab initio* and has never had the force of law.

In his judgment Henchy J. said at page 313 of the report:

"…I am satisfied that the argument suggesting that it for the courts to say whether a statute or statutory provisions, which has been held to have been enacted in breach of a constitutional limitation of the legislature power of the Oire Achtas, should be held invalid prospectively or with limited retrospectively cannot prevail. Such enactments are and have been consistently held to be invalid from the time of their purported enactment because the constitution truly read and duly accorded the necessarily implied consequences of breach of its legislative limitations, so ordains."

[**17**] The appellant also asks the Court to be guided by the decision of the Constitutional Court of South Africa in the **Scagell** case (supra). In that case the Constitutional Court declared certain sections of a pre-constitution Act unconstitutional but nevertheless held that such declaration would not render invalid any acts done or permitted in terms of such provisions prior to the judgment of the court unless the court decided in the interest of justice and good government to order otherwise.

That decision is not relevant because the Constitutional Court in making the declaration of invalidity prospective was relying on a provision of the same constitution which expressly gave the court such discretion.

The decision of the Supreme Court of Ireland in **Murphy** is highly persuasive dealing, as it does, with the effect of a post – constitution legislation (as in this appeal) declared unconstitutional as being repugnant to provisions of a constitution similar to Article 2(4) of our Constitution [**Article 2(4)**] which provides:

"Article 2(4). Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."

The effect of declaration of inconsistency of S.76(1) (9) of the Elections Act with Article 87(2) in **Joho** case by the Supreme Court must be ascertained from the specific provisions of Article 2(4) of the Constitution and not from the decisions of Federal Supreme Court or from any other jurisdiction which does not have a similar constitutional provision. That is why we have not found it necessary to consider the decisions from other jurisdictions where a similar constitutional provision does not exist.

[**19**] As already observed the Elections Act is a post Constitution legislation and the effect of inconsistency of any of its provisions with the Constitution is expressly stated in Article 2(4). Once the Supreme Court made a declaration of constitutional invalidity or inconsistency the declaration has the effect and operates in accordance with specific provision of the Constitution correctly interpreted. This Court has no choice between declaring invalidity prospectively or retrospectively as it cannot alter the declaration of unconstitutionality by the Supreme Court or for that matter legislate.

We have been spared the arduous task of interpreting article 2(4) which the Supreme Court in **Murphy** faced because unlike the Constitution of Ireland, Article 2(4) expressly provides that any law that is inconsistent with the Constitution is void to the extent of the inconsistency and that any act or omission in contravention of the constitution is invalid and further because the Supreme Court expressly declared section 76(1) (a) of the Elections Act a nullity. Thus the Supreme Court itself interpreted the effect of Article 2(4) in accordance with the Constitution. Being a nullity, section 76(1) (a) of the Act is retrospectively void from the date of its enactment.

[**20**] The decision of the Supreme Court in **Joho** case is by virtue of Article 163(7) of the Constitution a binding precedent on this Court and binds third parties including the appellant in all election petitions including appeals which have not reached finality where the issue has been properly raised and in future prospective election petitions.

The election petition is the subject matter of this appeal and cross-appeal and the **Joho** decision applies to it. Since the hearing of the appeal and the cross-appeal the decision of this Court differently constituted in **Nuh Nassir Abdi *v* Ali Wario & 2 Others, CA No. 43/2013** & **Suleiman S. Shahbal *v* IEBC & 3 Others, CA 42/2013,** where **Joho** decision was applied to pending appeal has been brought to our attention.

[**21**] The arguments raised in support of and against the cross-appeal and in the application to strike out the election petition are substantially similar to the arguments raised in the Supreme Court which led to the declaration of constitutional invalidity of section 76(1)(a) of the Elections Act. From what we have said above, we have come to the conclusion that the election petition on which the appeal is based was filed outside the constitutional limitation period stipulated in Article 87(2). Upon the expiry of the 28 days constitutional limitation, the appellant's right to file an election petition was extinguished. The election

petition was therefore incompetent and the High Court lacked jurisdiction to entertain it.

Consequently, the cross-appeal is allowed, and the appeal is struck out. In the interest of justice and in accordance with **Joho** and **Nuh Nassir Abdi**, each party shall bear their own costs of the cross-appeal and the appeal respectively.

Dated and delivered at Nairobi this 29th day of APRIL, 2014.

E.M. GITHINJI

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR