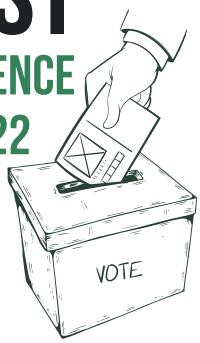
REPUBLIC OF KENYA

A JUDICIARY CASE DIGEST

EMERGING JURISPRUDENCE FROM THE AUGUST 2022 GENERAL ELECTIONS IN KENYA



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THE ELECTORAL LAW AND GOVERNANCE INSTITUTE FOR AFRICA

A JUDICIARY CASE DIGEST

Emerging jurisprudence from the
August 2022 General elections in Kenya

October 2024

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Foreword

The electoral process remains a cornerstone of democratic governance, as envisaged in the Constitution of Kenya, 2010. The 2022 election cycle, marking the third iteration since the introduction of the Constitution, provides a critical opportunity to assess the efficacy of our electoral system, jurisprudence, and procedures. The Judiciary plays an indispensable role in ensuring the credibility of elections by adjudicating disputes that arise throughout the electoral cycle. While this role was traditionally more prominent towards the conclusion of elections, the Judiciary's involvement is now integral at every stage. The courts are entrusted with resolving significant issues such as the qualifications for elective office, campaign financing, the procurement of election technology, voting rights, and the eligibility of candidates, especially in relation to Chapter Six of the Constitution.

In recognition of the Judiciary's expanding role throughout the electoral cycle, the Judiciary Committee on Elections (JCE) has continued to focus on building the capacity of judges, judicial officers, and court administrators in Electoral Dispute Resolution (EDR). The Judiciary Case Digest on Electoral Dispute Resolution is part of this effort, designed to provide judicial officers with a reference document that will guide them in their decision-making in electoral disputes. This publication aims to offer a practical resource for understanding the evolving body of electoral jurisprudence,

highlighting areas where the law has been clarified and areas where further development is necessary.

This publication is part of the ongoing effort to ensure that the Judiciary remains equipped to handle electoral disputes in a timely, transparent, and fair manner, contributing to the credibility and acceptance of electoral outcomes. It is hoped that this resource, alongside other capacity-building initiatives led by the Kenya Judiciary Academy in partnership with the JCE, will strengthen the Judiciary's role in electoral justice. Through continuous education and practical guidance, the Judiciary will uphold its constitutional mandate to give effect to the will of the people, respect the integrity of the electoral process, and foster public trust in the outcomes of our elections.

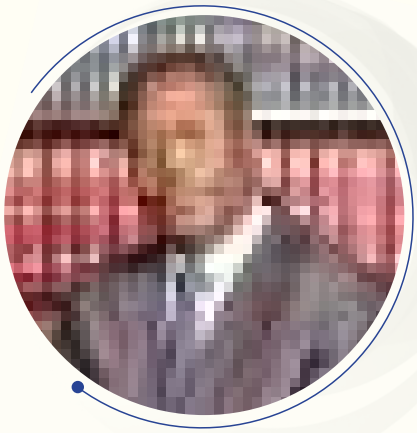
After the 2022 general elections, a total of 222 election petitions were lodged, showing a notable reduction from the 388 petitions filed in 2017. Of these, 9 petitions were presented to the Supreme Court, the largest number since the enactment of the Constitution in 2010. This may indicate growing public confidence in the Court, or possibly reflect ongoing concerns regarding the IEBC's ability to manage credible elections. Petitions filed in the High Court and Magistrates' Courts were distributed across various election categories, including gubernatorial, senatorial, and National Assembly elections. As per historical trends, the outcomes of these petitions reflected a pattern where a minority (approximately 10-13%) were upheld, while a larger proportion (50-60%) were dismissed after full hearings.

The JCE's role in improving election dispute resolution has had a substantial impact in the consolidation of Kenya's democracy, and this resource aims to further strengthen the Judiciary's capacity to deliver fair and credible results in election disputes. It is hoped that by equipping judges and judicial officers with the right tools and knowledge, they will continue to uphold the Constitution and contribute to the legitimacy of the electoral process.

I commend the Judiciary Committee on Elections for overseeing the development of this publication and thank all those who have contributed to this effort.

Hon. Justice Martha Koome, EGH
Chief Justice and President of the Supreme Court of Kenya

Preface



We are pleased to present this edition of the Judiciary Case Digest on Electoral Dispute Resolution, a publication that builds upon the foundation laid by the Judiciary Bench Book on Electoral Dispute Resolution 2022. While the Bench Book served as a comprehensive guide for handling electoral disputes before and during the 2022 elections, this Digest shifts focus to the post-election phase, offering an in-depth analysis of how the courts resolved disputes arising after the declaration of election results.

The 2022 elections posed notable challenges, including delays in the appointment of IEBC Commissioners, internal divisions during the announcement of results, and the proliferation of misinformation—all necessitating judicial intervention. Through the documentation of key cases, this Digest provides insights into the resolution of these disputes, equipping judicial officers with critical perspectives to guide future electoral dispute resolution efforts.

The Digest provides a comprehensive review of both pre-and post-declaration decisions, with a a particular emphasison post-election petitions challenging the credibility of results, alleged irregularities, and election offences. It highlights evolving trends, such as the narrowing scope of unresolved legal questions, shaped by precedents established during the 2013 and 2017 electoral cycles. The Digest also addresses emerging challenges, including the Supreme Court's jurisdiction over pre-election matters and disputes related to party list nomination .

An analysis of post-declaration petitions reveals that the majority were dismissed on technical grounds, with only a small farction being upheld. These outcomes are examined within the broader framework of Kenya's electoral jurisprudence, delving into critical issues such as scrutiny, recounts, the impact of irregularities on election outcomes, and the standard of proof required for election offences.

Organized by thematic areas, the Digest offers concise summarises of decisions on pre-election disputes: covering appeals from the IEBC and PPDTand post-election petitions adjudicated by the High Court, Court of Appeal, and Supreme Court. Each case summary includes the factual background, issues for determination, the legal principles applied, and the courts' reasoning. The Digest futher provides key takeaways, concluding observations, and proposals for both legal and administrative reforms. The thematic areas explored encompass the

eligibility and suitability of candidates, the participation rights of marginalised groups, principles governing scrutiny and recount , jurisdictional boundaries of electoral bodies, and irregularities capable of invalidating election results. Addtionally, it examines emerging challenges such as the Supreme Court's jurisdiction over pre-election disputes and procedural ambiguities, including non-compliance with security for costs and the abatement of petitions upon a party's death.

What distinguishes this publication is its focus on advancing legal and administrative reforms to enhance the Judiciary's capacity to adjudicate electoral disputes efefctively. The Digest identifies critical gaps in Kenya's legal framework and administrative processes, proposing key reforms such as harmonising rules on election technology scrutiny, refining timelines for dispute resolution, and resolving inconsistencies in statutes. It also undersores the need to address procedural ambiguities, including the implications of non-compliance with security for costs.

On the administrative front, the Digest advocates for improved access to judicial decisions through KenyaLaw, enhanced training for judicial officers on complex electoral matters, and fostering consistent jurisprudence in areas like party list disputes. Notably, it recommends appointing a Registrar to the Judiciary Committee on Elections- a strategic move to ensure better coordination and facilitate long-term planning for electoral dispute resolution.

This Digest transcends the immediate challenges of electoral disputes,presenting a strategicroadmap for enduring reform. By addressing both legal and administrative dimensions, it offers a comprehensive strategy to fortify Kenya's electoral justice system, ensuring its alignment with constitutional principles and international best practices. This resource not only equips the the Judiciary to resolve disputes effectively but also reinforces its role in fosteringfree, fair, and credible elections.

By documenting judicial decisions, theDigest enhances the capacity of judicial officers to adjudicate electoral disputes while contributingto the expanding body of literature on electoral law in Kenya. Moreover, it fosters South-South collaboration, offering valuable insights for other African judiciaries. The recommendations are designed to guide lawmakers, policymakers, and judicial officers in upholding constitutional principles, including the sovereignty of the people and their right to make political choices.

We trust that this edition will serve as an indispensable resource for judicial officers, complementing the 2nd Edition of the Judiciary Bench Book on Electoral Dispute Resolution 2022. Furthermore, it aims to enrich Kenya's electoral jurisprudence and contribute meaningfully to the broader African legal and electoral context.

Hon. Justice (Dr.) Smokin Wanjala,
Ph.D, FCIArb, CBS
Justice of the Supreme Court of Kenya and
Director General, Kenya Judiciary Academy

Acknowledgements

The Kenyan Judiciary Case Digest 2022 marks a significant milestone in the development of electoral jurisprudence in Kenya. This achievement has been made possible through the dedicated contributions of numerous individuals and institutions, to whom we extend our sincere and heartfelt gratitude.

First and foremost, I wish to express my profound appreciation to the Honourable Chief Justice and the Honourable Deputy Chief Justice for their visionary leadership and unwavering commitment to upholding the rule of law within the Judiciary. Their support has been pivotal in advancing the Judiciary's role in electoral dispute resolution and in ensuring the integrity of the electoral process in Kenya. We are deeply grateful to the Secretary of the Judiciary Committee on Elections, Honourable Zipporah Gichana, and the esteemed members of the Committee for their invaluable contributions. Their dedication, time, and expertise were indispensable in the compilation of this Digest. A special note of thanks goes to the Honourable Chief Justice for entrusting the Committee with the important task of enhancing the Judiciary's preparedness in election-related matters, as well as for his continuous support of the Committee's work.

A particular word of thanks is due to Ms. Lucianna Thuo and Dr. Seth Wekesa, whose scholarly contributions and tireless commitment to this project have significantly shaped its content. Their expertise and diligence have been essential to the success of this publication, and we commend their dedication to advancing electoral jurisprudence. Further, we appreciate the invaluable input received from the indefatigable research team comprised of Nelson Otieno, Kamene Munyao, Miriam Rosasi, David Arita, Purity Isiye and Diana Ateka who provided research support in the development of the publication.

We are equally appreciative of the critical feedback from legal practitioners, petitioners, respondents, and other key stakeholders. Their thoughtful insights and recommendations were instrumental in ensuring that this Digest remains current, comprehensive, and reflective of the latest developments in electoral law.

Our heartfelt thanks also go to the Electoral Law and Governance Institute for Africa (ELGIA), under the leadership of Executive Director Felix Odhiambo, for their financial and technical support, which played an essential role in bringing this Digest to fruition. We are deeply grateful for the continued partnership of ELGIA and other development partners, whose support strengthens the Judiciary's capacity to address electoral disputes effectively.

Finally, I would like to express my deep appreciation to the members of the Secretariat, who provided valuable logistical and technical assistance throughout this process. Your commitment to ensuring the smooth coordination and completion of this important work has been invaluable.

It is with great humility that we acknowledge the grace of Almighty God, who has granted us the wisdom, strength, and perseverance to complete this project.

Hon. Mr. Justice Mohammed Ibrahim, CBS
Judge of the inaugural Supreme Court of Kenya
Chairman, Judiciary Committee on Elections

List of abbreviations and Acronyms

CPK Communist Party of Kenya
CPR Civil Procedure Rules
CS Cabinet Secretary
DRC Dispute Resolution Committee
EACC Ethics and Anti-Corruption Commission
ECK Electoral Commission of Kenya
eKLR Electronic Kenya Law Reports
ELGIA Electoral Governance Institute for Africa
ID Identity Card
IDRM Internal Dispute Resolution Mechanism
KIEMS Kenya Integrated Elections Management System
IEBC Independent Electoral and Boundaries Commission
KLR Kenya Law Reports
MCA Member of County Assembly
MNA Member of National Assembly
NADCO National Dialogue Committee
NEB National Elections Board
NDC National Delegates Conference
ODM Orange Democratic Movement
ODPP Office of the Director of Public Prosecutions
PNU Party of National Unity
PPDT Political Parties Disputes Tribunal
SPM Senior Principal Magistrate
UDA United Democratic Alliance
WDM Wiper Democratic Movement

List of Cases

Abdikadir Hussein Mohammed v Abass Ibrahim Kafow & 3 Others Nairobi Election Petition Appeal No E004 of 2023

Abdirahman Ibrahim Mohamud v Mohamed Ahmed Kolosh & 2 Others

Adam v Jiir & 3 others Election Petition Appeal E008 of 2023

Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others SC Petition No. 3 of 2016; [2019] eKLR

Alfred Nganga Mutua & 2 Others v Wavinya Ndeti & Another [2018] eKLR

Amin Deddy Mohamed Ali v IEBC & 2 Others Election Petition No. E001 of 2022

Amos Chege Mugo v IEBC & 2 Others Election Petition No. 1 of 2022

Anarita Karimi Njeru v Republic [1979] eKLR

Attorney General of the Republic of Kenya v Prof. Peter Anyang Nyong'o & 10 Others EACJ Application No. 5 of 2007

Ayiera v Kimwomi & 3 Others Election Appeal No. 001 of 2023

Bardad Mohamed Farah v Abdullahi Bashir Sheikh & 2 Others Election Petition Appeal E007 of 2023

Beatrice Saki Muli & Another v Hon. Jude Kang'ethe Njomo & Another Civil Application No E021 of 2023

Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others (2015) eKLR

Boy Juma Boy & 2 Others v Mwamlole Tchappu Mbwana & Another [2014] eKLR

Bryan Khaemba v Didmus Barasa & 2 Others High Court Election Petition E001 of 2022.

Buoga v Attorney General & Another Constitutional Petition E290 of 2022

Centre for Rights Education and Awareness & Another v John Harun Mwau & 6 Others Civil Appeal 74 & 82 of 2012 [2012] eKLR

Charles Kamuren v Grace Jelegat Kipchoim & 2 Others [2015] eKLR

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Dennis Gakuu Wahome v IEBC & Others Constitutional Petition No. E321 of 2022

Dennis Omwenga Ayiera v Amos Nyaribo Kimwomi Election Petition No. E002 of 2022

Diana Kethi Kilonzo & Another v Independent Electoral & Boundaries Commission & 10 Others [2013] eKLR

Dolphine Nyangara Onkoba v Michelle Kemuma Omwonyo & 2 Others Election Petition No. E014 of 2023

Douglas Shitote Okumali v IEBC & 2 Others Election Petition Appeal No. E005 of 2023

Erastus Wade Opande v Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007

Erick Ntabo Omwenga v IEBC & 2 Others Election Appeal No. 005 of 2023

Esther Awuor Adero Ang'awa v Cabinet Secretary Responsible for Matters Relating to Basic Education & 7 Others; Kenya Private Schools Association & 4 Others (Interested Parties) [2021] eKLR

Evans Odhiambo Kidero & Another v IEBC & 4 Others Election Petition No. E001 of 2022

Evans Odhiambo Kidero v Ferdinand Ndungu Waititu & 4 Others [2014] eKLR

Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 Others [2014] eKLR

Fitch v Stephenson & Others [2008] ALL E 13 or 008 EWHC, 501 (QB)

Free Kenya Initiative & 6 Others v Independent Electoral & Boundaries Commission & 4 Others; Kenya National Commission on Human Rights (Interested Party) Constitutional Petition E160 of 2022

Garama v Karisa & 3 others Malindi Election Petition Appeal 1 of 2023

Gatirau Peter Munya v Dickson Mwende Kithinji & 2 Others [2014] eKLR

Geoffrey Omwenga Getuba & Another v Kibagendi & 2 Others Election Petition E002 of 2022 (Ruling)

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Janet Mbete v IEBC & Hassan Joho & Another [2013] eKLR

Janet Ndago Ekumbo Mbete v IEBC & 2 Others [2013] eKLR

Jared Odoyo Okello & Another v IEBC & 6 Others [2014] eKLR

Jimi Richard Wanjigi v Wafula Chebukati & 2 Others Supreme Court Petition 19 (E022) of 2022

John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR

John Harun Mwau & 2 Others v Independent Electoral & Boundaries Commission & 2 Others (2017) eKLR

John Harun Mwau v Independent Electoral and Boundaries Commission & Another [2013] eKLR

John Harun Mwau & 3 Others v Attorney General [2021] eKLR

John Munuve Mati v Returning Officer of Mwingi North Constituency & Others Nairobi Election Petition Appeal No. 5 of 2018

Johnson Muthama v Minister for Justice & Constitutional Affairs & Another (2012) eKLR

Josephat Shambu v Doreen Rodgers & 2 Others Election Petition Appeal No. 1 of 2023

Katiba Institute & 3 Others v Independent Electoral Boundaries Commission & 3 others; Law Society of Kenya & Another (Interested parties) Consolidated Constitutional Petitions No. E540 & E546 of 2021

Kenneth Njagi Njiru & 10 others v Ruto & 5 Others; Azimio la Umoja One-Kenya Coalition & 3 Others (Interested Parties) Petition 22 (E25) of 2022

Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & Another [2016] eKLR

Kenya Human Rights Commission & Others v Independent Electoral & Boundaries Commission & 2 Others HCCHR Petition E306 of 2022

Kenya National Commission on Human Rights v Attorney General; IEBC and 16 Others (Interested Parties) Supreme Court Advisory Opinion Reference No. 1 of 2017

Kilonzo v Wiper Democratic Movement & 3 Others Civil Appeal No. E132 of 2022

Legal Advice Centre & 2 Others v County Government of Mombasa & 4 Others [2016] eKLR

Lemanken Aramat v Harun Meitamei Lempaka & 2 Others [2014] eKLR

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Mike Sonko Mbuvi Gideon Kioko v Swalha Ibrahim Yusuf and 3 Others Petition E027 of 2022

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Munuve Mati v Returning Officer Mwingi North Constituency, Independent Electoral and Boundaries Commission and Paul Musyimi Nzengu [2018] eKLR

Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 others [2013] eKLR

Mwangi Priscilla Wangui & Another v Margaret Njeri Mwaura & 3 Others Election Appeal No. 1 of 2023

Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR

National Elections Board, Orange Democratic Movement Party v Odongo & Another Civil Appeal E317 of 2022

National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 Others [2022] eKLR

Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 Others [2014] eKLR

Odinga & 16 Others v Ruto & 10 Others; Law Society of Kenya & 4 Others (Amicus Curiae) Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)

Odinga & Another v Independent Electoral & Boundaries Commission & 2 Others Presidential Election Petition E005 of 2022

Okiya Omtatah Okoiti & Another v Attorney General & Another [2021] eKLR

Okiya Omtatah Okoiti v. Independent Electoral and Boundaries Commission & Others SC Petition No. 18 of 2017 [2020] eKLR

Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1

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Public Service Commission & 4 Others v Cheruiyot & 20 Others [2022] KECA 15 (KLR)

R v Big M Drug Mart Ltd [1985] 1 SCR 295

Raila Amolo Odinga & Another v IEBC & 2 Others [2017] eKLR

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Rajput & another v Independent Electoral & Boundaries Commission & another; Principal Registrar of Persons Ministry of State for Immigration & 2 others (Interested Parties) Constitutional Petition E260 of 2022

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Wanjiru Gikonyo & Others v National Assembly of Kenya & 4 Others, Petition No. 453 of 2015 [2016] eKLR

Wavinya Ndeti v IEBC & 4 Others [2014] eKLR

William Odhiambo Ramogi & Others v Attorney General & Others Consolidated Constitutional Petition Nos 159 of 2018 and 2019

Youth Advocacy for Africa & 7 Others v IEBC & 17 Others Election Petition E002, E003 & E005 of 2022 (Consolidated)

Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others [2014] eKLR

List of Relevant Statutes and Subsidiary Legislation

Statutes

Access to Information Act (No. 31 of 2016)
Anti-Corruption and Economic Crimes Act (No. 3 of 2003)
Appellate Jurisdiction Act (Chapter 9), Laws of Kenya
County Governments Act (No. 17 of 2012)
Elections Act (No. 24 of 2011)
Election Offences Act (No. 37 of 2016)
Evidence Act, (Chapter 80), Laws of Kenya
Independent Electoral and Boundaries Commission Act (No. 9 of 2011)
Interpretation and General Provisions Act, (Chapter 2) Laws of Kenya
Leadership and Integrity Act (No. 19 of 2012)
Political Parties Act (No. 11 of 2011)
Political Parties (Amendment) Act (No. 2 of 2022)
Public Officer Ethics Act (No. 4 of 2003)
Public Procurement and Asset Disposal Act (No. 33 of 2015)
Supreme Court Act (No. 7 of 2011)

Subsidiary Legislation

Court of Appeal (Election Petition) Rules, 2017 (Legal Notice 114 of 2017)
Elections (General) Regulations, 2012 (Legal Notice 128 of 2012; Legal Notice 72 of 2017)
Elections (Parliamentary and County Elections) Petitions Rules, 2017 (Legal Notice 116 & 117 of 2017)
Elections (Party Primaries and Party Lists) Regulations, 2017 (Legal Notice 69 of 2017) Elections (Technology) Regulations (Legal Notice 68 of 2017)
Political Parties (Internal Dispute Resolution) Model Rules, 2017

1.0 Introduction & Background

The election dispute resolution framework forms an integral part of the electoral process in Kenya. The recommendations from the Kriegler Report informed the design of the election's dispute resolution framework in the Constitution 2010 that handles both pre-election and post-election disputes. Before 2010, there was no framework for resolving disputes from party nominations. While the 2007 Political Parties Act established the Political Parties Disputes Tribunal, its mandate was limited to resolving disputes between the members of a political party; disputes between political parties forming a coalition; or appeals from decisions of the Registrar under the Act.

Political parties used internal organs to resolve party nomination disputes. Pre-election disputes before the Electoral Commission of Kenya (ECK) resulted mainly from the enforcement of the Electoral Code of Conduct. Courts were only involved in handling electoral disputes after the declaration of election results.

The framework under the Constitution 2010 introduced dispute resolution mechanisms in the pre-election and post-election stages. Then the provisions of the Constitution 2010 informed the design and provisions of the statutory and regulatory framework guiding the process of resolving pre-election and post-election disputes in Kenya. Political parties must establish their internal dispute resolution mechanisms (IDRMs) to resolve disputes before escalating to other forums established under the law. The law has empowered IEBC, PPDT and the judiciary to resolve political and electoral disputes at different levels.

1.1 Brief Legal Framework Relating to Election Dispute Resolution in Kenya

The Constitution of Kenya 2010 recognizes the sovereignty of the people. This sovereignty is exercised through elected representatives at the national and county levels of governance. Article 38 recognizes the political rights of the citizens which include being elected and voting in a free, and fair election. To effectuate these rights and guarantees, the Constitution requires IEBC to conduct elections in accordance with the principles laid down under Article 86 of the Constitution as well as applicable electoral laws including the Elections Act 2011 and Elections (General) Regulations 2012 (as amended in 2017).

There are various fora for resolving disputes that arise from the political processes. Under section 40(2) of the Political Parties Act, the Political Parties Disputes Tribunal (PPDT) can hear disputes arising between members of a political party and the political party, or between political parties; or between an independent candidate and a political party, or between coalition partners; as well as appeals from decisions of the Registrar under this Act. However, section 40(2) of the Political Parties Act provides that the PPDT cannot hear or determine such disputes unless there is proof that there has been an attempt to resolve the dispute by the internal dispute resolution mechanism (IDRM). IDRM mechanisms are usually provided in a coalition agreement,

party constitutions or nomination rules. The rationale for this requirement is that disputes must be resolved at the lowest level possible in line with the principle of subsidiarity. The Constitution also encourages the use of alternative dispute resolution mechanisms under Article 159. The jurisprudence of the courts has therefore firmly established that parties to a dispute must first exhaust the available remedies before seeking judicial intervention. In respect of courts that hear and determine election disputes, a similar rule is provided for under section 9(2) of the Fair Administrative Action Act 2015. This provision bars the High Court or a subordinate court from reviewing an administrative action or decision of a political party, party institutions and the Registrar of Political Parties unless mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

Once the IDRM has been attempted, the complaint can be filed at the Political Parties Disputes Tribunal (PPDT). The PPDT is established under section 39 of the Political Parties Act. Section 41 of the Political Parties Act empowers the Tribunal to determine such a complaint expeditiously within three months from the date the dispute is lodged. The procedure for disposing of such a complaint is provided for in the Political Parties Disputes Tribunal (Procedure) Regulations, 2017. A party dissatisfied with the decision of the Tribunal can appeal to the High Court on points of law and facts and points of law to the Court of Appeal. In such a case, the decision of the Court of Appeal shall be final.

Besides the PPDT, IEBC also has a role in the resolution of election disputes. Article 88(4)(e) of the Constitution recognizes that IEBC is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by a Statute. That role includes the settlement of electoral disputes, including disputes relating to or arising from nominations. However, this does not extend to election petitions and disputes after the declaration of election results. Section 74 of the Elections Act 2011 also recognizes the IEBC's power to settle nomination disputes in similar terms. IEBC usually constitutes a Dispute Resolution Committee formed comprising its commissioners. In 2022, the Commission expanded the DRC to include lawyers engaged by the Commission to bolster its internal dispute resolution capacity. The Committee hears and determines the disputes within the ten-day timeline or before the date of nomination whichever is applicable.

The party nomination process conducted by political parties, which occurs before their registration or clearance by the Independent Electoral and Boundaries Commission (IEBC), establishes a significant link between these two procedures. This connection can lead to overlapping jurisdictions, misunderstandings, and the potential for forum shopping between the Political Parties Disputes Tribunal (PPDT) and the IEBC. To mitigate these challenges in 2017, a Memorandum of Understanding was

signed between PPDT and IEBC delineating each body's mandate in the nomination process. The MoU was renewed in 2022.

In 2022, amendments were also introduced to the Political Parties Act, specifically granting the PPDT authority over party nominations as outlined in section 40(1)(fa) of the Act. Furthermore, there were suggested amendments to the Elections Act intended to clarify this relationship. While the revisions to the Political Parties Act were implemented, the proposed modifications to the Elections Act remained unresolved during the 2022 elections. After the completion of the party nomination process, the IEBC takes on the role of registering candidates for elections and is tasked with addressing any disputes that may arise from the nominations, as stipulated in Article 88(4)(e) of the Constitution.

After nominating candidates for the general elections, parties are also required to nominate persons who would stand elected if the party were entitled to all the nomination slots under Articles 97, 98 and 177 of the Constitution. The creation of party lists is bound to result in disputes. Both the PPDT and the IEBC have a role to play in resolving disputes relating to party lists.

Regulation 21 of the Elections (Party Primaries and Party Lists) Regulations, 2017 requires that each party list be submitted to the IEBC alongside a statutory declaration of compliance. Under Article 90(2) of the Constitution, it is the responsibility of IEBC to ensure that each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for. The political parties are required to submit for consideration, the nomination lists which are the National Assembly Party List, Senate (Women) Party List, Senate (Youth) Party List, Senate (Person with Disability) Party List, County Assembly (Gender) Party List, and County Assembly (Marginalized Group) Party List. Since Kenya practises a closed party list system, the method of nomination of candidates is within the discretion of the political party and this party autonomy will be upheld unless it can be demonstrated that the Constitution or other related laws were not complied with in generating the party list. The Constitution and Elections Act impose conditions of diversity, gender balance as well as prioritisation of marginalised groups in the preparation of these lists.

Article 90(3) of the Constitution further states that once the lists have been submitted to the IEBC, the Commission is to allocate the seats to the political parties in proportion to the total number of seats won by the candidates of the political party in a general election. IEBC must do this allocation within 30 days of the declaration of results. The formula for the allocation that ensures proportional representation is provided for in Regulation 56(2) of the Elections (General) Regulations, 2012 as amended in 2017. The role of the IEBC in the process is limited to reviewing the list and ensuring that it complies with the

Constitution, section 34(6) of the Elections Act, party nomination rules of the political party concerned, and prescribed regulations particularly the minimum requirements prescribed under Regulations 54 to 56 of The Election (General) Regulations, 2012 as amended in 2017 and The Elections (Party Primaries and Party Lists) Regulations, 2017. Once the IEBC determines that a party nomination list complies, section 31 of the Elections Act gives the Commission powers to publish the party lists in the Kenya Gazette.

Party list disputes are categorized under two types of jurisdictions: one concerning issues arising from the preparation of the list and the other related to the gazettement of nominees. Regarding the disputes stemming from the preparation of the list, the responsibility for resolution is shared between the PPDT and the IEBC. Regulation 27 of the Elections (Party Primaries and Party Lists) Regulations, 2017 directs that any dispute related to party nominations and party lists should be resolved in the first instance by the internal dispute resolution mechanism of the party. The dispute should be determined not later than ninety days before the date of the general election. The PPDT does not have an express mandate to resolve party list disputes under the PPA.

To establish clear boundaries for their respective jurisdictions, the 2017 MoU between the IEBC and PPDT, which was updated in 2022 to reflect changes introduced by the Political Parties (Amendment) Act 2 of 2022, established that the PPDT's authority covers disputes related to both party nominations and party list nominations, whereas the IEBC's jurisdiction begins once it has received the names of candidates or party lists for clearance. Although the PPDT can resolve disputes regarding party nominations and party lists, its jurisdiction ceases once the IEBC has cleared a political party nominee. Once a nominee is gazetted, they are declared elected and can only be removed from office via an election petition. Such a dispute therefore transmutes into an election dispute within the province of a gazetted election court under the Elections (Parliamentary and County) Election Petition Rules 2017.

Courts also have the jurisdiction to hear and determine election petitions and disputes after the declaration of election results. Under section 75 of the Elections Act, petitions relating to the County elections and election of Members of the National Assembly are to be determined by the High Court within the county or nearest to the county. An election court must be gazetted by the Chief Justice under the Elections (Parliamentary and County Elections) Petition Rules 2017. The county elections are those that concern the validity of the election of County Governor and Member of County Assembly. Section 85A of the Elections Act provides that parties that are aggrieved by the High Court decision can appeal to the Court of Appeal on matters of law only. The election petitions and the appeals are to be heard and determined within six months. However, the dispute which challenges the validity of the election of a member of a

county assembly is heard and determined by the Resident Magistrate's Court designated by the Chief Justice. Such a petition must also be heard and determined within six months. Section 75(4) of the Elections Act provides that appeals from the Resident Magistrate's court lie to the High Court on points of law only. The High Court and Resident Magistrates Courts that hear and determine the election petitions for county and parliamentary elections are guided by the Elections (Parliamentary and County Elections) Petitions Rules, 2017. The Rules provide guidance on procedural issues on the manner of filing the petition, contents of the petition, service, filing of responses, filing of affidavits, hearings and determinations and the procedure of issuing relief and making necessary orders during the proceedings.

For Presidential elections, the Supreme Court of Kenya has the exclusive original jurisdiction to hear disputes relating to Presidential elections. Article 140(2) of the Constitution grants the Supreme Court fourteen days to hear and determine the dispute. The decision that the Supreme Court makes is final.

In all electoral disputes, the burden of proof is upon the person who seeks to overturn an election outcome. The standard of proof is an intermediate one: above a balance of probabilities but below beyond reasonable doubt. The only exception for the standard is where there is an allegation of election offence or criminal conduct. In such cases, the standard of proof is beyond a reasonable doubt.

1.2 Administrative Structures for Election Dispute Resolution in Kenya

The Judiciary Committee on Elections (JCE) is mandated to prepare and manage the Election Dispute Resolution (EDR) process. JCE engages stakeholders, trains Judges and Magistrates, Judicial Staff, and sources for funding while putting in place strategies for hearing and determining election petitions. As he was establishing the Judiciary Working Committee on Elections (now known as the Judiciary Committee on Elections), CJ Emeritus Willy M Mutunga indicated that the intention was to not only prevent a recurrence of past mistakes but to also deliver an election that would be model for other democracies. Through proper institutional conduct, the Judiciary would earn the public confidence that was so dented in 2007 as to discourage parties from taking disputes to court.

1.3 Mandate of the Judiciary Committee on Elections

The mandate of the Judiciary Committee on Elections (JCE) is to advise the Judiciary on administrative arrangements and measures for the efficient disposal of election-related disputes. The Committee, in conjunction with the Kenya Judiciary Academy, also develops and implements a training programme for the efficient and effective management of election disputes for Judges, Judicial officers and staff. JCE is mandated to develop and design a system for monitoring and evaluating the management and administration of election-related disputes in court. Other roles of the

Committee are to liaise and cooperate with other stakeholders to ensure efficient, effective, and timely resolution of election-related disputes and offences and to advise the Judiciary on the information that needs to be developed and disseminated to the public.

1.4 Membership of Judiciary Committee on Elections

The current committee was appointed by the Chief Justice in December 2020 and later reconstituted to comprise the following members;

Hon. Mr. Justice Mohammed Ibrahim, CBS
Judge of the inaugural Supreme Court of Kenya
Chairman, JCE

Hon. Mr. Justice Daniel Musinga
President, Court of Appeal
Vice Chairman, JCE

Hon. Justice (Dr.) mokin Wanjala, Ph.D, FCIArb, CBS Justice of the Supreme Court of Kenya and Director General, Kenya Judiciary Academy Kenya.
Member, JCE

Hon. Mr. Justice Kathurima M'inoti
Judge, Court of Appeal
Member, JCE

Hon. Lady Justice Lydia Achode
Judge, Court of Appeal
Member, JCE

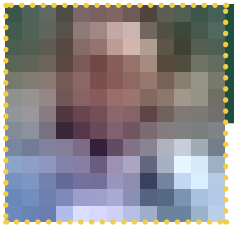
Hon. Mr. Justice Robert Limo
Judge, High Court
Member, JCE

Hon. Lady Justice Diana Rachel Kavedza - Mochache
Judge, High Court
Member, JCE

Hon. Lady Justice Wendy Kagendo Micheni
Judge, High Court
Member, JCE

Hon. Elizabeth Tanui
Member, JCE

Hon. Rosalynn Aganyo
Member, JCE



Hon. Lydiah Mbacho
Member, JCE

Mr. Walter Khobe
Member, JCE

Hon. Zipporah Gichana
Secretary

Hon. Edwin Mulochi
Deputy Secretary

Overview of the 2022 Election Petitions

In the aftermath of the 2022 elections, 222 petitions were submitted, a notable decrease from the 388 filed in 2017. Among these, 9 petitions were lodged in the Supreme Court, the highest number recorded since the 2010 Constitution's adoption. This trend could either reflect increased public trust in the Supreme Court or ongoing concerns about the IEBC's capacity to conduct credible elections. In the High Court, 12 petitions were related to gubernatorial elections, 2 challenged senatorial races, 4 contested elections for women representatives to the National Assembly, and 28 targeted National Assembly elections. Meanwhile, 80 petitions disputing MCA elections were filed in the Magistrates' Courts. Of these petitions, 24 (10.8%) were successful, 111 (50%) were dismissed, 60 (27%) were struck out, and 27 (12.2%) were withdrawn before a full hearing.

An analysis of petition outcomes from 2013 to 2022 shows that typically, 10-13% of petitions are upheld, 50-60% are dismissed after a full hearing, 9-12% are withdrawn, and 16.5-30% are struck out due to technicalities. The 2022 results align with these historical trends.

Table 1: Summary of 2022 election petitions

POSITION & COURT	NO.	TOTAL PER RANK	ALL PETITIONS
PRESIDENTIAL ELECTION PETITIONS			9
Supreme Court of Kenya (Presidential)	9	9	
PARLIAMENTARY & COUNTY ELECTION PETITIONS (High Court)			**126**
Governor	12	46	
Senator	2		
Woman Representative	4		
Member of National Assembly	28		
Magistrates' Courts (County Election Petitions)		80	
Member of County Assembly	80		
PARTY LISTS PETITIONS			**87**
Filed in the High Court	3	87	
Filed in Magistrates' Court	84		
Number of 2022 Election Petitions			**222**

2.0 Structure of the Case Digest

This Case Digest contains summaries of decisions of the Election Court in the exercise of its mandate to hear and determine the 2022 pre-election and post-election disputes. It captures, documents, preserves, and publishes the jurisprudence of the High Court, Court of Appeal and Supreme Court in election law. The cases have been carefully selected based on their jurisprudential value in election disputes. It is a useful resource for key stakeholders in the election space including judicial officers, practitioners of electoral law, legal academics, politicians, development partners, members of the public and other stakeholders. The review of the decisions of the Courts contributes to an assessment of the electoral dispute resolution process in the 2022 general elections and informs legal reforms for future elections.

The Case Digest is organised in thematic areas with appropriate headings covering court decisions emanating from the pre-election disputes (appeals from IEBC and PPDT to the High Court and Court of Appeal) and post-election disputes (election petitions in the High Court, Court of Appeal and Supreme Court). It provides a summary of facts, issue(s) for the determination and decision of the Court for each case. Each case explains the legal principles addressed by the courts and the reasons for their decisions. The digest also captures the key take-aways at a glance, concluding observations and proposals for legal reforms and administrative interventions in the last chapter.

The Case Digest contains court decisions that have been summerised under the following thematic areas: eligibility and suitability of candidates, participation rights of marginalised groups, complementary voter identification system and independent candidature, jurisdiction of the PPDT, internal dispute resolution mechanisms, party autonomy versus legitimate expectations of party members, rules and principles governing fresh nominations, impact of gazettement as an independent on participation in party nominations, party list disputes and qualification for nomination on the party list, principles on scrutiny, admission as amicus curie in presidential election petitions, striking out affidavits, filing further affidavit evidence, participation in the presidential election as a pauper, whether the Attorney General should be struck out of presidential petition, jurisdiction of the Supreme Court over pre-election issues, whether a pre-election dispute can be lodged as an election petition, principles guiding extension of time, law on witness evidence and admissibility, admissibility of evidence in election petition, withdrawal of applications, joinder of deputy governor as parties to petitions challenging election of a county governor, election irregularities, illegalities or malpractices that vitiate election results, principles guiding withdrawal of the petition, principles guiding payment of costs of the petition, review of orders of a judge with concurrent jurisdiction, applicability of Civil Procedure Rules in electoral disputes, abatement of election petition/appeals upon

death of a party, documents to be filed on appeal, failure to file notice or record of appeal on time, failure to deposit security for costs on appeal, deferred and sequential jurisdiction of the Court of Appeal and transfer of appeal filed in the wrong court.

3.0

Disputes preceding the declaration of election results

3.1 Eligibility and suitability of candidates

3.1.1 Resignation from public office before elections

Mwawaza v Mwaidza & another

Petition E001 of 2022

High Court of Kenya at Voi

JN Onyiego, J

15 July 2022

Summary of the facts

The Appellant, an independent aspiring candidate for Member of Parliament for Voi Constituency, presented his nomination papers on 31 May 2022. The Respondent, a Returning Officer, rejected his nomination, citing non-compliance with Section 43(5) of the Elections Act 2011 as the Appellant, a public officer, had not resigned six months prior to the election. The Appellant challenged the decision before the IEBC Dispute Resolution Committee on 4 June 2022, arguing that he was not a public officer as per Article 260 of the Constitution of Kenya.

On 16 June 2022, the Committee upheld the Returning Officer's decision, dismissing the complaint. Dissatisfied, the Appellant filed an appeal on 24 June 2022, seeking an order to compel the Respondent to validate his nomination. The appeal was grounded on the argument that the Committee misinterpreted the term "public officer" and violated his political rights under Article 38 of the Constitution.

The Respondent opposed the appeal, arguing that the Appellant failed to enjoin the IEBC and its Dispute Resolution Committee, which made the decision. Additionally, the Respondent noted that the appeal was overtaken by events as the IEBC had already gazetted independent candidates on 1 July 2022.

At the hearing, the Appellant maintained that his employment by a board of governors did not make him a public officer, as his salary was not drawn from the exchequer or consolidated fund. He also argued that the gazettement of candidates was not an obstacle to his candidacy, as the IEBC Chairman had promised to amend the gazettement if necessary.

The Respondent's counsel contended that the Appellant had wrongly sued the Returning Officer, who was functus officio, and that any orders should have been directed at the IEBC. The court noted that the Appellant had delayed in filing his appeal, which contributed to the complexity of the case.

Issues for determination

1. Whether the IEBC Dispute Resolution Committee erred in finding that the appellant is a public officer who should have resigned six months to the election date prior to presentation of his nomination papers in compliance with Section 43(5) of the Elections Act.

2. Whether the Returning Officer is properly sued as the Respondent in this appeal.

3. Whether the reliefs sought could be issued.

Decision of the court

The dispute in this case arose from the rejection of the appellant's nomination papers, which was based on the appellant's failure to comply with Section 43(5) of the Elections Act, 2011. This provision requires public officers who intend to run for election to resign from public office at least six months before the election date. The primary issue in this case revolved around whether the appellant qualified as a "public officer," which would necessitate his resignation within the prescribed time.

The term "public officer" is defined in Article 260 of the Constitution as encompassing any State officer or any other individual holding a public office. A "public office" refers to a position within the national or county government or public service, where remuneration is paid from the Consolidated Fund or funds provided by Parliament. "Public service" covers those working within a state organ, which is any commission, office, or agency established by the Constitution. The term "state" includes the government's various offices, organs, and bodies.

Further clarification is provided by the Public Officer Ethics Act, which defines a public officer as anyone working for or representing government entities, including individuals receiving public funds. The Anti-Corruption and Economic Crimes Act similarly broadens the definition to include those who are unpaid or working part-time in government institutions.

The appellant contended that, as an administrator at the Coast Institute of Technology, his position did not constitute a public office since his salary was paid by the institution's board of governors, rather than from the Consolidated Fund or parliamentary allocations. However, the court noted that the Coast Institute of Technology is a public institution under the Ministry of Education, classifying it as a public entity.

The Technical and Vocational Education and Training Act, 2013, established the Coast Institute of Technology as a public institution. Its board of governors is empowered to manage financial matters, including receiving student fees and making disbursements. This indicated that, although the appellant's salary was paid from student fees, the institute's overall funding was derived from the government, thereby affirming its status as a public institution.

The court referred to past decisions for context. In ***Charles Omanga & another v Independent Electoral & Boundaries Commission & another* [2012] eKLR,** the court highlighted the requirement for public officers to resign before seeking elective office to ensure impartiality in public service. Similarly, in ***Public Service Commission & 4 others v Cheruiyot & 20 others [2022] KECA 15 (KLR),*** the Court of Appeal reiterated the importance of timely resignation by public officers to uphold political neutrality.

The court held that the appellant was indeed occupying a public office and was therefore obligated to comply with Section 43(5) of the Elections Act. His argument that his role did not fit the definition of "public officer" was found to be inconsistent with the Constitution and relevant statutory provisions.

On the issue of the appropriate Respondent, the court determined that the appeal should have been directed at the IEBC Dispute Resolution Committee, not the Returning Officer. Under Section 74 of the Elections Act and Article 88 of the Constitution, the IEBC has the authority to resolve electoral disputes. The court noted that the appellant should have initiated judicial review proceedings against the IEBC Dispute Resolution Committee instead of filing a constitutional petition.

Given these procedural shortcomings, including the failure to involve the correct party, the court concluded that the appeal was not properly constituted. Consequently, the appellant's appeal was dismissed, and he was ordered to bear the Respondent's costs.

Public Service Commission & 4 others v Cheruiyot & 20 others

Court of Appeal No's

(119 & 139 of 2017 (Consolidated)

Court of Appeal at Nakuru

DK Musinga, W Karanja & AK Murgor, JJA

8th February 2022

Summary of facts

The genesis of the matter culminating in the appeal was that Petition 1 of 2017 filed at the Employment and Labour Relations Court by one Eric Cheruiyot the 1st Respondent herein challenged the Constitutionality of section 43(5) and (6) of the Elections Act, 2011. The petition was said to be anchored on Article 22(1) of the Constitution of Kenya, 2010 (the Constitution).

The Petitioner was aggrieved by a circular dated 1st December 2016 issued by the Chief of Staff and Head of Public Service to all public officers requiring those of them who were intending to vie for any elective position in the 2017 general election to resign at least six months before the general election, pursuant to the provisions of section 43(5) and (6) of the Elections Act, 2011.

The Petitioner contended that first, the enactment of sections 43(5) and (6) was not done through public participation as anticipated under Article 118, and secondly, the requirement to resign 6 months prior as envisaged under sections 43 (5) and (6) was discriminatory as some of the public officers resigned from office others would still remain in office despite their contesting an elective position.

Thirdly, the provisions of section 43(5) and (6) conferred undue advantage on members of Parliament, members of county assemblies and Governors over other public officers who are expected to terminate their respective

contracts of employment by operation of section 43(5) and (6) of the Elections Act, 2011. The provisions of that section were said to be in contravention of the rights of public officers who wished to contest in the 2017 general election guaranteed under articles 27, 38, 41(1) 234 and 236(1) of the Constitution.

The reliefs sought were, that sections 43 (5) and (6) be declared unconstitutional; that declaration that public officers can only leave office to participate in the election process upon dissolution of Parliament and County Assemblies; A permanent injunction to restrain the Respondents either by themselves, servants, agents, employees, assignees, proxies and/or representatives from disqualifying public servants from the next general election for not vacating public office six months to the election date; order of mandamus directed at the IEBC to gazette the date for the next general election; order of certiorari to quash the circular by the Chief of Staff and Head of Public Service dated December 1, 2016; and costs.

The petition was filed contemporaneously with an application seeking orders, inter alia, that pending inter parties hearing and determination of the application, the Respondents be restrained either by themselves, servants, agents, employees, assignees, proxies, and / or representatives from disqualifying public servants from the next general election for not vacating public office six months to the election date.

The trial judge issued interim orders which set in motion the filing of the second petition before the same court sitting at Kericho Employment and Labour Relations Court Petition 2 of 2017. On January 5, 2017 and January 6, 2017, the three Petitioners, who intended to run for elective positions in the 2017 general election, handed in their respective one-month resignation notices to the Governor, County Government of Embu pursuant to section 43 (5) and (6) of the Elections Act.

Later, it was alleged that the Petitioners learned of the interim orders issued by the court in Petition 1 of 2017, and in a bid to revoke their resignation wrote to the Governor County Government of Embu separately revoking their resignation notices pending the hearing and determination of the application, who later told them on 9th February 2017 that their resignation took effect and it was impossible to revoke their notices.

The Petitioners, (herein the Respondents') petitions were consolidated for reasons that orders sought by the Petitioners with regard to the constitutionality of section 43(5) and (6) of the Elections were similar to those sought by the Petitioners in Petition No 1 of 2017.

In the trial court, the appellants raised a preliminary objection challenging the jurisdiction of the Employment and Labour Relations Court they agreed that the matters raised in the petition were matters under Article 165 of the Constitution, which the Employment and Labour Relations Court did not have jurisdiction to handle.

By a ruling dated February 14, 2017, the trial court held that it had jurisdiction to hear and determine the issues raised in the petition.

The trial court delivered its judgment on the consolidated petitions on 29 March 2017. It held that section 43(5) of the Elections Act, 2011 was unconstitutional. The court issued an order of certiorari quashing the letter dated 1 December 2017 from the Chief of Staff and Head of Public Service, which required public servants seeking elective posts in 2017 to resign from office. The court further held that public officers could only leave their positions to participate in the election process or nomination after the nomination process for the general election had commenced. Additionally, the letter dated 9 February 2017 from the Governor of the County Government, which declined to revoke the resignation notices submitted by the Petitioners in Petition 2 of 2017, was declared illegal. The court found that this action violated the Petitioners' rights under Articles 27, 28, 41, 47, and 50 of the Constitution. An order of certiorari was issued to quash the Governor's letter of 9 February 2017.

The Appellant's i.e. the Public Service Commission, The Attorney General, The Chief of Staff and the Head of Public Service being aggrieved with the decision of the trial court filed the instant joint appeal, and the County Government of Embu being aggrieved filed an appeal.

Both appeals were cross-cutting raising the same issues as follows: - that the learned judge erred in arrogating himself jurisdiction to handle constitutional matters that are the reserve of the High Court as elucidated in article 165(3)(b) and (d) of the Constitution. They also challenged the fact that the court never concluded that the constitutionality of sections 43 (5) and (6) had been determined in ***Charles Omanga & another v Independent Electoral and Boundaries Commission & another* [2013] eKLR** and was therefore res judicata.

Further, the Appellants claimed that the learned judge erred in law in finding that there was no public participation in the enactment of sections 43(5) and (6) of the Elections Act, 2011, despite evidence placed on record that the requirement for public participation under article 118 of the Constitution had been suspended by dint of section 2(1) (b) of the Sixth Schedule of the Constitution until the first elections of 2013.

Finally, they challenged the fact that the learned used the wrong principles of constitutional and statutory interpretation thereby reaching an erroneous finding that sections 43(5) and (6) of the Elections Act, 2011 were unconstitutional and that the learned judge erred in law and fact by finding that an employee can retract a resignation notice tendered voluntarily and acted upon by an employer.

Upon grant of orders of stay of the trial court judgement and orders for consolidation of both appeals, counsels proceeded to highlight their submissions, with counsel for the 1st, 2nd

and 3rd Appellant stating that the trial court had no jurisdiction as it was tritely stated by the Supreme Court in the case of ***Samuel Kamau Macharia and another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR*** that a court cannot expand its jurisdiction through judicial craft or innovation.

On the issue of Section 43(5) and (6) of the Elections Act counsel submitted that the trial matter was res judicata as the same had been determined by the High Court in ***Charles Omanga & another v Independent Electoral & Boundaries Commission & Others.*** Therefore, pursuant to the provisions of section 7 of the Civil Procedure Act, the trial court was barred from entertaining the same issue again as it was res judicata.

counsel submitted that the provisions of section 43(5) of the Elections Act ought to be read together with Articles 10, 99(2), 193(2) (a) and 232 of the Constitution as well as section 23(3) of the Leadership and Integrity Act and section 5 of the Political Parties Act and that the provisions of section 43(5) of the Elections Act, 2011 were not discriminatory but merely stipulated different treatment of appointed and elected leaders on the issue of their resignation before offering themselves for competitive politics.

It was also submitted by counsel for the 2nd and 3rd Appellant that the issue of public participation had been suspended by section 2(1)(b) of the Sixth Schedule of the Constitution at the time Parliament enacted the Elections Act, 2011. Further, on the issue of resignation, the court was persuaded to consider the fact the resignation notices had taken effect, and the previous offices had replacements, therefore the notices could not be retracted. The IEBC chose to fully rely on the submissions of counsels made by the appellants.

In response, the counsel for the 1st Respondent stated that the issue of public participation had not been raised in the ***Charles Omanga*** case and therefore the issues which the two courts were invited to determine regarding the constitutionality of section 43(5) of the Elections Act, 2011 were distinct and not res judicata.

On the claim of jurisdiction, the 1st Respondent stated that since the petition was anchored on article 22 of the Constitution it left it open for any person to institute proceedings. Therefore a reading of article 22(1) of the Constitution and article 23 and only lead to the conclusion that the trial court had jurisdiction to entertain the consolidated petitions. He argued that there was no employer-employee relationship with the Appellants but subject to the provision of Article 22(1) of the Constitution he had the liberty to institute the petition at the trial court.

The 2nd to the 4th Respondents' counsels never highlighted the submissions, but stated as follows in the submissions' that the dispute between the Respondents and the appellants was anchored on an employment relationship and that their claim arose from the alleged

violation of their fundamental rights to fair labour practices, protection of the law among others. For this reason, therefore, the Employment and Labour Relations Court had competent jurisdiction to hear and determine the issues raised in the consolidated petition, and more so the issue of the constitutionality of section 45(3) of the Elections Act, 2011. Reliance was placed on the cases of ***Sollo Nzuki v Salaries and Remuneration Commission & 2 others* [2019] eKLR** and ***Charles Oyoo Kanyangi & 41 others v Judicial Service Commission of Kenya* [2018] eKLR** to buttress this argument.

On the question of the constitutionality of section 45(3) of the Elections Act, 2011, the 2nd to 4th Respondents contended that the same was unconstitutional for contravening article 24 (1) and (2) of the Constitution by obligating a seven-month resignation period without any reasonable and justifiable bases thereby limiting the Respondents' rights under Article 41 as read with Articles 27 and 38 of the Constitution.

Counsel for the 10th to 14th Respondents stated that he would be relying on the submissions of the 1st Respondent.

Issues for determination

1. Whether the Employment and Labour Relations Court had jurisdiction to entertain and determine the matters raised in the consolidated petitions.

2. Whether the proceedings before the trial court were res judicata.

3. Whether section 43(5) of the Elections Act, 2011 is unconstitutional.

4. Whether the trial judge made the correct findings on the requirement of public participation during the enactment of the Elections Act, 2011.

Decision of the court

On jurisdiction, the learned judges submitted that jurisdiction is everything relying on the celebrated case of Owners of the ***Motor Vessel "Lillian S' v Caltex Oil (Kenya) Ltd.*** That the learned judges further submitted that a court cannot arrogate itself of powers by judicial craft or innovation.

In interpreting Article 162, the court stated that superior courts were the Supreme Court, the Court of Appeal, the High Court and the Courts mentioned in clause 2 where the Parliament is to establish courts of a similar status to the High Court to hear employment and labour relations disputes as well as Environment and the use and occupation of, and title to land.

It is pursuant to the provisions of article 162(2) of the Constitution that Parliament enacted the Employment and Labour Relations Court Act, 2011 with the jurisdiction of hearing and determining matters as enunciated in section 12(1) which also included constitutional violations of the rights of any party arising from an employee-employer relationship.

However, the court was keen to note that, any constitutional dispute that the said court was called upon to entertain ought to be ancillary and incidental to the matters contemplated under section 12 of the Act.

It was therefore admitted in the two consolidated appeals that none of the Respondents, then Petitioners as they were in the trial court demonstrated an existing employee-employer relationship with any of the appellants herein or with any public entity. At some point Counsel for the 1st Respondent conceded that there was no existing employer-employee relationship with the appellants however article 22(1) allowed the 1st Respondent to institute proceedings against the appellants in the Employment and Labour Relations Court.

The 2nd to 4th Respondents, though they were employees of the County Government of Embu, had rendered their resignations with a month's notice and therefore their respective dues had been processed and at the time of the petition their resignation had crystallized.

Therefore, with no evidence to show that their resignation was involuntary, it thus meant that the resignation was voluntary with dues being processed, their positions being filled and their resignation crystallizing. Therefore, their employer-employee had come to an end.

In the absence of an employee-employer relationship, it was the considered view that the court that had jurisdiction to entertain and determine the issues raised in the consolidated petitions was the High Court. The establishment of the High Court found in Article 165(1) of the Constitution specifically under Article 165(3), the High Court has jurisdiction to determine the question of whether a right or fundamental freedom in the Bill of Rights had been violated, infringed or threatened. Under Article 165(d)(i), the High Court has jurisdiction to determine whether any law is inconsistent with or in contravention of the Constitution.

Further the Constitution appreciated that there were matters within the exclusive jurisdiction of the High Court on the one hand and those reserved and/or falling within the jurisdiction of the courts contemplated in article 162(2) on the other hand, even though the latter courts enjoy the same status as the High Court.

The learned judges of appeal relied on the case of **Karisa Chengo** where it was opined that status was not synonymous with jurisdiction and due to the lack of employer-employee relationship, the court found that the Employment and Labour Relations Court arrogated to itself jurisdiction.

The court stated that the issue on jurisdiction would have dispensed with the consolidated petitions in the trial court However owing to the gravity and public interest of the remaining issues for determination, the apex court would proceed to determine the remainder of the issues.

It was argued in the consolidated appeals that the question of whether section 43(5) and (6) of the Elections Act, 2011 was unconstitutional

had already been determined by the High Court vide ***Charles Omanga and another v Independent Electoral and Boundaries Commission*** and another (supra) and was therefore res judicata.

In this case the two Petitioners were identified as Charles Omanga and Patrick Njuguna respectively. The Respondents were the Independent Electoral and Boundaries Commission and the Hon Attorney General as the 1st and 2nd Respondents respectively. The Union of Kenya Civil Servants was an Interested Party. One of the issues that had been raised in the petition and which the court was called upon to determine was: "Whether the provisions of section 43(5) of Election Act, 2011 requiring the resignation of State officers seven (7) months before the elections while at the same time excluding other categories of State or public officers is discriminatory, accords an unfair advantage to some, breaches the requirement for fairness, equality and proportionality and therefore unconstitutional.

In a Judgment dated 2nd August 2012, the learned Judge opined that it was reasonable that Public Officers resign 6 months before seeking an elective seat and therefore the provisions in sections 43(5) and (6) was not in contravention of the Constitution.

The apex court noted a striking similarity between the issues identified and determined by Lenaola, J in the Charles Omanga petition and the issues identified for determination by the trial judge in the consolidated petitions regarding the constitutionality of sections 43(5) and (6) of the Elections Act, 2011.

However, the learned judges in the appeal herein relied on the case of the court in ***Independent Electoral & Boundaries Commission v Maina Kiai & 5 others*** to state the set out requirement that ought to be met in determining whether the matter in dispute is res judicata. These were that the suit or issue should be directly and substantially in issue in the former suit; that the former suit was between the same parties or parties under whom they or any of them claim; those parties were litigating under the same title; the issue was heard and finally determined in the former suit; and a court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

The parties in the Charles Omanga petition and in the consolidated petitions that gave rise to the consolidated appeals were different. The Petitioners in the consolidated petitions were Eric Cheruiyot, Raymond Kinyua, Emily Thaara Njuki and Monica Syombua Gitari as the 1st to 4th Petitioners respectively.

The Public Service Commission, the Chief of Staff and Head of Public Service, Embu County Government, the Governor-Embu County, County Government of Bomet, County Public Service Commission Board-Bomet County who were the 2nd, 4th, 5th, 6th, 7th, and 8th Respondents in the consolidated petitions were not parties in the Charles Omanga petition.

In addition, the consolidated petitions had eight Interested Parties who were not parties in the Charles Omanga petition. Therefore, the requirements of res judicata in section 7 of the Civil Procedure Act and some of the elements laid down by this court in the ***Independent Electoral and Boundaries Commission v Maina Kiai & 5 others (supra)*** had not been satisfied, and therefore it could not be said that the consolidated appeals were res judicata.

However, the learned court in determining the constitutional appropriateness of sections 43(5) and (6), remarked that the impartiality of public servants is a cardinal principle enshrined in Article 232 of the Constitution that requires the public servant in public offices to be politically neutral so that they are effectively responsive to their service.

The learned judges opined that election processes are also undertaken under strict timelines that allow the IEBC to plan and comply; therefore the resignation of the public officers would come in handy in allowing the IEBC to plan smoothly.

They also determined the aspect of discrimination in leaving out some public officers and stated that a reading of articles 24 and 25 of the Constitution yielded the interpretation that the political and or the labour rights of the State and, or public officers seeking to join elective politics were not absolute rights that could not be limited pursuant to the provisions of article 25 of the Constitution. The rights could be limited by the application of relevant laws provided that the limitation was reasonable and justifiable in an open and democratic society.

In the exposition on the principle of equality by Khanna, J. the court relied on the case by stating that equality must be seen as the parity of treatment under parity of conditions. It is not desired that State and/or public officers intending to join elective politics have one leg in public service and another in elective politics. The fact that section 43(6) of the Elections Act lists persons to whom the provisions of section 43(5) do not apply does not in any way afford preferential treatment to those officers.

They fully associated themselves with the decision of Lenaola, J as he then was in the ***Charles Omanga case*** that sections 43(5) and (6) were justifiable and reasonable and did not in any way contravene the Constitution, since government functions cannot be suspended during an election period.

Finally, on the issue of public participation, the court held that the status of transitional provisions was not of a less status and that the provisions of section 2(1) (b) of the Sixth Schedule of the Constitution had effectively suspended the application of article 118(1) (b) of the Constitution until the first elections for Parliament under the 2010 Constitution were conducted and results announced.

The provisions of Article 118(1) (b) of the Constitution having been suspended by operation of the provisions of section 2(1) (b) of the Sixth Schedule to the Constitution, it

was the court's view that public participation was not a constitutional prerequisite in the enactment of Elections Act, 2011 which was assented to by the President on August 27, 2011, more than one year before the first general election under the new Constitution.

In conclusion, the learned judges determined that the consolidated appeals were merited and allowed as prayed save for the order affirming the constitution of 43(6) of the Elections Act, 2011 which is the view of the court was innocent and harmless as it is a replication of the Constitution on the subject.

3.1.2 Whether Members of the County Assembly who change political parties before elections are required to resign

Peter Kibe Mbae v Speaker of the County Assembly of Nakuru & another Registrar of Political Parties and 49 Others (Interested Parties)

Petition No E004 of 2022

High Court at Nakuru

Joel Ngugi, J

18 March 2022

Summary of facts

In a petition dated 25 February 2022, the Petitioner, a Member of the County Assembly, challenged the constitutionality of section 14 of the Elections Act. This section required sitting Members of the County Assembly and National Assembly to resign from their respective seats as a precondition for switching political parties for the purpose of participating in an election. The Petitioner sought a declaration that the provision was unconstitutional, null, void, and of no effect, as it violated Article 38(3)(c) of the Constitution, read together with Article 24(1) and 24(2)(c). The timeline for such changes in party membership was determined by the law and the Independent Electoral and Boundaries Commission ahead of a General Election.

He also prayed that the court determines that under section 14 of the Political Parties Act if a Member of Parliament or a County Assembly resigns from one political party to the other on the last day of the times lines set by the law and the Independent Electoral and Boundaries Commission for purposes of participation in a general Election need not thereby resign from and/or lose his seat because of such change of party membership.

The Petitioner also prayed that a conservatory order be issued to the 2nd to 50th Interested Parties from declaring as a vacant a seat of any member who moves from one political party to the other on the date set by the Independent Electoral and Boundaries Commission as the final date for verification and closure of party membership registers for purposes of the General Election scheduled for 9 August 2022.

The court directed the parties to file written submissions in relation to the petition. In response, the 1st Respondent submitted a preliminary objection and a replying affidavit,

while the 2nd Respondent filed an entry of appearance and submissions. The Interested Party also submitted its written submissions. However, the 50th Respondent only filed an entry of appearance without submitting any additional documentation to the court.

Issues for determination

1. Whether the Preliminary Objection raised by the 1st Respondent whether the Petition was fatally defective for misjoinder.

2. Whether the Petition raised a substantial question of law under Article 165(4) to warrant the empanelling of a multi-judge bench by the Honourable Chief Justice.

3. Whether to grant the Conservatory Orders as prayed by the Petitioner

Decision of the court

Please replace these two paragraphs with these new ones for clarity: Regarding the Preliminary Objection, the 1st Respondent argued that he had been wrongfully joined as a party, asserting that neither the Application nor the Petition disclosed any culpability on his part concerning the alleged violation of rights or fundamental freedoms under the Bill of Rights.

The court observed that the 1st Respondent was an unusual party in the matter, as his interpretation of the Constitution and the Political Parties Act, which the Petitioner had contested, was central to the alleged rights violations outlined in the Petition. Furthermore, the court noted that the 1stRespondent had not provided submissions on this specific issue, leaving the court to speculate on the reasoning or arguments supporting the Preliminary Objection.

The court referred to Rule 5(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, which provides that a petition shall not fail due to the misjoinder or non-joinder of parties and that the court may address the substantive matter in dispute. The court further cited the decision of the Court of Appeal in Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others [2019] eKLR, where it was held that a petition for enforcement of fundamental rights cannot be defeated solely on the basis of misjoinder or non-joinder of parties. The court is mandated, as far as possible, to resolve the substantive issues. Consequently, the Preliminary Objection was found to lack merit and was dismissed.

On the second issue as to whether conservatory orders should be issued, the court remarked that the Petition was founded on alleged incongruence of Article 194 as read with Articles 38 and 101 (4) and (5). The Petitioner stated that when Article 194 (1) (e) was read in isolation, any time a Member of the County Assembly resigned from a party that sponsored him the seat is subsequently declared vacant. However, a reading of the section with Article 38 and 101 (4) and (5) three

constitutional questions emerged which were whether the narrow and textual interpretation of Article 194 negates the effect and mandate provided in Article 101 (4) that a segment or people should not remain unrepresented for a long period than necessary, whether the purpose of Article 101 (5) can be reconciled with the right of the people to representation; whether the impugned supposed "narrow" and textual interpretation of Article 194(1)(e) of the Constitution would likely result in paralysis of legislative bodies all over the country for lack of quorum. This would occur if members of County Assemblies were to resign in large numbers, which would be constitutionally unacceptable in light of Article 259(1) (d) of the constitution, which requires that the Constitution be interpreted in a manner that contributes to good governance.

The responses from the Respondents and some of the Interested Parties stated that the Petition raised no arguable allegations. They further contended that the natural context of Article 194 and Section 14 should be considered, as the law is clear: when a party resigns from a party that sponsored them, the seat becomes vacant. They also argued that such a situation would ordinarily disrupt business, particularly in the event of a mass fallout. However, they maintained that this was speculative.

On determining whether conservatory orders should be issued, the court determined that conservatory orders are to be issued in light of public interest and are not to be interpreted as injunctive orders that require personal redress. In the case of ***Board of Management of Uhuru Secondary School vs. City County Director of Education and 2 others* (2015) eKLR,** the learned Judge set out the principles for determining the threshold for the grant of a conservatory order, stating that the Applicant must argue a prima facie case with a likelihood of success and that in the absence of conservatory orders, there is a likelihood of suffering irreparable damage; that once the court has decided the grant of the conservatory orders the court must determine that the relief given must promote constitutional values and rights under the Bill of Rights; and that finally, based on the two principles discussed above, if the conservatory orders are not granted the petition or its substratum would be rendered nugatory.

The courts stated that the petition presented arguable points, and the Petitioner presented an irremediable injury if the conservatory orders were not issued and therefore granted conservatory orders. Therefore, the court determined the issue of whether the petition should be heard by a multi-judge bench, by stating that it passed the criteria of ***Esther Awuor Adero Ang'awa v Cabinet Secretary Responsible for Matters Relating to Basic Education & 7 others; Kenya Private Schools Association (KPSA) & 4 others (Interested Parties)* [2021] eKLR** because the matter fell under the scope of Article 165 (3)(b), the matter raised substantial issues,that there was a state of uncertainty in the law, that it was a matter of immense public importance and had unique significance in our constitutional democracy

and that it was complex and that it required a substantial amount of time to be disposed of.

In conclusion, the court upheld the Petitioner's claim and granted a conservatory order pending the hearing of the main petition and directed to forward the file to the Honourable Chief Justice on a priority basis and to follow up with the Office of the Honourable Chief Justice to point out the urgency of the case to prompt the Honourable Chief Justice to act on it with all due dispatch.

Peter Kibe Mbae v Speaker of the County Assembly of Nakuru & another Registrar of Political Parties and 49 Others (Interested Parties)

Petition No E004 of 2022

High Court at Nakuru

Joel Ngugi, Chemitei, Matheka, JJ

7 July 2022

Summary of Facts:

On 25 February 2022, the Petitioner, an MCA in Nakuru County, filed a petition in his personal capacity and the public interest. He sought declarations against several Respondents, including the Speaker of the Nakuru County Assembly, the Attorney General, the Registrar of Political Parties, and the IEBC, challenging the constitutionality of Section 14 of the Political Parties Act.

The petition revolved around the interpretation of Articles 38 (on political rights), 101(4)-(5) (on filling parliamentary vacancies), and 194(1)(e) (on county assembly vacancies). The Petitioner argued that forcing MCAs to vacate office when switching political parties close to a general election infringed on their political rights and those of their constituents. He also argued that Section 14 of the political parties Act failed to account for the dynamics of electoral cycles and the evolving nature of political party ideologies, which may necessitate party changes without losing a seat.

The 50th Interested Party, the Speaker of the Nairobi City County Assembly, supported the petition, contending that Section 14, when applied close to an election, could result in unrepresented wards and constituencies since Article 101(5) prohibits by-elections within three months of a general election.

The court issued conservatory orders on 18 March 2022, preventing the enforcement of Section 14 until the matter was fully heard. The case was then referred to the Chief Justice for the empanelment of a bench. Both the Speaker of the Nakuru County Assembly and the Attorney General opposed the petition, arguing that it was frivolous and violated constitutional provisions.

The Petitioner relied on various constitutional provisions, including Articles 2(4), 38, and 259, arguing that laws inconsistent with the Constitution should be declared void. He further argued that Section 14 disproportionately restricted MCAs' political rights and could lead to legislative paralysis.

Issues for Determination:

1. Whether Section 14 of the Political Parties Act was unconstitutional, as it required MCAs to resign when switching parties within 180 days of a general election.

2. Whether the political rights of the electorate would be violated if a ward was left without representation due to a member's resignation before an election.

3. Whether Articles 101(4)-(5) of the Constitution (on parliamentary vacancies) applied to county assembly vacancies.

4. Whether a sitting MCA could seek an advisory opinion from the Supreme Court.

5. What canons of constitutional interpretation should be applied?

6. What was the nature of party discipline under the Constitution?

7. How Articles 38, 101, and 194 of the Constitution should be harmonised to safeguard political rights.

8. What impact mass resignations by MCAs could have at the end of the electoral cycle?

Decision of the court

The petition primarily sought the court's interpretation of Article 194(1)(e) of the Constitution, which provides for the circumstances under which a seat in the County Assembly becomes vacant, including a Member of the County Assembly (MCA) resigning or defecting from the political party that sponsored them. The interpretation of this provision was contested in light of Section 14 of the Political Parties Act, which outlines the procedure for resignation from a political party, leading to the automatic loss of an MCA seat upon resignation.

The Petitioner argued that the interpretation advanced by the 1st Respondent (the Speaker of Nakuru County Assembly) could result in extended non-representation of County Assembly wards if an MCA resigned or switched parties close to a general election. Under such circumstances, a by-election could not be held within the 90 days required by the Constitution, and the ward might remain unrepresented for up to six months, beyond the constitutionally permissible three-month vacancy limit.

The court addressed several preliminary issues, including the jurisdiction of the High Court to hear the matter, the claim that the petition sought to challenge the constitutionality of the Constitution itself, and the issue of specificity in the petition. The court found that the petition was appropriately framed as a constitutional interpretation issue, not as a request for an Advisory Opinion from the Supreme Court. It also clarified that the petition did not seek to declare any part of the Constitution unconstitutional, but rather requested harmonisation of various constitutional provisions, including Articles 194, 101, and 38, to uphold the principles of representation and political participation.

On the substantive matter, the court applied a purposive and holistic approach to constitutional interpretation, emphasising that the Constitution must be construed in a manner that promotes its objectives, values, and principles, as required under Article 259. It considered the historical, social, and political context of the provisions in question, including the role of party discipline and the need for effective political representation.

The court found that Section 14 of the Political Parties Act, as interpreted, was constitutionally deficient. It did not adequately account for the potential non-representation of County Assembly wards during the period preceding a general election, when by-elections cannot be held within the 90-day window due to Article 101(5) of the Constitution. The court held that the strict application of Section 14 would lead to extended periods of non-representation, thereby undermining the political rights of the electorate under Article 38 and contradicting the principles of democratic governance enshrined in the Constitution.

To remedy this, the court exercised its jurisdiction to "read in" a proviso to Section 14 of the Political Parties Act. This proviso would prevent a vacancy from arising in the County Assembly if an MCA resigned or switched parties within 180 days before a general election. The court reasoned that such a provision was necessary to preserve the integrity of the legislative framework, ensure continuous representation, and avoid legislative paralysis in the County Assembly during the critical period leading up to a general election.

In its final orders, the court declared Section 14 of the Political Parties Act unconstitutional to the extent that it required MCAs to vacate their seats upon party-switching within 180 days before a general election. It also issued a conservatory order restraining the declaration of seats as vacant in such circumstances. Each party was directed to bear its own costs, recognizing the public interest nature of the litigation.

3.1.3 Educational qualifications

County Assembly Forum & 6 Others v Attorney General & 2 Others

Constitutional Petition E229, E226, E249 and 14 of 2021
High Court at Nairobi (Milimani Law Courts)
AC, Mrima J
15th October 2021

Summary of the facts:

The consolidated petitions arose from the constitutional requirement for degree qualifications set out in Section 22(1)(b)(ii) of the Elections Act, which mandates that candidates for the County Assembly must hold a degree from a recognised university. This provision was introduced through the Elections Laws (Amendment) Act No. 1 of 2017, which was enacted on 9 January 2017 and

became operational on 30 January 2017.

The Petitioners contended that this amendment was suspended until after the 2017 general elections, highlighting that only 30% of the then-elected Members of the County Assembly were eligible under the new requirement. They argued that socio-economic factors rendered the degree requirement unfair, citing that only 3.5% of Kenyans held degrees as of the 2019 National Census. They noted the impact of the COVID-19 pandemic on education, asserting that governance issues stemmed from leadership qualities rather than academic qualifications.

The 4th Petitioner claimed that the requirement violated Article 38(3) of the Constitution by limiting voting rights and was discriminatory under Article 27, while the 5th Petitioner raised concerns about the negative impact on youth, women, and marginalized groups, arguing that the section perpetuated discrimination and excluded many from political participation.

The 6th Petitioner expressed that the qualification requirement hindered his political aspirations due to his student status and cited previous court rulings that found similar provisions unconstitutional. The 7th Petitioner echoed these sentiments, asserting that the amendment unjustifiably restricted the rights of candidates, particularly impacting marginalized communities.

The 1st and 2nd Respondents defended the legality of the Elections Act, arguing that it was enacted according to constitutional eligibility criteria and citing past court rulings that upheld educational qualifications for political candidates. They also contended that the petitions were res judicata, having been previously determined by courts of coordinate jurisdiction.

The 3rd Respondent, the Speaker of the National Assembly, opposed the petitions, claiming that the National Assembly had exclusive jurisdiction to determine public petitions related to the constitutionality of the contested provisions. The 1st interested party emphasised the importance of educational qualifications in achieving constitutional goals and the separation of powers, arguing for the dismissal of the consolidated petitions.

Issues for determination

1. Whether the consolidated Petitions were res-judicata.

2. Whether the consolidated Petitions were caught up by the ripeness doctrine.

3. Depending on the outcome in (i) and (ii) above, the settled principles in Constitutional and statutory interpretation.

4. Whether section 22(1)(b)(ii) of the Elections Act offends articles 24, 27, 38(2), 55 and 56 of the Constitution.

5. Whether there was adequate public participation in the enactment of section22(1)(b)(ii).

Decision of the court

In the first issue, the learned judge compared the rulings in ***John Harun Mwau v Independent Electoral* and *Boundaries Commission & another [2013] eKLR and Johnson Muthama v Minister for Justice and Constitutional Affairs & another* [2012] eKLR.** The judge noted that these decisions were based on amendments related to section 22 of the Elections Act, and since the matter concerning Members of the County Assembly was not previously litigated, the doctrine of stare decisis did not apply. The court identified ***Okiya Omtatah Okoiti & Another v Attorney General & Another* [2021] eKLR** as a possible forum for adjudicating the issues in the consolidated Petitions but ultimately declined jurisdiction, leaving the matter unresolved.

Regarding the ripeness doctrine, the court asserted it was part of a broader principle of non-justiciability, stating that the court should refrain from involvement in issues that have not fully crystallized. The 3rd Respondents referenced article 119 of the Constitution and the Election (Amendment Bill) No 42 of 2021 and No 43 of 2021, both aimed at repealing the contested provision. Article 119 grants individuals the right to petition Parliament on matters within its jurisdiction, including legislative actions. The Respondents argued that the existence of consolidated petitions before the National Assembly questioning the constitutionality of Section 22(1)(b)(ii) of the Elections Act suggested that court intervention would be premature.

The learned judge reaffirmed that the mere presence of petitions before Parliament did not prevent parties from addressing issues in court. The court clarified that Parliament's legislative function was not impeded by the High Court's exercise of jurisdiction, but it had the responsibility to ensure that laws conformed to the Constitution. Therefore, the contention that the consolidated petitions were not ripe for consideration failed.

On whether the impugned provision violated the Constitution, the court emphasized a holistic interpretation requiring a purposive approach. It found that Article 38(3) indicated that the provision limited political rights and must meet the standards set out in Article 24, which delineates the conditions under which rights can be restricted. The court noted that the limitation should be reasonable and justifiable within a democratic society. The analysis highlighted that only 1.2 million Kenyans held degrees, representing 3.5% of the population, suggesting that the provision would negatively impact representation at the ward level.

While the Respondents asserted that certain legislative functions necessitated education, the Petitioners demanded evidence of failures due to a lack of degrees among MCAs. The impugned provision mandated a uniform academic qualification—specifically a university degree—for all elective positions in Kenya, irrespective of differing responsibilities. The court acknowledged the need for distinct qualifications based on the

diverse roles and the principle of political self-fulfillment enshrined in the Constitution. It criticized the provision for lacking nuance and not considering the unique demands of various offices.

The court also examined public participation in enacting section 22(1)(b)(ii) of the Elections Act, invoking Article 10's mandate for public involvement in governance. Citing ***Simon Mbugua & another v Central Bank of Kenya & 2 others Petitions 210 & 214 of 2019 (Consolidated)* [2019] eKLR,** the court emphasized the necessity for active community engagement in decision-making processes. It referred to local precedents such as ***Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR,** which outlined principles of effective public participation.

Ultimately, the court found insufficient evidence of adequate public participation in enacting the contested provision. The lack of challenge from the Respondents allowed the Petitioners' claim to stand, indicating Parliament's failure to meet its constitutional obligation. Consequently, the court ruled that section 22(1)(b)(ii) of the Elections Act was unconstitutional for failing to adhere to the public participation requirement under Article 10(2)(a). It declared the provision a violation of Articles 24, 27, 38(3), and 56 of the Constitution, rendering it void ab initio and nullifying the degree requirement for County Assembly members. The court did not issue any costs, recognizing the case as a matter of public interest.

Wambui & 10 others v Speaker of the National Assembly & 6 others

Constitutional Petition 28 of 2021 & Petition E549, E037 & E065 of 2021 & E077 of 2022 (Consolidated)

High Court at Nairobi

AC Mrima, J

13th April 2022

Summary of facts

The judgment arose from five petitions, with Petition No. 28 of 2021 leading the consolidated cases. These petitions challenged the constitutionality of section 22(1)(b)(i) of the Elections Act, as amended in 2017, which imposed a university degree requirement as a pre-condition for nomination to Parliament or inclusion in political party lists. The Petitioners contended that the amended section was void from the outset and contravened several constitutional provisions. They argued that the requirement violated democratic principles outlined in Chapters 1(1) and 4 of the Constitution, as well as Article 38, by imposing undue restrictions. They further claimed that the provision was discriminatory and breached Articles 24, 25, and 27, which safeguard against discrimination. In addition, the Petitioners asserted that the amendment violated the rights of persons with disabilities under Article 54, as well as the rights of minorities and marginalized groups protected under Article 56.

The Petitioners also challenged the 7th *Respondent*, the Independent Electoral and Boundaries Commission (IEBC), for failing to publish the educational requirements for Members of Parliament in the Gazette Notices, which they claimed was a violation of Article 35(3) of the constitution. They argued that the provision infringed on political rights enshrined in Article 38(3) and failed to meet the standards of fair administrative action outlined in Article 47, as the process was neither expeditious nor procedurally fair. The Respondents opposed the petitions on several grounds, including the argument that the issues raised had already been resolved and were therefore res judicata. They also maintained that the impugned provision enjoyed a presumption of constitutionality and that no evidence had been presented to demonstrate its unconstitutionality. Additionally, the respondents argued that if the court were to declare the provision unconstitutional, such a declaration should be suspended until after the next general election. They highlighted the need for legal certainty during the ongoing election process, especially considering that some public officers without university degrees had not resigned in accordance with section 43(5) of the Elections Act.

Issues for determination

1. Whether the consolidated petitions were res-judicata.

2. Whether the consolidated petitions were caught up by the ripeness doctrine.

3. Depending on the outcome in (1) and (2) above, the settled principles in constitutional and statutory interpretation.

4. Whether section 22(1)(b)(i) of the Elections Act offends Articles 24, 27, 38(2), 55 and 56 of the Constitution.

5. Whether there was adequate public participation in the enactment of section 22(1)(b)(i) of the Elections Act.

6. Disposition.

Decision of the court

The court examined whether the matters were res judicata and reiterated that the doctrine goes to the root of a dispute, requiring consideration at the earliest opportunity. The Respondents challenged the consolidated petitions, relying on ***Johnson Muthama v Minister for Justice and Constitutional Affairs & Another* (2012) eKLR, *John Harun Mwau v Independent Electoral and Boundaries Commission & another* (2013) eKLR, *and Okiya Omtatah Okoiti & Another v Attorney General & another* (2020) eKLR.**

In ***Johnson Muthama v Minister for Justice and Constitutional Affairs & another* (2012) eKLR**, the constitutionality of sections 3(1), 22(1)(b), 22(2), 23(1)(b), 24(1)(b), 25(1)(b), and 26(1) of the Elections Act was challenged for limiting leadership eligibility to those with post-secondary qualifications. The Petitioners argued that these provisions violated Articles 10, 27, and 38 of the Constitution by discriminating against candidates

without post-secondary qualifications. The Respondents defended the legislation based on Articles 99(1)(b), 180(2), 193(1)(b), 193(2)(g), and Chapter 6 of the Constitution, stating that the court had no jurisdiction to interfere with the legislature's discretion. The court, however, declared section 22(1) unconstitutional. This decision was not appealed against and was deemed supportive of the consolidated petitions, not the Respondents' argument, thereby ruling that the petitions were not res judicata.

In ***John Harun Mwau v Independent Electoral and Boundaries Commission & another* (2013) eKLR**, the dispute involved the IEBC allegedly violating the rights of independent candidates regarding nomination requirements, including educational qualifications for Members of Parliament. The court, comparing section 24(1) of the Elections Act to Article 99(1) of the Constitution, found them identical. Therefore, declaring the section unconstitutional would amount to declaring the Constitution unconstitutional. The petition was dismissed, and the Court of Appeal upheld this, noting that educational qualifications for leaders are not discriminatory. A 2017 amendment to section 22 of the Elections Act introduced a university degree qualification for candidates, leading to the challenge in ***Okiya Omtatah Okoiti & Another v Attorney General & Another* (2020) eKLR**, where the court found that earlier decisions did not address the 2017 amendment, making the consolidated petitions not res judicata.

The court concluded that the petitions were not barred by res judicata as they challenged a 2017 amendment, not addressed in prior rulings. Furthermore, the petitions could not have been raised in earlier cases since the university degree requirement did not exist before 2017.

The court then considered whether the petitions were ripe for adjudication. Citing ***County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya (Interested Party)* Constitutional Petition Nos E229, E226, E249, and 14 of 2021**, the court noted that disputes must be real and not hypothetical. The Respondents argued that Parliament was still considering petitions on the constitutionality of section 22(1)(b)(i) and that the matter was pending in the National Assembly, making it premature for the court to intervene. However, the court, referencing ***Council of Governors & 3 others v Senate & 53 others* (2015) eKLR**, held that Parliament's power to enact, amend, or repeal legislation did not prevent the court from exercising its jurisdiction under Article 165(3) of the Constitution.

On constitutional interpretation, the court relied on Article 259 of the Constitution and the principle of holistic interpretation, as highlighted in ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2015) eKLR** and ***Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012 [2012] eKLR**. The court examined

the impugned provision against Articles 24, 27, 38(2), 55, and 56 of the Constitution, concluding that it limited political rights under Article 38 and failed the Article 24 test for reasonable limitations in a democratic society. The court found that the impugned section discriminated based on educational qualifications, violating Articles 27 and 38(3), and did not account for the National Qualifications Act's recognition of equivalent qualifications.

The court also found that the provision violated Article 56 by failing to consider the rights of marginalised groups and had been enacted without adequate public participation, referencing ***Matatiele Municipality and others v President of the Republic of South Africa and others (2)* (CCT73/05A) [2006] ZACC 12**.

The court found section 22(1)(b)(i) of the Elections Act, which introduced a university degree requirement for candidates vying for the position of Member of Parliament, unconstitutional. The court held that the provision violated the right to equality and non-discrimination under Article 27 of the Constitution, as well as political rights under Article 38(3). Furthermore, the provision did not pass the proportionality test under Article 24, as it imposed an unreasonable limitation on political rights in a democratic society. The court also determined that the requirement disproportionately impacted marginalized groups, contrary to Article 56 of the Constitution, and had been enacted without sufficient public participation, as required under Article 10. Consequently, the court nullified section 22(1)(b)(i) of the Elections Act.

Buoga v Attorney General & Another

Constitutional Petition E290 of 2022
High Court of Kenya at Nairobi
Mrima J
30th September 2022

Summary of the facts:

Victor Buoga filed a Petition on 16 June 2022, challenging the constitutionality of section 22(2) of the Elections Act No. 24 of 2011, which mandates specific academic qualifications for County Governor candidates. He argued that this provision contradicts Article 180(2) of the Constitution and discriminates against potential candidates, violating Article 27.

Buoga sought interim orders to restrain the Independent Electoral and Boundaries Commission (IEBC) from enforcing this section and from printing ballot papers for County Governor elections until the petition's resolution. He referenced a prior case, ***County Assembly Forum & 6 others v Attorney General & 2 others* [2021] eKLR**, which found a similar provision unconstitutional, asserting that the current petition is not subject to the exhaustion doctrine established in ***Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2013] eKLR**.

The Attorney General opposed the Petition, arguing it was defective and justified due to

the distinct responsibilities of the Governor compared to Members of the County Assembly. The IEBC also opposed it, asserting that the qualifications are constitutional extensions and that the term "notwithstanding" indicates a legislative intent for higher standards for Governors.

In their submissions, the IEBC argued that Acts of Parliament regarding educational requirements are presumed constitutional and requested dismissal of the Petition with costs.

Issues for determination

1. Whether the Court had jurisdiction over the dispute and if so, whether the Petition met the precision requirement.

2. Depending on (1) above, the principles in Constitutional and statutory interpretation.

3. The constitutionality of section 22(2) of the Elections Act.

Decision of the court

The court addressed jurisdictional issues before evaluating the parties' arguments. Citing ***Public Service Commission & 2 Others v Eric Cheruiyot & 16 Others* [2017]** and ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1**, it established that jurisdiction must be acquired prior to judgment and can be challenged at any point in proceedings.

The court examined two jurisdictional limbs: (1) whether the Petitioner should have petitioned Parliament under Article 119, invoking the exhaustion doctrine, and (2) whether the impugned section of the Elections Act was challengeable under Article 2(3) of the Constitution. The court determined that the Petitioner's invocation of Articles 22 and 258(1) and reliance on Article 165(6) permitted the court to hear the matter, thereby dismissing the first limb.

On the second limb, the 2nd Respondent claimed that laws derived from the Constitution cannot be challenged. The court referenced ***Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR**, clarifying that while the Kelsenian theory is valid, the 2010 Constitution requires a different interpretative approach due to its transformative nature.

The court emphasized the need for precision in constitutional petitions, ruling that the Petition adequately outlined the constitutional violations, specifically regarding Articles 180(2) and 193(1)(b).

On the constitutionality of section 22(2) of the Elections Act, the court concluded that it imposed additional academic requirements for County Governor candidates beyond what the Constitution stipulates. It found that the impugned section created a distinction between the qualifications for County Governors and Members of County Assemblies, violating Article 180(2). Thus, the court held that section 22(2) contravened constitutional

provisions by differentiating the eligibility criteria.

Rajput & another v Independent Electoral & Boundaries Commission & another; Principal Registrar of Persons Ministry of State for Immigration & 2 others (Interested Parties)

Constitutional Petition E260 of 2022
High Court of Kenya at Nairobi
AC Mrima J

16th December 2022

Summary of the facts

The judgment involved a petition filed by Nazlin Omar Fazaldin Rajput, the 1st Petitioner and President of the Caucus for Peace & Independent Candidates of Kenya, who sought to run as an independent presidential candidate in the 2022 general elections. The Petitioner challenged the Independent Electoral and Boundaries Commission (IEBC) for refusing to clear her and other independent candidates, arguing that this decision violated Article 1 of the Constitution, which upholds the right to exercise sovereign power through elected leaders.

She contended that barring independent candidates from the upcoming elections would undermine democracy and highlighted the significant obstacles imposed by the IEBC that hindered her and other independent aspirants from exercising their democratic rights. Despite being cleared by the Office of the Registrar of Political Parties, the IEBC rejected her nomination, and she claimed that the requirement to submit identity cards for nominators was burdensome and discriminatory, creating undue hardships for independent candidates.

The Petitioner also expressed concerns regarding the sitting President's involvement in the campaign for a rival candidate, alleging it constituted an abuse of office. She requested several orders, including the suspension of the IEBC's deadlines for candidate submissions and the verification of identity card submissions. The Petitioner sought to have her name and campaign symbol included in the election process, arguing for the same qualifications for presidential candidates as for Members of Parliament as outlined in Article 137 of the Constitution.

In response, the IEBC, represented by Moses Ledama, argued that the petition lacked specificity regarding constitutional violations and claimed that the Petitioner failed to meet pre-nomination requirements outlined in the Elections Act. The IEBC maintained that its actions were consistent with the law and that educational requirements were not discriminatory.

The Attorney General, representing the Principal Registrar of Persons and the Director of Criminal Investigations, opposed the petition, asserting the constitutionality of Section 22(2) of the Elections Act and arguing

that the petition was an abuse of the court process. Both Respondents contended that the academic qualifications for presidential candidates were justified based on the distinct responsibilities of the office compared to those of Members of Parliament. They dismissed the request for an investigation into identity cards as lacking merit.

Issues for determination

1. Preliminary issues.
2. A consideration of the constitutional and statutory principles in constitutional and statutory interpretation.
3. Whether Regulations 18(2), 24(2), 28(2), 32(2)(c) and 36 (2)(c) of the Election (General) Regulations, 2017 require independent candidates for the various elective positions in the August 2022 General Elections to submit copies of identity cards of their supporters to the IEBC for clearance to vie are constitutional.
4. Whether the Director of Criminal Investigations should be directed to institute investigations on inter alia the manner the copies of identity cards presented to the IEBC by various aspirants in the run-up to the 9th August 2022 General Elections were obtained.
5. Whether it was constitutional for State officers and other public officers to campaign for candidates running for various political offices in elections.
6. Whether Section 22(2) of the Elections Act which requires a presidential candidate to possess a degree qualification from a recognised university as read with Section 22(1)(b)(i) of the Elections Act contravenes Article 137(1)(b) of the Constitution.
7. Whether the collection of fees on the registration of candidates in elections in Kenya by IEBC was contrary to the Constitution.
8. Whether the 1st Petitioner was discriminated against by the IEBC in refusing to accept her nomination papers for the presidency towards the General Elections held on the 8th August 2022.
9. Whether the processes undertaken by IEBC towards the General Elections held on 8th August 2022 were so flawed to render the said elections null and void.

Decision of the court

The court's decision addressed several key issues regarding the 1st Petitioner's bid for the presidency amid time constraints due to the petition's filing in June 2022. Preliminary matters led to rulings on 20th and 30th June 2022, with the main petition heard before the court reserved judgment on 18th July 2022, acknowledging the urgency of the election timeline. Unfortunately, the judgment was delayed due to the presiding judge's transfer, and the court expressed regret over not delivering the decision before the elections, which rendered some issues moot.

The court discussed principles of constitutional interpretation, emphasizing a holistic approach that reflects the Constitution's transformative nature. It examined specific regulations concerning independent candidates, declaring certain provisions unconstitutional for violating constitutional articles and the Data Protection Act.

Regarding the role of state and public officers in political campaigning, the court clarified that they are restricted from engaging in activities that could compromise their neutrality, as outlined in the Political Parties Act. The court also addressed the constitutionality of Section 22(2) of the Elections Act, which required presidential candidates to have a university degree. The Petitioners argued this was unconstitutional based on a previous ruling in ***Wambui & 10 Others v Speaker of the National Assembly & 6 Others* [2022] KEHC 10275 (KLR),** which deemed similar qualifications for Members of Parliament unconstitutional.

The court confirmed that, since Section 22(1)(b)(i) was found unconstitutional, Section 22(2) could not be valid either. It stated that Article 137(1)(b) aligns the eligibility criteria for presidential candidates with those for Members of Parliament, asserting that any law creating different standards was unconstitutional. Consequently, the court declared Section 22(2) unconstitutional and invalidated the university degree requirement for presidential candidates, reinforcing constitutional supremacy.

While the Petitioners did not prove that the IEBC's election processes were fundamentally flawed, the court found that the 1st Petitioner faced discrimination when barred from presenting her nomination papers. The court ruled that administrative fees imposed by the IEBC were unconstitutional. Ultimately, the court declared that all state officers and public officers, except Cabinet Secretaries and County Executive Committee Members, were restrained from political activities that could compromise their neutrality. The ruling on the unconstitutionality of Section 22(2) was set to take effect in the next General Election, with each party bearing its own costs.

Walter Onchonga Mongare v Wafula Chebukati & 2 Others

Constitutional Petition No. E318 of 2022

High Court at Nairobi Milimani Law Courts

Mrima J

30th June 2022

Summary of facts

The petition revolved around the issue of qualification to vie for election. Petitioner alleged that he qualified to vie for the presidential position come the 8th August 2022 election while the Respondent averred that the Petitioner was not qualified on account of lack of academic qualifications.

The Petitioner sought conservatory orders restraining the Respondent from publishing the names of persons registered for the presidential position as well as printing ballot papers to that effect. The Petitioner averred that he was nominated by the Umoja Summit Party as its Presidential candidate for the General election scheduled for 9 August 2022 and that he was aggrieved by the 1st Respondent the National Returning Officer who revoked his nomination as a candidate for the presidential election hence violated the Petitioner's rights and fundamental freedoms guaranteed under the provisions of Articles 1, 10, 27, 38, 47, 50, 81, 137 and 259 of the Constitution.

The Petitioner averred that his academic transcripts and the completion letter from Daystar University coupled with the letter from the Commission for University Education were sufficient evidence that he is a holder of a degree and as such he had satisfied the requirements in Section 22(2) of the Elections Act.

The 1st Respondent stated that it was within the law that the revocation of the nomination was done and that the 1st Respondent has the mandate to recall the certificate of registration that was erroneously issued. The 1st Respondent stated that the Petitioner did not issue a certified copy of the degree, and it was not certain if everything was subject to change and that further, there was a difference between an award of a certificate of completion and completion of an academic programme.

The 1st Respondent stated that they should not be faulted for making decisions in law and that in differentiating decision in ***Janet Mbete v IEBC & Hassan Joho & Another* [2013] eKLR** and ***Mable Muruli v IEBC* (2013) eKLR**, as relied on by the Petitioner, stated that the decisions were made in 2013 that required that parties render certified copies of their academic qualifications.

Issues of determination

1. Whether the Petitioner was a holder of a degree from a university recognized in Kenya.

2. Based on (i) above, whether the Petitioner was eligible to be nominated as a Presidential candidate.

3. Whether the decision by the 1st and 2nd Respondents to revoke the nomination of the Petitioner as a Presidential candidate infringed Articles 47 and 50 of the Constitution.

4. Whether the Petitioner's rights under Articles 27 and 38 of the Constitution were violated.

Decision of the court

The court found that the Petitioner was not a holder of a degree university from a recognized university and that the Petitioner was not eligible for nomination as a presidential election candidate. On the question of the constitutionality of the actions of the 1st and 2nd

Respondents, the court found that the decision to revoke the nomination of the Petitioner as a Presidential candidate infringed Articles 47 and 50 of the Constitution. However, the said constitutional infractions did not confer upon the Petitioner the eligibility to be nominated as a Presidential candidate. Finally, the Petition partially succeeded on the point that revoking the nomination of the Petitioner as a Presidential candidate infringed Articles 47 and 50 of the Constitution.

Republic v Chebukati & 2 others Ex parte Wanjigi

Miscellaneous Application E083 of 2022

High Court of Kenya at Nairobi

Ngaah J

1st July 2022

Summary of the facts

In this case, Wanjigi was nominated by his political party, Safina, to be its presidential candidate for the August 2022 general elections. On 6 June 2022, he submitted his nomination papers to the Independent Electoral and Boundaries Commission (IEBC), represented by its chairman, the 1st Respondent, for registration as a presidential candidate. The 1st Respondent rejected his application, citing insufficient supporters' signatures from Nairobi and Siaya counties, the absence of a nomination certificate for Wanjigi's running mate, and Wanjigi's lack of a university degree certificate. Dissatisfied, Wanjigi lodged a complaint with the IEBC Dispute Resolution Committee, the 3rd Respondent, which upheld the 1st Respondent's decision. The 3rd Respondent found that Wanjigi had not met the statutory requirements for registration, as outlined in section 22(2) of the Elections Act and Regulation 47(1) of the Elections (General) Regulations, 2012, and that his running mate lacked the required nomination certificate.

On 29 June 2022, Wanjigi filed an application for judicial review, seeking orders to quash both the 1st Respondent's and the 3rd Respondent's decisions. He also sought a mandamus order compelling the 1st Respondent to gazette his name as a presidential candidate and include him on the ballot papers. His application was supported by a statutory statement and affidavit, while the Respondents opposed it through a replying affidavit and a preliminary objection. The 3rd Respondent's objections aligned with the 1st and 2nd Respondent's positions, citing the statutory requirement for a physical degree certificate.

Decision of the Court

The court's attention was on the 3rd Respondent's decision, not the original rejection by the 1st Respondent. The court considered judicial review grounds, including illegality, irrationality, and procedural impropriety, as established in ***Council of Civil Service Unions v Minister for the Civil Service [1985] A.C. 374***. Wanjigi argued that the 3rd

Respondent misinterpreted section 22(2) of the Elections Act, contending that a candidate only needed to demonstrate eligibility for a degree and not necessarily provide a physical certificate. However, the 3rd Respondent noted that amendments to the Elections Act now explicitly required submission of a physical degree certificate. The court found that the 3rd Respondent acted within its mandate and that judicial review was not an avenue to reconsider the merits of the decision but to assess the decision-making process. The application for judicial review was therefore denied.

Wanjigi v Chebukati & 2 others

Civil Appeal E404 of 2022

Court of Appeal at Nairobi

Makhandia, K M'inoti & HA Omondi, JJA

29th July 2022

Summary of facts

On 12 July 2022, the Court heard an appeal concerning the nomination of Mr. Jimi Richard Wanjigi for the presidential election scheduled for 9 August 2022. The Appellant was represented by Mr. Omwanza and Mr. Otieno, while the 1st and 2nd Respondents were represented by Mr. Gumbo, and the 3rd Respondent by Mr. Ndaiga and Mr. Mukele. Due to the urgency of the matter, the Court delivered an extempore judgment on the same day, dismissing the appeal with costs and reserving the full reasoning for 29 July 2022.

The Appellant's nomination was rejected by the 1st Respondent, a returning officer, on three grounds: lack of a university degree as required under section 22(2) of the Elections Act, failure to meet the requirement of nomination by at least 2,000 voters from each of at least 24 counties, and the absence of a nomination certificate for his running mate. The Appellant challenged the decisions before the 3rd Respondent, who upheld the rejection. The Appellant then sought judicial review, which was dismissed by the High Court on 1 July 2022, leading to the appeal.

Issues for determination

1. Whether the application addressed recognised grounds of judicial review whereas issues of illegality, irrationality, unreasonableness, bias and legitimate expectation were raised.

2. Whether the applicant was granted leave to commence judicial review proceedings while the application did not disclose grounds for judicial review;

3. Whether the court erred in finding that judicial review is not concerned with the merits of an impugned decision.

4. Whether the court failed to find that the 1st and 3rd Respondent had themselves concluded that the appellant was compliant as regards nomination by the prescribed number of registered voters in 24 Counties;

5. Whether the court erred in failing to hold that the appellant had satisfied the requirements of Article 148 of the Constitution regarding the nomination of the running mate;

6. Whether the court erred in failing to decide and hold that the proceedings before the 3rd Respondent were null and void on account of bias; and

7. Whether the court erred in failing to decide and hold that the 1st and 3rd Respondents were bound by precedent from superior courts.

Decision of the court

The Court carefully considered the arguments presented by both parties and the relevant legal authorities. It started by addressing the primary issue of whether the Appellant's application for judicial review disclosed sufficient grounds to warrant the relief sought. The Appellant had based his claim on allegations of illegality, irrationality, unreasonableness, bias, and violation of legitimate expectations, all of which are established grounds for judicial review under the Constitution of Kenya, 2010, and the Fair Administrative Action Act. The Court reviewed the statutory statement and verifying affidavit, which are required when seeking judicial review, and noted that the application had been granted leave by the High Court to proceed with judicial review proceedings, indicating a prima facie case.

The Court examined whether the High Court had erred by dismissing the judicial review application on the basis that judicial review only concerns the decision-making process and not the merits of the decision. It was highlighted that, in the pre-2010 constitutional era, judicial review was indeed limited to examining the legality, rationality, and procedural propriety of decisions made by public bodies. However, the Appellant argued that the scope of judicial review had since expanded following the enactment of the 2010 Constitution and the Fair Administrative Action Act, which permits courts to consider the merits of a decision where it affects the rights of a party.

The Appellant contended that the learned judge failed to account for this broader scope and cited several cases, including ***Republic v PPARB ex parte Syner-Chemie* [2016] eKLR *and Judicial Service Commission v Njora* [2021] KECA 366 (KLR)**, to support his argument that the Court should have delved into the merits of the decision, particularly where it concerned constitutional rights. The Court agreed that the judicial review courts are now empowered to review the merits of a decision where it infringes upon constitutional rights, but it clarified that this power should be exercised cautiously, ensuring that it does not undermine the principle of separation of powers by stepping into the role of administrative bodies.

The Court then evaluated whether the Appellant had demonstrated the specific grounds of illegality, irrationality, and bias. On the issue of illegality, the Appellant had argued

that the rejection of his nomination papers by the 1st and 2nd Respondents was unlawful, as he had submitted all necessary documentation, including a degree completion letter from Daystar University and confirmation from the Commission for University Education. The Appellant further argued that the Respondents had misapplied the law by requiring a degree certificate, which he claimed was unnecessary at that stage. The Court rejected this argument, noting that section 22(2) of the Elections Act explicitly requires a candidate for the presidency to possess a degree from a recognised university, and Regulation 47(1) of the Elections (General) Regulations stipulates that the candidate must submit a certified copy of the degree certificate. The completion letter and other documents provided by the Appellant did not satisfy this statutory requirement.

On the question of irrationality, the Appellant claimed that the 1st Respondent had acted irrationally by rejecting his nomination because his supporters from various counties were not properly verified. He argued that he had complied with the requirement of obtaining the support of at least 2,000 voters from 24 counties, as prescribed under Article 137(1)(d) of the Constitution and section 23(1)(d) of the Elections Act. However, the 1st Respondent found that the Appellant's nomination papers contained errors, including illegible signatures, incorrect sequencing of voter records, and failure to verify the identities of several supporters. The Court found that these procedural errors justified the rejection of the nomination and that the 1st Respondent had acted within its mandate in rejecting incomplete or flawed nomination documents.

The Court also considered the allegation of bias on the part of the chairperson of the 3rd Respondent, based on their previous role as an advocate for the 1st Respondent. The Appellant argued that this created a perception of bias, relying on the principles of natural justice and several precedents, including ***Leila Konchellah & Others v Chief Justice & Others* [2021] eKLR** and the ***Attorney General of the Republic of Kenya v Prof. Peter Anyang Nyong'o & 10 Others* EACJ Application No. 5 of 2007**. The Court applied the test for apparent bias, which is whether a reasonable, fair-minded, and informed observer would conclude that there was a real possibility of bias. The Court held that the mere fact that the chairperson had previously represented the 1st Respondent in a different capacity did not constitute evidence of bias. It emphasised that bias must be demonstrated through concrete evidence, which the Appellant had failed to provide.

The Court further addressed the Appellant's reliance on the doctrine of legitimate expectation, which is grounded in the principle that public authorities must act consistently and not frustrate the expectations they have created. The Appellant argued that he had a legitimate expectation that his nomination would be accepted based on previous precedents such as ***Janet Ndago Ekumbo Mbete v IEBC & 2 Others* [2013] eKLR** and ***Mable***

***Muruli v Hon. Wycliffe Ambetsa Oparanya & 3 Others* [2013] eKLR**, where similar issues had been resolved in favour of candidates. The Court rejected this argument, noting that the facts in the cited cases differed significantly from the present matter and that the law had since been amended, particularly in relation to the requirements for degree qualifications and nomination papers. Moreover, the Court reiterated that legitimate expectation must be based on a clear promise or practice by the public authority, which was not established in this case.

The Appellant also raised the issue of his running mate's nomination, arguing that the 1st Respondent's refusal to register his running mate was unlawful. He relied on Article 148 of the Constitution, which outlines the requirements for nominating a Deputy President. The Appellant contended that there was no requirement under the Constitution or any statute for a running mate to be nominated by a political party. The Court, however, disagreed, stating that Article 148(1) requires a running mate to meet the qualifications for nomination as a presidential candidate, except for the requirement of voter support from multiple counties. As the Appellant's running mate did not fulfil all these requirements, the 1st Respondent's refusal was lawful and proper.

Finally, the Court considered the procedural aspect of granting leave for judicial review. It was observed that the Appellant had been granted leave to apply for judicial review, but the High Court had later dismissed the substantive application. The Court reiterated that once leave is granted, it can only be withdrawn in limited circumstances, such as where the application is frivolous or vexatious. However, in this case, neither the 1st nor the 3rd Respondents had challenged the grant of leave on appeal, and the Court found that the High Court should have proceeded to consider the merits of the judicial review grounds.

In conclusion, the Court found that the Appellant had failed to demonstrate that the decisions of the 1st and 3rd Respondents were tainted by illegality, irrationality, unreasonableness, or bias. The Court held that the 1st and 3rd Respondents had acted in accordance with the law and had properly applied the relevant constitutional and statutory provisions. The Appellant's appeal was dismissed, and costs were awarded to the Respondents.

Jimi Richard Wanjigi v Wafula Chebukati & 2 Others

Supreme Court Petition 19 (E022) of 2022

Supreme Court of Kenya at Nairobi

Mwilu DCJ & VP, Wanjala, Njoki, Lenaola & Ouko SCJJ

24th July 2023

Summary of the facts

This case arose from a Court of Appeal decision on 12 July 2022. The Appellant, a

presidential candidate for the Safina Party, was disqualified by the IEBC (1st Respondent) for not meeting the requirements of having a degree, securing 2,000 voters' nominations in 24 counties, and submitting a nomination certificate for his running mate.

After the IEBC dismissed his application, the Appellant lodged a complaint, which was rejected on similar grounds. He then sought judicial review, claiming illegality, irrationality, unreasonableness, bias, and breach of legitimate expectations. The High Court dismissed the case, stating the court could only review the process, not the merits of the decision.

The Appellant appealed to the Court of Appeal, which focused on whether judicial review grounds were valid and whether the High Court's dismissal was appropriate.

The Court of Appeal dismissed the Appeal on the following findings that on judicial review the judicial review court had the propensity to look into the process of making decisions and merits of a quasi-judicial administrative decision. On the second issue the Court of Appeal held that the Appellant did not adduce a certified copy of a degree certificate from a recognized university and that further he did not adduce the certificate of his running mate as required in law therefore the Appellant failed to meet the threshold of Article 137(1) as read with Section 23 of the Elections Act. Finally, on bias, the court held that the Appellant did not prove any actual bias in applying the test of reasonable apprehension.

Being aggrieved with the decision of the Court of Appeal, the Appellant proceeded to the Supreme Court faulting the Court of Appeal for failure to upload the doctrine of stare decisis; failing to consider the import and effect of section 22 of the Elections Act; misapplying and misinterpreting Article 10 of the Constitution by finding that regulation can amend a statute; misconstruing and misapplying the Appellant's Constitutional rights with respect to Article 38; failing to consider the misapplication of Article 83(3) as regards the Appellant's political rights and that administrative decisions ought to assist in the election but not deny an eligible citizen to stand for election; misapplying Article 10 by allowing the 1st Respondent appoint a personal advocate to preside over the functions of the 2nd Respondent, and misapplying the principle on costs by awarding costs against the Appellant having partially succeeded in the Appeal.

In response, the 1st and 2nd Respondents raised a preliminary objection as to the jurisdiction of the court and filed responses in opposition to the petition. The 1st and 2nd Respondent contended that the Appeal did not raise any matter requiring the interpretation or application of the Constitution as contemplated in Article 163(4)(a) of the constitution since the Articles raised were not issued neither decided by the courts below.

Secondly it was contended the Appellant had not complied with the provisions of section 22 of the Elections Act and that the impugned

precedent was set prior to the amendment of regulation 47(7) of the General Elections Regulations and the issue that the impugned precedent addressed was the definition of a graduate as opposed to who is the holder of a degree certificate.

The 1st and 2nd Respondent also contended that the Appellant was non-compliant with Article 137(1) of the Constitution as read with Section 23 of the Elections Act for failing to attain a minimum of at least 2000 voters in a majority of the counties. With regards to the Appellant's running mate, the 1st and 2nd Respondent stated that pursuant to Articles 148 and 137 of the Constitution, a presidential candidate, as well as their running mate, must be persons who qualify for nomination for election as President and consequently, clearance by the nominating political party was a prerequisite.

On the issue of bias, the 1st and 2nd Respondents contended that it was an after-thought and that the Appellant's contestation did not meet the requirement of bias in the ***Gladys Boss Shollei case*** that stated that there must be reasonable apprehension of bias in the mind of a reasonable, fair-minded and informed member of the public.

The 3rd Respondent relied on its grounds of objection and written submissions to the Appeal, in full support of the 1st and 2nd Respondent submissions stating that the Appellant did not properly invoke the jurisdiction of the court and that the issues raised are not contemplated under Article 163(4) (a) of the Constitution and that on the issue of bias, the Court of Appeal found that nothing had been placed before it to meet the objective test of bias.

Issues for determination

1. Whether this Honourable Court had jurisdiction to hear and determine the appeal under Article 163(4) (a) of the Constitution.

2. Whether the Court of Appeal erred in dismissing the appeal; and

3. Whether the Appellant was entitled to the remedies sought.

Decision of the court

On the question of whether the honourable court had jurisdiction to hear and determine the appeal under Article 163(4) (a) of the Constitution, the court stated the impugned averments from the Respondent and Appellant for and against jurisdiction were worth a consideration since jurisdiction is everything and in the event the court has no such jurisdiction it ought to down its tools.

The court noted that substantial issues raised at the High Court were on judicial review. However, the Appellants' claims were dismissed for not meeting the judicial review threshold. The learned judges faulted the trial court for strictly constricting judicial review to the pre-2010 Constitutional dispensation and for failing to see that the Appellant's application revealed in sufficient detail

grounds for judicial review which necessitated a decision from the court.

Having identified that the genesis of the Appeal before the Supreme Court was from a judicial review application, the question that the court was left to deliberate on was whether all judicial review matters are appealable to the Supreme Court as of right; and whether it was open to the party to move the Supreme Court on Article 163 under normal certification; whether if the matter came up under Article 163, it was important to identify the Constitutional provisions that were discussed at both the High Court and Court of Appeal; and further where the Appellant should demonstrate that the superior courts misdirected themselves by failing to grant judicial review remedies.

The court held that the Court of Appeal had addressed each issue raised as to compliance and bias and the only thing left for determination was whether the grievances underpinned under Article 38 had nothing to do with interpretation of the Constitution. The court observed that the Appellant did not challenge any statute neither did the Appellant set out the extent and to the court's satisfaction, the manner in which the superior courts interpreted and applied the Constitution one way or the other.

Therefore, the court reiterated that it is not every mention of the Constitution by the Court of Appeal that automatically invoked the Supreme Court Appellate jurisdiction under Article 163(4). Therefore, the appellant did not raise issues that sustained a case that raises any constitutional issues, whether for interpretation or application, the court determined that it did not serve a purpose for the court to delve into the other issues although the invitation was to deal with the matter for posterity. The court upheld the preliminary objection and dismissed the Appellant's petition with each party bearing its cost.

Dennis Gakuu Wahome v IEBC & Others
Nairobi High Court Petition No. E321 of 2022

In the High Court of Kenya at Nairobi

Mrima J

12th July 2022

Summary of the facts

On June 7, 2022, Sakaja was cleared by the Nairobi County Returning Officer to contest for the gubernatorial seat with a Bachelor of Science in Management from Team University, Uganda. Dissatisfied, Dennis Gakuu Wahome, the Petitioner, challenged this decision with the Independent Electoral and Boundaries Commission's Dispute Resolution Committee (DRC), questioning the authenticity of Sakaja's degree. The DRC upheld the Returning Officer's decision, prompting Wahome to file a petition against the DRC's ruling.

Wahome claimed that Sakaja lacked a genuine degree and argued that both the Returning Officer and DRC unlawfully failed to verify its

authenticity, improperly shifting the burden of proof to him. He sought various court reliefs, including declarations that the DRC's decision violated his fair hearing rights, rendering Sakaja's nomination irregular and void.

Through counsel, Mr. Nyamodi, the Petitioner made three main arguments: improper shifting of the burden of proof, violation of fair trial rights, and non-compliance by the DRC with Article 88 of the Constitution on electoral disputes. He asserted that the court had jurisdiction under Articles 165(3) and (6) of the Constitution, citing relevant case law. The Petitioner contended that the principle of res judicata did not apply, as the 2nd Respondent is distinct from the Court.

The Petitioner objected to new evidence presented by the 4th Respondent, arguing it violated precedent and asserted that the 2nd Respondent failed to adequately handle evidence and make necessary findings. He questioned the authenticity of Sakaja's degree certificate and argued that the clearance was invalid based on discrepancies.

In response, the 1st Respondent, through Mr. Owiye, defended the decision to register Sakaja, asserting that the registration process was lawful, and that the DRC acted on the evidence presented. The 3rd Respondent maintained that their role was to ensure documentation was in order, not to verify the authenticity of degrees. Both the 1st and 3rd Respondents submitted joint defenses, arguing that the case evolved beyond the original DRC presentation and emphasized the DRC's adversarial nature.

Issues for determination

1. Whether the jurisdiction of the Court had been properly invoked.

2. In the event issue (a) was answered in the affirmative, a brief look at the principles of constitutional interpretation.

3. Whether the proceedings before the DRC were conducted in contravention of Article 50(1) of the Constitution and the applicable principles on the burden of proof.

4. Whether the nomination of the 4th Respondent to vie for the position of the Governor, Nairobi City County by the 3rd Respondent was irregular, null and void as the 4th Respondent did not possess the qualifications required by Article 193(1)(b) of the Constitution as read with Section 22(2) of the Elections Act.

Decision of the court

The court evaluated its jurisdiction by addressing several sub-issues, including res judicata, the procedural requirements for challenging decisions made by the Independent Electoral and Boundaries Commission (IEBC) Dispute Resolution Committee (DRC), and the precision of the petition.

In examining jurisdiction, the court referenced previous rulings, notably ***Public Service***

***Commission & 2 Others v Eric Cheruiyot & 16 Others* [2021] eKLR** and ***County Government of Embu & Another v Eric Cheruiyot & 15 Others* [2022] eKLR**, which affirmed the necessity of establishing jurisdiction before any determination can take place, underscoring that jurisdiction is derived from either the Constitution or legislation. Regarding the doctrine of res judicata, the court noted that it prevents the re-litigation of issues previously adjudicated. Citing ***John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR**, it clarified that for res judicata to apply, there must be a final judgment on the merits, issued by a competent court, with identical parties and issues. The court concluded that because the current constitutional petition raised new issues compared to a prior judicial review, the doctrine of res judicata did not bar the petition.

The court also addressed whether challenges to DRC decisions should strictly be by way of appeal. It affirmed that the High Court has the authority to address grievances through judicial review or supervisory jurisdiction, highlighting that supervisory jurisdiction allows for oversight of lower courts to ensure lawful operation. It referenced ***Sammy Ndung'u Waity v Independent Electoral and Boundaries Commission & 3 others* [2018] eKLR**, emphasizing that the High Court could exercise jurisdiction in such matters. In this case, the court pointed out that there was no explicit legal requirement for appealing DRC decisions, which may warrant legislative reform.

In terms of the precision of the petition, the court noted that it was initiated as a constitutional one under Article 165, which required a clear linkage between the aggrieved party and the alleged constitutional violations. The Supreme Court confirmed that the petition met the necessary criteria for consideration, adhering to the guidelines established by the ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules)*** and historical precedents regarding constitutional petitions, including ***Anarita Karimi Njeru v Republic* (1979) KLR 154**.

The court further scrutinized how the DRC managed the burden of proof, emphasizing that the legal burden lies with the Petitioner to substantiate their claims, particularly in electoral disputes where a higher standard of proof is expected. The court upheld the DRC's finding that the Petitioner had failed to provide sufficient evidence to support allegations of fraud against the 4th Respondent. It cited ***Raila Amolo Odinga & Another v IEBC & 2 Others Presidential Election Petition No. 1 of 2017* [2017] eKLR** regarding the burden of proof.

Addressing claims concerning the right to a fair trial under Article 50(1), the court found no infringement when the DRC expunged supplementary affidavits. It stressed the importance of maintaining procedural integrity and compliance with statutory deadlines, referring to ***Raila Odinga & 5 Others***

***v IEBC and 3 Others* [2013] eKLR** and ***Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another* [2018] eKLR** regarding procedural fairness.

Finally, regarding the validity of the 4th Respondent's nomination, the court determined that the nomination was proper. It affirmed that the IEBC does not possess a mandate to verify the authenticity of documents beyond those presented by candidates. As a result, the court dismissed the petition with costs, affirming the DRC's handling of the proceedings as appropriate and lawful

Republic v Wavinya Ndeti & 4 Others Ex – Parte Gideon Ngewa Kenya & Kisilu Mutisya

Judicial Review No. 3 of 2022

In the High Court of Kenya at Machakos

GV Odunga J.

18th July 2022

Summary of the facts

The Applicants contested the nomination and registration of Wavinya Ndeti for the position of Governor of Machakos County, asserting that she did not hold a degree recognised in Kenya, as required by Section 22 of the Elections Act, 2011. They pointed to irregularities in her academic qualifications, claiming her educational progression was questionable. Ndeti was awarded a Graduate Diploma in 1990 from South Bank University, a Master of Science degree in 1992 from City University, London, and a Bachelor's Degree in 1995 from South Bank University. The Applicants argued that it was implausible for someone to obtain a Master's degree before completing a Bachelor's degree and highlighted further inconsistencies, such as the use of different names (Wavinya Oduwole, Petti Wavinya Oduwole) across various certificates. They sought to have the IEBC's clearance of Ndeti quashed, her degrees verified, and a bar placed on the recognition of her qualifications pending investigations.

In response, Ndeti argued that the application was politically driven and aimed at disrupting her campaign. She asserted that the Applicants had failed to prove allegations of fraud and forgery before the IEBC Dispute Resolution Committee, which had dismissed their complaints for lack of jurisdiction and merit. She maintained that fraud allegations required concrete evidence, which had not been produced. The IEBC, as the 2nd Respondent, clarified that its mandate was limited to verifying those candidates submitted prima facie valid documents and that it lacked authority to investigate academic qualifications.

The court evaluated whether the decision to clear Ndeti was unreasonable and whether judicial review was the proper remedy. Referring to established case law, the judge

underscored that judicial review addresses the decision-making process, not the merits of the decision itself. Since the Applicants had not provided sufficient proof of their fraud and forgery claims, the court found it could not act as an investigative body on the matter.

Issue for determination

1. Whether the 2nd Respondent can investigate the authenticity of a university degree.

Decision of the court

The Applicants argued that the Dispute Resolution Committee failed to address their complaint, claiming it lacked jurisdiction as the issue involved questioning the authenticity of Wavinya Ndeti's academic qualifications. The 2nd Respondent asserted that under Article 88 of the Constitution and Section 74 of the Elections Act 2011, its mandate did not extend to verifying academic certificates. It maintained that the responsibility for authenticating degrees and certificates rested with the Commission for University Education (the 3rd Respondent), as per the Universities Act.

The judge agreed with the 2nd Respondent, noting that the Applicants did not cite any law requiring the 2nd Respondent to verify or equate university degrees. They had relied on Regulation 47 of the Election (General) Regulations 2012, which the judge found did not grant the 2nd Respondent such powers. Citing a previous decision in ***Dennis Gakuu Wahome v IEBC and Others*** **(Petition E321 of 2022),** the judge reiterated that the 2nd Respondent lacked the authority to recognise or question academic qualifications already validated by the 3rd Respondent.

As a result, the Applicants failed to meet the legal threshold for the orders sought, and the application was dismissed.

3.1.4 Suitability for public office under Chapter Six of the Constitution

Okiya Omtatah Okoiti & 15 Others v Attorney General & 7 Others; Commission on Administrative Justice & 15 Others (Interested Parties)

Constitutional Petition E090, E168, E221, E230, E234, E249, E017, E109 & E010 of 2022 (Consolidated))

High Court of Kenya at Nairobi

DAS Majanja, EC Mwita & M Thande, JJ

24 July 2022

Summary of Facts

The petitions addressed the interpretation of Chapter 6 of the Constitution concerning the electoral process, particularly related to the 2022 General Elections and the qualification of candidates under Articles 99 and 193.

In **NRB Petition No. E090 of 2022**, Petitioner Okiya Omtatah Okoiti raised concerns about

candidates lacking integrity when running for public office. He highlighted that a person who had been arrested and charged with bribery was elected as a Member of Parliament, which he argued undermined governance and accountability. Consequently, Okoiti sought the court's interpretation of eligibility criteria under Articles 99 and 193 and requested declarations to bar candidates who failed to meet moral and ethical standards.

Similarly, in **NRB Petition No. E221 of 2022**, Petitioner Edward Asitibat alleged that the IEBC failed to prevent individuals with questionable integrity from running for office unless a court ordered it. In this regard, he sought declarations to bar individuals removed from office via impeachment or found guilty of abuse of power from holding state office, as well as disqualifying candidates with ongoing serious criminal cases.

Furthermore, **NRB Petition No. E168 of 2022**, presented by Petitioners Inuka Kenya ni Sisi, Wanjiru Gikonyo, the Kenya Human Rights Commission, and Transparency International Kenya, aimed to establish a fit and proper test for leadership under Chapter 6, applicable to all offices. They contended that the IEBC has a mandate to determine candidates' compliance with integrity standards, thereby affirming the importance of this vetting process.

In **MSA HC Petition No. E017 of 2022**, Petitioner George Odhiambo argued that Mike Mbuvi Sonko was disqualified from holding state office due to impeachment. Consequently, he sought declarations affirming that all impeached individuals are ineligible for elective office, emphasizing the need for accountability in leadership roles.

Similarly, in **ELD Petition No. E010 of 2022**, Petitioner Silverstor Kipkemoi Arap contended that both Mike Mbuvi Sonko and Ferdinand Ndung'u Waititu Babayao, having been impeached, were disqualified from running for office. He sought an injunction against their candidacy, underscoring the principle that those removed from public office should not be permitted to stand for election.

Moreover, in **NRB Petition No. E230 of 2022**, Petitioners Mukudi Jwenge and Anderson Warui argued that Sonko's impeachment barred him from holding any state office under Article 75(3). They sought declarations preventing him from being nominated for any public office, thereby reinforcing the constitutional standards for leadership.

In another instance, **NRB Petition No. E234 of 2022**, Petitioner Kevin Njui Wangari claimed that Paul Thang'wa, who had been impeached from his position as Kiambu County Executive Member for Youth Affairs, was unfit for any elective office. Thus, he sought to prevent Thang'wa's candidacy, reiterating the disqualification of impeached individuals from public office.

Finally, in **Petition No. E249 of 2022**, Petitioner Onchieku Hesbon Moisiori challenged Samuel Arama's eligibility to contest in elections, citing his conviction in an Anti-Corruption

Criminal Case. Consequently, he sought orders to bar Arama from contesting and to declare his nomination process illegal.

In response, the Attorney General opposed the petitions, arguing that they sought advisory opinions and lacked specificity. He contended that granting the petitions would interfere with constitutional mandates and that the issues raised were not ripe for adjudication. Meanwhile, the Ethics and Anti-Corruption Commission (EACC) acknowledged its role in ensuring compliance with Chapter 6, stating that it had submitted an integrity verification report for the IEBC's use in disqualifying candidates not meeting integrity thresholds.

On the other hand, the IEBC asserted its independence, emphasizing its authority to resolve electoral disputes and denying that it was bound by EACC recommendations without a court order. It reiterated that it conducted its assessments based on constitutional criteria.

Moreover, Mike Sonko and the Wiper Party argued that the court lacked jurisdiction to contest Sonko's eligibility, claiming that the petitions infringed on their political rights under Article 38. They further contended that the petitions were premature since Sonko's case was pending before the Supreme Court.

In contrast, Paul Thang'wa maintained that, although the Kiambu County Assembly passed a resolution for his removal, he had neither been impeached nor removed from office. He asserted that he remained in office and had pending legal processes regarding his status.

Lastly, Samuel Arama admitted to being convicted in Nairobi Anti-Corruption Criminal Case No. 20 of 2018 but noted that sentencing was pending. He stated his intent to pursue all legal avenues following sentencing, thereby reinforcing the ongoing legal considerations surrounding his eligibility.

Issues for Determination

1. Whether the court had jurisdiction to hear and determine the petitions that raise abstract and hypothetical questions.

2. Whether the petitions were premature in view of the Constitutional and statutory mandate of the IEBC.

Decision of the Court

The court acknowledged that its jurisdiction to adjudicate over matters concerning the Constitution is wide. Regarding the matter brought before it, it highlighted Article 165(3) which stipulates for its jurisdiction to determine matters revolving around the interpretation of the Constitution and the violation of a fundamental freedom or right. Accordingly, it was the court's view that it the clause had confirmed the Petitioner's position that it may entertain any question regarding the interpretation of the Constitution.

The court adopted the standing in ***John Harun Mwau & 3 Others v Attorney General*** **[2021] eKLR** where it was held that the court does

not deal with hypothetical issues and that the jurisdiction to interpret the Constitution under Article 165(3)(d) does not exist in a vacuum and is not exercised independently in the absence of the real dispute. The aforesaid position also emanated in the case of ***Wanjiru Gikonyo & Others v National Assembly of Kenya & 4 Others, Petition No. 453 of 2015*** **[2016] eKLR** where the principle of ripeness of a matter was invoked to ensure that a matter was factually ripe for determination.

The court admitted that despite it having jurisdiction to interpret the Constitution, it could not proceed to grant reliefs merely on the ground that there were conflicting decisions that required harmonisation. It referred to ***Kenya National Commission on Human Rights v Attorney General; IEBC and 16 Others (Interested Parties)*** **Supreme Court Advisory Opinion Reference No. 1 of 2017** where an invitation to "harmonise" jurisdiction based on the need to clarify the fit and proper test for leadership under Chapter 6 of the Constitution in light of the conflicting case laws that had built up on the issue. It opined that harmonization could only be achieved where an actual and live dispute existed.

Having considered the entirety of Petition Nos. E090 of 2022, E168 of 2022, and E221 of 2022 the court posited that they were general in nature, raised issues without reference to concrete facts, did not allege any wrongdoing against a specific person and did not have specific Respondents against which the reliefs would be granted. Hence, they were rejected.

Regarding the second issue, the court stated that the net effect of the decision made in the case of ***Mohamed Abdi Mohamud v Ahmed Abdullahi & Others SCK Pet. No 7 of 2018*** **[2019] eKLR,** where the jurisdiction of IEBC was affirmed by dint of Article 88(4)(e) of the Constitution was that pre-election disputes such as those regarding suitability and eligibility for nomination of candidates must be resolved by the IEBC in the 1st instance. The High Court's jurisdiction is only triggered once the IEBC makes a decision on the issue. In applying the above principle, the court asserted that the cases concerning Mike Mbuvi Sonko, Paul Thang'wa and Samuel Arama were presented prematurely in court.

It went further and stated that considering the DRC process was invoked, it must be allowed to run its course and highlighted that its jurisdiction should only be invoked until the process was exhausted while quoting the case of ***International Centre for Policy and Conflict & 5 Others v Attorney General & 5 Others*** **Constitutional Petitions Nos 552, 554, 573 & 579 of 2012 (Consolidated)**. Consequently, jurisdiction claims made on the petitions relating to Mike Sonko, Paul Thang'wa and Samuel Arama were rejected.

Republic v Independent Electoral & Boundaries Commission Dispute Resolution Committee & another; Thang'wa (Ex parte); Party (Interested Party)

Judicial Review Application 2 of 2022

In the High Court of Kenya at Kiambu

R Ngetich J

18th July 2022

Summary of facts

The ex parte Applicant sought judicial review to challenge the 1st Respondent's (IEBC Dispute Resolution Committee) decision, which upheld the 3rd Respondent's refusal to clear him for the Kiambu Senatorial race under the UDA party. The refusal was based on his alleged ineligibility following his removal from office and for submitting his nomination papers outside the gazetted timelines.

The Applicant filed the case in Milimani High Court, later transferred to Kiambu High Court. He argued that his disqualification was based on a 4 June 2022 IEBC Chairman's communique and that he was denied a fair hearing, in violation of his right to natural justice under Rule 9 of the IEBC Rules. He also claimed the decision was based on the incorrect assumption that he was impeached, while it was the former Governor who had been removed from office.

Further, the Applicant contended the 1st Respondent acted irrationally by considering extraneous issues like late submission, which was not initially cited as a reason for disqualification. The Respondents argued that the nomination deadline was 30 May 2022 and that the Applicant missed key briefing sessions.

In response, the Applicant noted that court orders in Petition E234 of 2022 barred his clearance until 6 June 2022, and submitting papers earlier would have been contempt of court. He also cited Article 99(3) of the Constitution, which allows candidates with pending appeals to run for office. Lastly, he argued that under Rule 9 of the IEBC Rules, the complaint should come from a third party, not the IEBC itself.

Issues for determination

1. Whether the ex parte Applicant was granted right to fair hearing.

2. Whether the decision by the 1st Respondent was illegal, irrational and procedurally unfair.

Decision of the court

The court examined whether the 1st Respondent's decision was illegal, irrational, or procedurally unfair as required for judicial review. The Applicant argued that his constitutional rights under Articles 47, 50, 75, and 99 had been violated, primarily due to the 1st Respondent's decision to uphold the 3rd Respondent's refusal to clear him for the Senate position in Kiambu County.

First, the court addressed the Applicant's right to natural justice. The Applicant claimed bias, arguing that the 1st Respondent acted as a judge in its own cause. However, the court rejected this, relying on ***Diana Kethi Kilonzo & Another v Independent Electoral & Boundaries Commission & 10 Others* [2013] eKLR**, which held that the IEBC's dispute resolution role is constitutionally valid.

Next, the court assessed whether the decision was illegal and irrational. The Applicant argued that his disqualification was initially based on his impeachment under Article 75 of the Constitution, but the 1st Respondent later cited late submission of nomination papers as the reason for rejection, which had not been raised earlier. The court found this procedurally unfair, as the Applicant was not given a chance to explain the delay, which he could have justified due to a prohibition order in place at the time.

The court also noted that under Article 99(3) of the Constitution, the Applicant could not be disqualified while an appeal was pending. Since the Applicant had appealed the decision disqualifying him, he was entitled to protection under Article 99.

The court concluded that the 1st Respondent acted beyond its mandate and quashed its decision of 19 June 2022 in complaint No. 130 of 2022. An order of mandamus was issued compelling the 2nd Respondent to clear the Applicant to run for the Senate seat in the 9 August 2022 elections. No orders as to costs were made.

Mike Sonko Mbuvi Gideon Kioko v Swalha Ibrahim Yusuf and 3 Others

Petition E027 of 2022

High Court at Mombasa

Sewe, Githinji & Ong'injo JJ

13th July 2022

Summary of the facts

In his petition dated 22 June 2022, Mike Sonko claimed that his constitutional rights were violated when the Independent Electoral and Boundaries Commission (IEBC) disqualified him from running for the Mombasa gubernatorial seat. Sonko argued that despite meeting nomination requirements and presenting necessary documents, the IEBC disqualified him for failing to provide an original degree certificate and a certified copy, and due to his impeachment under Article 75 of the Constitution. He contended that this disqualification was designed to prevent him from contesting, even though he had a pending appeal regarding his impeachment, which should have allowed him to run under Article 193(3). He also alleged unequal treatment compared to other candidates.

The 1st Respondent, Mombasa County Returning Officer, argued that Sonko had been impeached in 2020 for gross misconduct, and this was upheld by the courts. The Ethics and Anti-Corruption Commission (EACC) confirmed his impeachment and ongoing criminal charges, making him ineligible under Chapter Six of the Constitution. Furthermore, Sonko failed to submit his degree documents on time, leading to his disqualification.

The 2nd Respondent's Legal Director supported this, stating that Sonko's appeal against impeachment was out of time and invalid. The 4th Respondent, Wiper Democratic Movement Party, supported Sonko's petition, arguing that the IEBC's actions were unreasonable and unconstitutional, particularly the requirement for a new nominee within 72 hours.

The petition was challenged on grounds of merit, degree requirements, and impeachment disqualification.

Issues for determination

1. Whether the Petitioner presented all the documents required by the 3rd Respondent within the stipulated time; and if not, whether time could be extended in the circumstances;

2. Whether the Petitioner was entitled to reprieve from disqualification under Article 193(3) of the Constitution.

3. Whether costs are payable and by who.

Decision of the court

The Petitioner, Mike Sonko, who was impeached as Governor of Nairobi City County on 17 December 2020, challenged his impeachment through a petition, ***Hon. Mike Sonko Mbuvi Gedion Kioko & Another v Clerk, Nairobi City County Assembly & 9 Others***, **Petition No. E425 of 2020**, which was dismissed by the High Court on 24 June 2021. He subsequently filed an appeal, ***Mike Sonko Mbuvi Gedion Kioko v Clerk Nairobi City County Assembly & 11 Others***, **Civil Appeal No. 425 of 2021**, which was also dismissed by the Court of Appeal on 4 March 2022. Undeterred, Sonko approached the Supreme Court in ***Hon. Mike Mbuvi Sonko v The Clerk County Assembly of Nairobi City & 11 Others***, **Appeal No. E008 of 2022**, where the matter remained pending.

With an interest in running for Governor of Mombasa County in the General Elections scheduled for 9 August 2022, Sonko received a Nomination Certificate from the Wiper Democratic Movement Party in accordance with the nomination process outlined in Gazette Notice No. 434. However, on 4 June 2022, a press release indicated that he was disqualified due to his impeachment.

Despite appearing on the designated date to submit his Nomination Papers, Sonko was not cleared because he failed to present his original degree certificate and a certified copy. His complaint to the Disputes Resolution Committee was dismissed on 20 June 2022, prompting him to seek relief from the court regarding the presentation of documents and the applicability of Article 193(3) of the constitution for reprieve from disqualification.

The court found that Sonko had complied with constitutional and statutory requirements, noting that the nomination conditions may not have been adequately communicated. It deemed the refusal to accept his documents unreasonable and referenced the decision in ***Harun Mwadalu Mwaeni v IEBC & Another***

[2017] eKLR, which emphasised flexibility and consideration of exceptional circumstances.

Regarding his eligibility under Article 193(3), the court recognised that Sonko's impeachment barred him from holding public office, but Article 193(3) offered protection for those with pending appeals. The court adopted a holistic approach to constitutional interpretation, supported by the Supreme Court's decision in ***The Matter of the Kenya National Human Rights Commission***, **Supreme Court Advisory Opinion Reference No. 1 of 2012 [2014] eKLR**, which highlighted the importance of interpreting the Constitution in context. It also referenced ***The Matter of Interim Independent Electoral Commission*** **[2011] eKLR**, which advocated for a purposive approach rather than a formalistic one.

Ultimately, the court concluded that the denial of Sonko's candidature violated his rights and quashed the disqualification decision, ordering the acceptance of his nomination papers and declaring him eligible to run for Governor, with each party bearing its own costs.

Kenneth Njagi Njiru & 10 others v Ruto & 5 others; Azimio la Umoja One-Kenya Coalition & 3 others (Interested Parties)

(Petition 22 (E25) of 2022)

Supreme Court of Kenya at Nairobi

Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola, Ouko, SCJJ

6th September 2022

Summary of the facts

The Petitioners filed an application under Articles 3, 10, 88(4)(e), 99, 137, 148, and 163(3)(a) of the Constitution, as well as Section 12 of the Supreme Court Act 2011. The petition sought ten declarations, which were condensed into four main prayers: firstly, a declaration that the 2nd Respondent was unfit and unsuitable to hold the office of Deputy President due to non-compliance with Chapter Six of the Constitution and Articles 99(1) and 148(1); secondly, a declaration that the nomination of the 2nd Respondent as a running mate by the 1st Respondent was invalid, null, and void ab initio; thirdly, a declaration that the 1st Respondent violated Articles 99(1), 137(1), and 148(1) by nominating the 2nd Respondent as a candidate for Deputy President in the General Elections held on 9 August 2022, thus rendering him unfit and unsuitable to hold the office of President; and finally, an order quashing the 4th Respondent's Gazette Notice No. 7995, published on 1 July 2022, which declared the 1st and 2nd Respondents as candidates for President and Deputy President, respectively.

Alongside the petition, the Petitioners sought conservatory orders under Article 163(4)(a) of the Constitution, Sections 21(1)(a) and 24(1) of the Supreme Court Act 2011, and Rules 3(5), 31, and 32 of the Supreme Court Rules 2020. These orders aimed to restrain the 1st and 2nd Respondents from being sworn into office as

President and Deputy President, respectively, in the event they were elected during the General Elections scheduled for 9 August 2022.

In response, the 1st to 3rd Respondents filed a Notice of Preliminary Objection on 11 August, while the 4th and 5th Respondents filed a similar Notice and Grounds of Opposition on 15 August 2022, challenging the court's jurisdiction to entertain the appeal and motion. The Respondents contended that the court possessed exclusive original jurisdiction under Article 140 of the Constitution. They further argued that the petition and application violated the principle of exhaustion, as there were alternative avenues for recourse available under Article 88(4)(d) and (e) of the Constitution. They also claimed that the petition failed the tests of justiciability and ripeness and violated the principle of sub judice, given that Constitutional Petition E395 of 2022 was pending before the High Court. Consequently, they urged the court to strike out the petition and application as incompetent and an abuse of the court's process.

The Petitioners filed written submissions on 9 August and additional submissions on 15 August 2022, asserting that the preliminary objections were unmerited. They maintained that the court held exclusive original jurisdiction under Article 163(3)(a) of the Constitution and argued that the application sought to preserve the subject matter of the petition.

Decision of the court

In its determination, the Supreme Court carefully examined the arguments regarding its jurisdiction to address disputes related to the election of the President, as defined under Article 140 of the Constitution. The Court reaffirmed that its exclusive and original jurisdiction, outlined in Article 163(3)(a), is limited to disputes arising after the declaration of presidential election results, as specified in Article 140(1). Citing its previous decision in ***Okiya Omtatah Okoiti v. Independent Electoral and Boundaries Commission & Others; SC Petition No. 18 of 2017*** **[2020] eKLR**, the Court clarified that this jurisdiction did not extend to all interpretational questions concerning the election of the President and did not override the High Court's original jurisdiction under Article 165(3)(d) to interpret the Constitution.

The Court noted that the petition and motion were filed prior to the General Elections and before the declaration of the presidential election results, thus falling outside the jurisdiction granted by the Constitution. The Court found that the applicants were attempting to improperly expand its jurisdiction, which it could not accept. Consequently, the Court ruled that it lacked jurisdiction to hear the petition and application, resulting in their dismissal. The objections raised by the Respondents were upheld, leading to the striking out of the petition and motion as incompetent. The applicants were ordered to bear the costs of the proceedings.

3.2 Enforcement of the Electoral Code of Conduct

Sabina Wanjiru Chege v Independent Electoral and Boundaries Commission

Constitutional Petition E073 of 2022

High Court of Kenya at Nairobi

AC Mrima, J

4 April 2022

Summary of Facts

The Petitioner by way of a petition dated February 11, 2022 and a contemporaneous application sought conservatory orders staying further proceedings before the Enforcement Committee.

The Petitioner stated that on a February 11, 2022 she was summoned before the Enforcement Committee to attend a hearing because it was seized of a report and material against her regarding violation of Clause 6(a) and (I) of the Electoral Code of Conduct. She was also served with a statement of breach indicative of the words allegedly uttered by the Petitioner at a public rally in Isibuye area within Vihiga County.

According to the Respondent, the issue of dispute is that the Petitioner uttered that the Jubilee Party, to which the Petitioner was a member, rigged the elections in 2017 and that there was intent to rig once again in the year 2022. The Petitioner also claimed that the Respondent's voting system was foul and penetrable and the integrity of the electoral process would not be maintained.

The Petitioner therefore requested the investigatory report and material in support of the allegations before the Enforcement Committee and a proper procedure documenting the obligations of the Enforcement Committee as a quasi-judicial body However the Petitioner received contradictory responses.

The Petitioner asserted that the requested investigations were initiated after 11 February 2022, following her summons to appear before the Enforcement Committee. This was in connection with correspondence addressed to the Communications Authority of Kenya, requesting the NTV clip that had been aired on 11 February 2022.

The Petitioner contended that the Enforcement Committee commenced proceedings on its own motion without the appointment of a chairperson hence violating clause 6 and 15(1) of the Code of Conduct.

Further, the Petitioner contended that the framework of the complaint was designed in such a way that it did not afford the Petitioner an opportunity to respond, thereby violating Articles 47 and 50 of the Constitution, which guarantee the right to a fair hearing. The Petitioner also argued that the Committee was not among the commissions vested with the mandate to summon individuals for alleged violations of the Code of Conduct. Instead, the Committee's role was limited to conducting investigations and subsequently raising the disputed issues before a court of law.

The petitioner also Asseted that the Respondent had no jurisdiction to conduct judicial proceedings since section 109(1) and (3) of the Elections Act obligated the Respondent to develop draft regulations and submit them to public participation and parliamentary approval before gazettement, which had not been undertaken. She, therefore, contended that the Legal Notice No. 139 of 2012 on the rules of procedure for settlement of disputes did not rise to the expectation of the statute from which the requirement was expected to come.

The Respondent, the Independent Electoral and Boundaries Commission (IEBC), argued that it possessed the authority to conduct hearings and summon witnesses in relation to breaches of the Electoral Code, as established by the Elections Act and its associated rules. The IEBC contended that the Enforcement Committee, which was responsible for these functions, was legitimate and operated within its mandate to ensure compliance with electoral laws.

The IEBC maintained that its powers to investigate complaints and conduct hearings were essential for upholding electoral integrity and facilitating fair elections. It argued that the constitution allows for the establishment of such mechanisms to ensure accountability among political entities and candidates. The commission emphasized that the enforcement of the Electoral Code was crucial for maintaining democratic principles and protecting the rights of voters.

Furthermore, the IEBC asserted that the provisions of the Electoral Code and the Rules of Procedure were designed to empower it to take necessary actions against violations. It claimed that these statutory instruments were in line with the constitutional framework governing its operations and did not contravene any constitutional provisions.

Issues for Determination

1. Whether the Enforcement Committee had the jurisdiction to entertain the violations of the Electoral Code.

2. Whether the Electoral Code was in force and if so, whether the Electoral Code was binding upon the Petitioner.

3. Whether the Respondent's Chairperson erred in chairing the sittings of the Enforcement Committee.

4. Whether the Respondent has formulated Regulations to guide the proceedings before the Enforcement Committee.

5. Whether the proceedings against the Petitioner before the Enforcement Committee violate articles (1)(1), 2(1), 2(4), 3(1), 20(1), 22, 23, 24 (1) (a)-(e), 27, 33, 35(1), 35(3), 47(1), 47(2) and 50 of the Constitution.

6. Whether the Petitioner was entitled to any relief.

Decision of the Court

Jurisdiction is fundamental to the exercise of judicial authority. Without it, a court lacks the power to take any further steps. Where jurisdiction is absent, there is no basis for the continuation of proceedings. It is well-established that jurisdiction cannot be created through the ingenuity of a party's arguments or conferred by consent. Jurisdiction either exists or does not exist; there is no middle ground.

The Electoral Code has a constitutional basis. Article 84(4)(j) of the constitution provides that the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for the development of a code of conduct for candidates and parties contesting elections.

It is the Elections Act that fully envisages the Code of Conduct and obligates anyone running for office to subscribe to the Code, failing which they will not be allowed to participate in the electoral process.

In Section 1(3), the Electoral Code further reiterates the need for subscription as follows:

> *All registered political parties and referendum committees shall execute this Code through the hand of their respective registered officials to signify their acceptance to be bound by the provisions of this Code and their commitment to strive to ensure that their members and any person who supports the political party abide by the code at all stages of elections and referendum.*

In the event there is a breach and infringement of the Electoral Code, the Commission must impose sanctions, and in the event the sanctions are not complied, with the Commission may cancel the right of such a political party or candidate to participate in the next election or the Commission may institute proceedings on its own motion or in consequence of any report at the High Court.

Section 21 of the Elections Act provides that the Office of the Director of Public Prosecution has the power to order investigations and prosecute offences under the Electoral Code. Rules of Procedure on Settlement Disputes (hereinafter referred to as 'the Rules of Procedure') were also promulgated by the Respondent vide Legal Notice No 139 of 2012. The basis of the Rules of Procedure is section 109 of the Elections Act which accords the Respondent the power to make regulations. The Rules of Procedure are, hence, a subsidiary legislation or a statutory instrument.

The Constitution provides that the Enforcement Committee falls within the definition of a commission as envisaged under

the Constitution. Constitutional commissions and independent offices have the autonomy to conduct investigations on receipt of a complaint or on their own motion However, the Constitution limits the power to summon witnesses to only four entities, which are, Kenya National Human Rights and Equality Commission, the Judicial Service Commission, the National Land Commission and the Auditor-General. The Respondent herein was not, one of the specified entities.

However, a reading of the Electoral Code section 15 provides that the Enforcement Committee has the power issue to summons but the same should be done in compliance with Article 2 (4) of the Constitution with regard to supervising referenda and elections. Therefore the powers vested in the Enforcement Committee are by the Electoral Code and not the Constitution. Therefore, the court found that the Respondent ought to have restricted its autonomy to what was set out in the Electoral Code.

The court found that the Enforcement Committee of the IEBC lacked jurisdiction to either summon witnesses or conduct hearings regarding complaints about breaches of the Electoral Code. It ruled that the Enforcement Committee was unconstitutional and could not enforce the Electoral Code in this manner. The court clarified that while the IEBC could investigate complaints either on its own initiative or based on public complaints, it did not have the authority to summon witnesses or conduct hearings. Instead, after completing its investigations, the IEBC could refer matters to the Director of Public Prosecutions or initiate proceedings in the High Court. Additionally, the IEBC could engage in mediation and conciliation through its Peace Committees. The court emphasized that any legal provisions granting the Enforcement Committee such powers contradicted the Constitution and were therefore null and void.

Independent Electoral and Boundaries Commission v Sabina Wanjiru Chege

Civil Appeal E255 of 2022

Court of Appeal of Kenya at Nairobi

W. Karanja, J. Mohammed & Laibuta, JJ.A.

15 July 2023

Summary of the facts

The Respondent was summoned to the IEBC Code of Conduct Enforcement Committee (hereinafter "the Committee") following her alleged remarks made on 10th February 2022. She appeared before the Committee but raised a preliminary objection arguing that the Committee lacked jurisdiction. The objection was dismissed on the basis that it had jurisdiction.

Dissatisfied by the ruling, the Respondent petitioned the High Court seeking various declarations, prohibitions, conservatory

orders and orders of certiorari claiming that the Committee lacked jurisdiction to investigate, hear and determine the complaints relating to a breach of the Electoral Code of Conduct (hereinafter "the Code"). Upon hearing the parties' petitions, the High Court allowed the Respondent's petition and declared, inter alia, that the Committee contravened Articles 2(4), 3(2), 249 and 252 of the Constitution and hence deemed unconstitutional.

Aggrieved by the judgment of the High Court, the appellant lodged an appeal, outlining seven grounds in the Memorandum of Appeal. The appellant contended that the learned judge erred in several respects: firstly, by determining that the appellant lacked jurisdiction to summon witnesses or conduct hearings regarding complaints of breaches of the Electoral Code and that the Enforcement Committee had no authority to enforce the Code.

Secondly, the judge incorrectly ruled that the Committee was unconstitutional. Thirdly, the appellant argued that while it had the jurisdiction to conduct investigations on its own initiative or based on public complaints, the judge wrongly concluded that it could not summon witnesses or conduct hearings. Fourthly, the appellant claimed that the judge acknowledged the Code was in force but failed to recognize that the Respondent was bound by it, thereby misinterpreting the petition and infringing upon the appellant's mandate to enforce the Code. Fifthly, the appellant asserted that the judge applied incorrect principles in interpreting the Constitution. Lastly, the appellant argued that the judge neglected to consider the appellant's response to the petition, written submissions, and relevant authorities, leading to an erroneous decision.

In light of these grounds, the appellant sought two main prayers from the court: to allow the appeal and set aside the judgment and decree of the High Court, and to direct that the costs of the appeal and the costs incurred in the High Court be awarded to the appellant.

The Respondent argued that the Enforcement Committee had the jurisdiction to investigate and address complaints regarding breaches of the Electoral Code. The IEBC contended that the Committee was established under the constitutional framework to ensure compliance with electoral laws and that it was empowered to summon witnesses and conduct hearings as part of its mandate to uphold electoral integrity.

In its defense, the IEBC maintained that the Electoral Code of Conduct was binding on all candidates and political parties participating in elections, thus asserting that the Respondent had a duty to adhere to the Code. The IEBC emphasized that the Committee's role was crucial in enforcing the Code and that any allegations of breaches warranted investigation and appropriate action.

Furthermore, the IEBC highlighted that the Constitution grants it the authority to conduct investigations either on its initiative

or based on public complaints, reinforcing its position that it could take necessary actions to ensure electoral compliance. The IEBC argued that the High Court erred in ruling that the Committee lacked jurisdiction, asserting that the enforcement of the Electoral Code was essential for maintaining democratic principles and protecting the rights of voters.

Issues for Determination

1. Whether the Committee had jurisdiction to summon the Respondent, hear the alleged complaint against her, make findings thereon, and possibly impose sanctions on her.

2. Whether the impugned parts of the Code were constitutional.

3. Whether the appellant is entitled to the relief sought in this appeal.

4. What orders ought this Court to make, including orders as to costs?

Decision of the Court

The Court observed that the legal authority of the Code is premised on the actual subscription by political parties, professed candidates for elective positions at the national and county level and every leader or official of a referendum committee. It further acknowledged Section 110(1) of the Act which instructs those that are mandated to subscribe to the Code. The Court took a further stance in analysing when the Code begins to apply as stipulated in Section 18 of the Act. Subject to the provision, the Code applies in the case of a general election, from the date of publication of the notice of election until the swearing-in of newly elected candidates.

The Court highlighted that the Appellant had not provided evidence to show that the Respondent's political party joined the petition from which this appeal was raised and that the record before it suggested that she was not under investigation as an official of the party. With reference to the above, the Court stated that the Respondent was not a candidate for an elective position in the 9 August 2022 general elections hence not a subscriber to the Code and was not bound by the prescriptive provision of Article 84 of the Constitution.

The Court took note of Section 15 (4) & (8) of the Act which purports to confer powers of summoning witnesses, conducting hearings, making findings and punishing errant persons found to breached the Code. It argued that the said provision violates the grain of the constitutional provisions, which delimit IEBC's general powers. It further argued that the Act intends to vest substantive and judicial or quasi-judicial authority to the Committee which is not initially availed to the Commission and is therefore inconsistent with the Constitution by virtue of Article 2(4). It recognised the case of ***Phoenix of E.A. Assurance Company Limited v S.S. Thiga t/a Newspaper Service*** **[2019] eKLR** that defined jurisdiction as the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This

definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has the authority to hear it and decide. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity *ab initio* and any determination made by such court will be amenable to being set aside *ex debito justitiae*.

The Court accredited that indeed the Respondent raised her objection to the Committee's jurisdiction, but the Committee ruled against it despite the Code not applying to her. Since the Respondent was not bound by the Code and also the Committee acting in excess of its powers the Court concluded that the Committee lacked jurisdiction to summon the Respondent. It referred to the case of ***Olum & Another v Attorney General* [2002] 2EA 508** where it was stated that to determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe on a right guaranteed by the Constitution, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional. In light of this, the Court was of the view that the impugned provisions of the Act were unconstitutional as their application posed a risk of prejudice to the Respondent.

The Court agreed with the High Court that the provisions in question are inconsistent with the Constitution and such powers should not have been visited upon the Respondent who was not bound by the Code as she stood to be prejudiced by the prospect of breach of her right to fair administration as espoused in Article 47 of the Constitution. In view of the foregoing, the Court concluded that the final two issues fall into place. It stated that it found nothing to fault the learned judge and that the appeal lacked merit. It further concluded that the Appellant is not entitled to the reliefs sought and dismissed the appeal in its entirety with the costs to the Respondent.

Independent Electoral and Boundaries Commission v Sabina Wanjiru Chege

Supreme Court Petition No. 23 (E026) of 2023

Supreme Court of Kenya at Nairobi

Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ

12 September 2023

Summary of the Facts

The Independent Electoral and Boundaries Commission (IEBC) of Kenya has filed an appeal against a Court of Appeal judgment, challenging it on five main grounds. These grounds primarily concern the court's interpretation of the IEBC's powers and the constitutionality of certain electoral procedures.

The IEBC argued that the court erred in finding paragraph 15 of the Second Schedule to the

Elections Act unconstitutional, which had empowered the IEBC to summon witnesses. They contend that Article 88(4)(e) of the Constitution allows them to settle electoral disputes, including those related to the Electoral Code of Conduct.

Furthermore, the IEBC disputes the court's ruling that the Electoral Code of Conduct Enforcement Committee is unconstitutional. They argue that this committee is a legitimate extension of their constitutional mandate to settle electoral disputes.

The appeal also challenges the court's interpretation of Article 252(3) of the Constitution, which the IEBC believes incorrectly limits the power to summon witnesses to only certain commissions and independent offices. They argue that this interpretation could have far-reaching consequences for other constitutional bodies not explicitly listed in Article 252(3).

The IEBC maintains that the court failed to consider the full scope of its constitutional mandate, including its responsibility to prescribe and enforce a code of conduct for elections. They argue that the Electoral Code of Conduct Enforcement Committee and its powers are derived from various constitutional provisions and are essential for conducting free and fair elections.

Lastly, the IEBC contends that the court applied incorrect principles when interpreting the Constitution, failing to view it as an integrated document. They argue that this interpretation renders the Electoral Code of Conduct ineffective and undermines the principles of a free and fair electoral system.

In response, the Respondent has filed a cross petition opposing the appeal. They argue that the IEBC has overstepped its constitutional boundaries by acting as both complainant and adjudicator in electoral disputes. The Respondent contends that the IEBC's powers are limited to developing the Electoral Code of Conduct, not enforcing it and that the commission lacks the constitutional authority to conduct hearings or summon witnesses.

The Respondent seeks several declarations, including that attempts to turn the IEBC into a quasi-judicial body are unconstitutional, and that certain clauses of the Electoral Code and the Second Schedule to the Elections Act should be declared invalid. They argue that the IEBC should remain an impartial and neutral elections management body, only acting on complaints from citizens or political parties regarding violations of the Electoral Code.

Issues for Determination

1. Whether the Appellant had jurisdiction to summon the Respondent, hear the alleged complaint against her and make findings thereon.

2. Whether the impugned parts of the Code were unconstitutional.

3. Whether the Electoral Code of Conduct was binding upon the Respondent.

4. Whether the Respondent's Cross-Petition herein is incompetent.

Decision of the Court

The Court took note of Article 252(1)(a) of the Constitution which stipulates for the authority of the commissions (including the Appellant) to conduct investigations on its own initiative, or a complaint made by a member of the public. To that effect, the Court took a further step of grappling with the issue as to whether said power involves the issuance of a summons requiring appearance before the Appellant or committee established under it as well as conducting hearings in the enforcement of the Code. The Court considered Section 15 of the Electoral Code which established the Enforcement Committee under the Appellant's auspice specifically Sub-Sections 4 – 7.

Similarly, the Court further took note of Rules 15(4) and 17(1) and (2) of the Rules of Procedure on Settlement of Disputes which bestows powers to the Appellant including imposing sanctions. According to Article 252(3) only the Kenya National Human Rights and Equality Commission, Judiciary Service Commission, National Land Commission and Auditor-General and warranted with the authority to summon witnesses and not the Appellant. In light of the foregoing, the superior Courts indicated that any law that conferred power to the Appellant to summon witnesses is unconstitutional to the extent of its inconsistency with the Constitution.

The Court recognised the case of ***Silverse Lisamula Anami v IEBC & 2 Others, SC Petition No. 30 if 2018 [2019] eKLR*** where one of the issues in question was the Appellant's authority to adjudicate over election period disputes by dint of Article 88(4)(e). It was argued that, where a matter has not been conclusively determined on merits by the IEBC, Political Parties Dispute Tribunal (PPDT), or the High Court, the Election Court cannot assume jurisdiction as if it where an appellate institution since the Constitution has not vested this authority to it. Further, in the Case of ***Sammy Ndung'u Waity v IEBC & 3 Others, SC Petition No. 33 of 2018 [2019] eKLR*** it was the Court's position that regarding pre-election disputes, including those arising from nominations, the Constitution clearly stipulates that they are to be resolved by the Appellant *vide* its Committee on Dispute Resolution as indicated in Section 12 of the enabling Act or where applicable the PPDT. However, where the Constitution or any other law establishes a competent entity with a specified mandate to resolve a given criterion of disputes, any other body would be at fault if they usurp such power.

It was the Court's view that Article 88(4)(e) of the Constitution is clear and without ambiguity that the Appellant is tasked with the responsibility to entertain matters arising from nominations and conclusively determine them. It further stated that the Election Act and the Electoral Code of Conduct are deliberately designed to enable the IEBC to perform its constitutional mandate notably in Articles 84, 88(4)(e), 88(5), and 252(1) of the Constitution. The Court also pointed out

the above finding answers the second issue for determination that the Electoral Code of Conduct is constitutional.

On the second issue, the Court first analysed Section 110 of the Electoral Code of Conduct which states that every political party and every person who participates in an election or referendum shall subscribe to and observe the Electoral Code of Conduct set out in the Second Schedule of the Act. The Second Schedule sets out the parties required to subscribe to the Electoral Code which includes every political party participating in the election, every candidate, every leader, chief agent, and agent or official of a referendum committee.

The Court took note of Article 84 of the Constitution which obligates all candidates and political parties to comply with the Code of Conduct prescribed by IEBC. Hence, the above provisions prove to be mandatory for political parties, candidates, and members of the referendum committees participating in an election. Regarding the Respondent, the Court highlighted that she formed part of the Jubilee Party which participated in the 2022 general elections. Despite this, the Appellant did not adduce any evidence implicating that the Jubilee party participated in the 2022 general election. Therefore, based on the evidence provided (in this case, not provided) the Respondent was not found liable.

The Court adopted the definition of a cross-petition from the Black's Law Dictionary which defines it as a proceeding undertaken to have a decision reconsidered by a higher authority, especially the submission of a lower courts or agency's decision to a higher court for review and possible reversal on the third issue. It further fostered the definition provided in the case of ***Albert Chaurembo Mumba & 7 Others (suing on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v. Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)*** **SC Petition No. 3 of 2016; [2019] eKLR**) as an appeal by an Appellee, usually heard at the same time as the Appellant's appeal.

Guided by the foregoing, the Court to notice of Part V of the Supreme Court Rules 2020, which regulates the mode of filing appeals before the Court expressly refers to a Cross-Appeal, as opposed to a Cross-Petition. In this case, the Court was of the view that the Respondent ought to have filed a Cross-Appeal following the justification provided in the case of ***Senate & 3 Others v Speaker of the National Assembly & 10 Others, Petition 19 (E027) OF 2021; [2023] KESC 7 KLR*** where Rule 47(2)(b) requires the Appellant to lodge eight copies of the memorandum of appeal and record of appeal and not to rely on the other party's pleadings as prayed.

The court found the cross-petition to be defective and issued several orders regarding the appeal. Firstly, it ruled that the appeal

partially succeeded in affirming that the Independent Electoral and Boundaries Commission (IEBC) had the jurisdiction to summon witnesses, hear complaints, and make findings related to breaches of the Electoral Code, as stipulated in Article 88(4)(e) of the Constitution. Secondly, the court determined that the Electoral Code of Conduct was constitutionally valid. However, the appeal was dismissed concerning the Respondent's liability. The court also struck out the cross-petition and ordered that each party bear its own costs in the proceedings before the Court, the Court of Appeal, and the High Court. Additionally, the court directed that the sum of Kshs. 6,000 deposited as security for costs upon lodging the appeal be refunded to the appellant.

3.3 Participation rights of marginalised groups and marginalised communities

Reuben Kigame Lichete v Independent Electoral and Boundaries Commission & Another; Attorney General (Interested Party)

Constitutional Petition E275 of 2022

High Court of Kenya at Nairobi

AC Mrima, J

18 July 2022

Summary of Facts

The Petitioner called upon the court to examine the manner in which the Independent Electoral and Boundaries Commission (IEBC) and the returning officer (the second Respondent) declined to clear him to stand as a presidential candidate. The Petitioner raised two main grounds for this appeal. Firstly, he argued that the IEBC Dispute Resolution Committee (DRC) erred in upholding the decision of the returning officer to reject his clearance as a candidate. Secondly, the Petitioner contended that the Respondents failed to uphold the Constitution and the law by not considering his status as a person living with a disability (PWD), which he believed entitled him to an opportunity to stand for election. These grounds underscored the Petitioner's assertion that the decision to deny him candidacy was not only unjust but also unconstitutional, as it overlooked his rights and the provisions aimed at promoting inclusivity in the electoral process.

The Petitioner sought conservatory orders barring the Respondents from processing the papers for the other presidential candidates for the 2022 General Elections. He deposed to the hardship he underwent as he sought the clearance by the Respondents claiming that their actions violated Articles 27, 38, 47, 54, 56, 83 and 137 of the Constitution and section 11 of the Person with Disabilities Act (hereinafter the Disabilities Act), sections 22, 23, 33 of the Elections Act (hereinafter the Act) and Regulations 16, 17 and 18 of the Elections (General) Regulations.

The Petitioner further contended that the Respondents infringed the Declaration of the Rights of Disabled Persons (1975), the Conventional and Optional Protocol on the

Rights of Persons with Disabilities (2006), the International Covenant on Civil and Political Rights (1966), the Universal Declaration on Human Rights (1948), and the African Charter on Human and People's Rights (1981), African Charter on Democracy and Governance (2007).

The Petitioner sought several orders from the court in response to the actions of the IEBC and the returning officer, who declined to clear him as a presidential candidate. He requested a declaration that the Respondents had violated his rights as outlined in Articles 27 and 54 of the Constitution. Additionally, he sought an order of certiorari to quash the decision made by the IEBC and the returning officer, which stated that he did not qualify to proceed to the next level for registration as a presidential candidate. The Petitioner also requested a declaration affirming that his right to be treated with dignity, as provided under Articles 28 and 54(1) of the Constitution, had been violated by the Respondents.

Furthermore, he sought another order of certiorari to quash the decision of the IEBC delivered on June 18, 2022, which dismissed his complaint against the Commission. The Petitioner requested an order of mandamus compelling the IEBC and the returning officer to accept his documents that complied with the requirements and to include his name among the other presidential candidates. He also sought an order of prohibition to prevent the Respondents from taking any further discriminatory actions against him.

In addition, the Petitioner requested a compensatory order as deemed fit by the court, along with exemplary and aggravated damages. He sought an order to compel the IEBC to comply with affirmative action measures that would promote inclusiveness. The Petitioner also requested any other orders the court may find appropriate and asked for the costs of the petition, including interest, to be awarded to him.

In response to the petition, the Respondents filed a joint reply and stated that prior to the DRC's decision and the Petitioner's amended Petition, they filed a Notice of Preliminary Objection on the jurisdiction of this court on the basis of exhaustion which was maintained even after the DRC delivered its decision. The Court directed that the objection and the Petition be heard together. The objection then mutated in the submissions to be that the Court lacked jurisdiction since there is no provision for an appeal from the DRC to the High Court.

The Respondents deposed that they complied with the law that guides the nomination of the candidates and on verification of the papers that the Petitioner presented, it was established that he had not complied with the law fully in relation to the presentation of signatures from at least 24 counties in Kenya, hence disqualified. They further contended that the Petitioner lacked specificity and could not stand in law and that there was no identification as how the alleged rights were flouted.

On the prayers of mandamus, it was submitted that the threshold to grant said orders was not attained, and further, the Court usurped the role of DRC and in the end, they prayed for the court to dismiss the petition.

Issues for Determination

1. Whether the Court had jurisdiction over the dispute.

2. In the event issue (i) is answered in the affirmative, the principles of constitutional interpretation.

3. Whether the Respondents rightly exercised their mandates in declining to register the Petitioner as a Presidential candidate and in view of his disability.

4. What remedies ought to issue, if any?

Decision of the Court

The court took note of the case of ***Hon. Mike Mbuvi Sonko v The Clerk, County Assembly of Nairobi City & 11 Others, Petition No. 11* (E008) of 2022,** which captured the aspects on jurisdiction and stated that *"In Nyarangi JA's time-honoured words in the Owners of the Motor Vessel "Lillians" v. Caltex Oil Kenya Limited [1989] KLR 1, which were originally penned by the United States of America Supreme Court in 1915 in the case of McDonald v. Mabee, 243 U.S. 90,91 (1915), without jurisdiction a court has no power and must down tools in respect of the matter in question."*

The Court further acknowledged the case of ***Dennis Gakuu Wahome v IEBC & No Others (Unreported),* Constitutional Petition No. E321 of 2022,** where the trial court rejected the preliminary objection made on jurisdiction following a judgment made in the case of ***Sammy Ndung'u Waity v IEBC & 3 Others,*** as that court made it clear that the High Court may exercise jurisdiction in the instance of a party being aggrieved by a decision of the DRC. Additionally, the Supreme Court provided two approaches to mounting an issue in the High Court via judicial review in the exercise of its supervisory jurisdiction and appellate jurisdiction.

To that effect, the court summed that the High Court has supervisory jurisdiction as indicated in Article 165(3)(b) and (6) of the Constitution to ensure that subordinate courts, tribunals, or quasi-judicial bodies act within their legal limits. When exercising this jurisdiction, the High Court can not only nullify the challenged proceedings, judgment, or order, but it can also issue directives to guide the lower court or tribunal on the appropriate course of action. This supervisory authority is constitutionally granted and cannot be overridden by statute.

This form of jurisdiction differs from appellate jurisdiction, which is the authority of a higher court to review and potentially alter the decisions of lower courts. Appellate jurisdiction involves examining both the law and the evidence, and it may be established by either the Constitution or statute. Unlike supervisory jurisdiction, appellate jurisdiction

does not entail general oversight of the lower courts or tribunals but is confined to the specific case being reviewed.

In the current matter, the court highlighted the title of the Petition, which was brought pursuant to Articles 2(1), (5) and (6), 3(1), 10(1), (2)(b) and (c), 20(1) and (2), 21(1) and (3), 22(1) and (2), 23(3), 27(1) among other constitutional provisions. As such the petition was properly placed before the Court granting it jurisdiction over the matter.

The court noted the case of ***David Ndii & Others v Attorney General & Others* [2021] eKLR**, which captured with precision how the Kenyan transformative Constitution ought to be interpreted, particularly in the second issue.

The four key principles for interpreting the Constitution discussed are essential for understanding its application and relevance in governance. Firstly, a holistic interpretation emphasizes that the Constitution should be understood in context, taking into account other provisions, historical background, current issues, and prevailing circumstances. This approach, often referred to as a "structural holistic approach", aims to bring the Constitution to life as intended by its framers.

Secondly, the non-formalistic approach suggests that the Constitution should not be interpreted merely as a statute. Instead, it calls for consideration of non-legal factors to foster a robust, patriotic, and indigenous jurisprudence, recognizing the unique socio-political landscape of the nation.

Thirdly, the constitutional theory of interpretation posits that the Constitution contains its own interpretive framework designed to protect and preserve its values, objectives, and purposes. Courts have a duty to provide guidance that advances the Constitution's aims, clarifies its intentions, and resolves contradictions within its text.

Lastly, the incorporation of non-legal considerations such as historical, economic, social, cultural, and political contexts is deemed critical for discerning the true meaning and values of constitutional provisions, particularly those related to human rights. Together, these principles contribute to a comprehensive understanding of the Constitution, ensuring that its interpretation aligns with the aspirations of the people it governs. Based on the above, a consideration of the next issues follows.

On the second issue, the court argued that the mandate of every Respondents in the nomination of candidates to stand for elections and in the resolution of pre-election disputes has been well captured by the Respondents in their disposition and submission. It further stated that despite it not having issues with the decision of DRC in relying on the Elections (General) Regulations, its focus primarily was on the manner in which the DRC dealt with the aspect of the Petitioner's disability. The court recognised that the DRC appropriately captured the Petitioner's complaint regarding disability. By quoting three paragraphs specifically paragraphs 29, 30 and 31 it further

acknowledged that the DRC's argument that the complainant sought special treatment and consideration other than that envisaged in the law when it comes to compliance with the regulations as opposed to the international conventions invoked by him.

The court contended that the DRC erned in disregarding the provision of the Disabilities Act and the Constitution, particularly Article 54 and relying only on Regulation 43 of the Elections (General) Regulations which grants discretion to IEBC to reject nomination papers. A cursory look at both the Constitution and the persons with Disabilities Act 2003 indicates that there is a deliberate effort to ensure that PWDs achieve equal opportunities in life. The court was of the view that the Petitioner's rights were infringed by the DRC based on the manner he was treated, and the legal provisions relied upon. For instance, the Court highlighted that there was no indication that the Petitioner was accorded any assistance to overcome disability in complying with the election requirements. Other than that, there was no further indication that the Petitioner was accorded documents in braille or how the Petitioner was to access the whole country with a view of collecting the signatures and copies of identity cards of his supporters and in ways to overcome the constraints that arise from his disability.

According to the Court, the DRC should have seized the opportunity to ensure that the Petitioner, who was a PWD in the presidential race, was accorded a reasonable opportunity to participate in the elections. Furthermore, the DRC ought to have noted that despite the challenge on his part, the Petitioner had come up with the required number of signatures from his supporters albeit and slightly out of the regulatory timelines. However, the Petitioner was placed in an equal level with the rest of the presidential aspirants and there was no review on account of his disability.

Based on the foregoing, it was the court's standing that the manner in which the DRC arrived at its decision was illegal to the extent that it was not based on the Constitution, the law or any other international instrument. This made said decision unfair, unreasonable, irrational and unproportional in the unique circumstances of the matter.

On the final issue, the court directed that the foregoing discussion had resulted in the success of the amended Petition and that the Petitioner had proved that the DRC's decision was inconsistent with the Constitution and the law. The court cited cases that comprehensively discussed the most appropriate reliefs including ***Total Kenya Limited v Kenya Revenue Authority (2013) eKLR, Simeon Kioko Kitheka & 18 Others v County Government of Machakos & 2 Others*** **[2018] eKLR** and ***Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi and Another*** **Nairobi HCCC No. 473 of 2006 [2008] 2 EA 311** where it was indicated that the court could fashion new remedies while protecting fundamental rights.

The court dismissed the Notice of Preliminary Objection dated 14 June, 2022. It declared that the decision by the Independent Electoral and Boundaries Commission (IEBC) Dispute Resolution Committee in Complaint No. 038 of 2022, which rejected the Petitioner's candidacy, violated his rights under Article 54 of the Constitution and the Persons with Disabilities Act. The court issued an order of certiorari to remove and quash the committee's decision, finding it unconstitutional. Furthermore, the court ordered a writ of mandamus compelling the IEBC to accept the Petitioner's nomination papers and consider them in line with the judgment, the Constitution, and the law. The court directed the Deputy Registrar to transmit copies of the judgment to the Clerks of the National Assembly and the Senate. Finally, the court ordered the Respondents to bear the costs of the petition.

3.4 Complementary voter identification system

Kenya Human Rights Commission & Others v Independent Electoral and Boundaries Commission & 2 Others

HCCHR Petition E306 of 2022

High Court of Kenya at Nairobi

M Thande, J

4 August 2022

Summary of Facts

The Petitioners claimed that the decision made by the 1st and 2nd Respondents to forego the printed register in identifying voters at the general election on 9 August 2022 could result in disenfranchising and bar eligible voters from exercising their rights to vote either on account of lack of fingerprints or technological failure. They further contended that the same overlooked the fact that manual process of voter identification was entrenched in the law by virtue of Section 44A of the Elections Act and Regulations 69 of the Elections (General) Regulations and the said decision of the 1st and 2nd Respondents ought to be quashed.

Additionally, the Petitioners appealed that the arbitrary decision of the 1st and 2nd Respondents contravened the rights of the registered voters to vote in the general elections, the right to legitimate expectations that the general elections shall be conducted in compliance with the election law and the rights to free and fair elections as guaranteed under Articles 27, 38, 81 and 83 of the Constitution.

The Petitioners sought several forms of relief from the court, including an order requiring the Independent Electoral and Boundaries Commission (IEBC) and its Chairperson to conduct the general elections by providing manual registers for voter identification. They also requested an order to quash the decision made by the IEBC to eliminate the use of manual registers for this purpose. Additionally, the Petitioners sought a declaration

affirming that the IEBC and its Chairperson have a constitutional obligation to take all necessary steps to ensure that the rights of the Petitioners and citizens, as enshrined in the Constitution, are observed, respected, protected, and fulfilled.

On the other hand, the Respondents presented several key arguments opposing the Petitioners' claims regarding the use of the manual voter register in the upcoming general elections. It argued that the decision to rely solely on electronic voter identification through the Kenya Integrated Elections Management System (KIEMS) complied with the law, specifically Section 44 of the Elections Act, which mandates the use of technology in the electoral process. They contended that the manual register was only to be used as a last resort if the electronic system failed, emphasizing that the deployment of the printed register could lead to potential misuse and undermine the integrity of the electoral process.

The IEBC further asserted that the petition was based on a hypothetical scenario and a misunderstanding of the role of technology in voter identification. They referenced previous court rulings, including the ***NASA Case***, which clarified that the complementary mechanism for voter identification should enhance the existing electronic system rather than replace it. The Respondents maintained that the decision to forego the manual register was made to safeguard the electoral process and ensure its credibility. IEBC the court to dismiss the petition, arguing that the Petitioners had not demonstrated any likelihood of failure of the KIEMS system that would necessitate the use of a manual register.

Additionally, the 4th Interested Party supported the IEBC's position, emphasizing that the use of technology in voter identification was mandatory and that there were provisions in place to address any potential failures of the KIEMS system. They highlighted that a truncated manual register would be available at polling stations as a backup, reinforcing the argument that the electoral process was designed to facilitate, rather than hinder, citizens' rights to vote. Overall, the Respondents sought the dismissal of the petition, asserting that it posed a threat to the established legal framework governing elections in Kenya.

Issues for Determination

1. Whether the 1st Respondent's decision not to deploy the printed register of voters at the polling station to identify voters in the General Elections complied with the law.

2. Whether the Court could direct the 1st Respondent to deploy the manual register to identify voters in the General Elections.

Decision of the Court

The court acknowledged that technology can and has failed in the course of an electoral process as indicated in the case of ***Raila Odinga & 5 Others v IEBC & 3 Others*** **[2013]**

eKLR where the Supreme Court stated that it is common ground for even the best technology to be faulty and if this occurs in the process of voter identification it could result to their disenfranchisement. The court further highlighted that Parliament enacted Section 44A of the Elections Act which obligates the Commission to establish a complementary mechanism of voter identification to ensure compliance with Article 38 of the Constitution and secure voters' rights to participate in elections.

The court drew the inference from the ***NASA Case Appeal of 2017*** where the Court of appeal reproduced an internal memo dated 27 July 2017, which explicitly indicated three modes of voter identification: biometrics, the augmenting mechanism of alphanumerical search of the voters' details and the printed register of voters. The internal memo clearly indicated that the presiding officer would resort to the printed register after approval from the Commission that the KEIMS Kit had completely failed and that there was no possibility of repair or replacement. In light of the above the Court of Appeal made a finding that said memo had to be adhered to by the parties concerned in application of Regulation 69.

Subject to the foregoing, the court found that the impugned decision of the 1st and 2nd Respondents to abandon the use of the printed register of voters in the identification of the voters in the general elections violated Articles 38, 83 and 86 of the Constitution, section 44A of the Elections Act and Regulation 69 of the Election (General) Regulations.

The court highlighted Article 249(2) of the Constitution which stipulated the independence of the Commission and the holders of the independent offices. It further highlights that said entities are subject to the Constitution and the law as opposed to any form of direction or control by any person or authority. Despite this, in circumstances where the 1st Respondent failed to operate within the parameters of the law, such operations were deemed unlawful and open to attack. The court drew assistance from the case of ***Law Society of Kenya v Centre for Human Rights and Democracy & 13 Others*** **[2013] eKLR** where it was established that if an institution deviates from its legal obligation, it is the duty of the High Court to intervene and firmly point the delineated legal path that said entity ought to follow.

Additionally, though the court recognised that the 1st Respondent did not act with malice, it underscored the fact that the 1st Respondent made a decision that violated the Constitution, the Elections Act and General Regulations and its own internal memo which necessitated its intervention through its supervisory jurisdiction under Article 165 of the Constitution. To that effect the court took note of the case of ***Republic v Public Procurement Administrative Review Board; Principal Secretary, State Department of Interior, Ministry of Interior and Co-ordination of National Government (Interested Party);***

***Ex Parte Applicant CMC Motors Group Limited* [2020] eKLR** which defines the phrase "appropriate relief" as a viable approach with regards to the court's intervention on the matter.

According to the case "appropriate relief" is required to protect and enforce the Constitution and depending on the nature of the circumstances on a case-by-case basis, said relief might be a declaration of rights, an interdict, a mandamus, or any other relief required to ensure that the rights encapsulated in the Constitution.

The court issued several orders in this case. It declared that the Independent Electoral and Boundaries Commission (IEBC) and its Chairperson must take necessary steps to ensure the Petitioners' and citizens' rights under Articles 38 and 83(3) of the Constitution are observed, respected, protected, promoted and fulfilled. The court also declared that the IEBC has a constitutional mandate to take logical steps to ensure administrative arrangements for voter registration and election conduct, including voter identification for the August 2022 elections, facilitate rather than deny eligible citizens the right to vote. Furthermore, the court declared the IEBC's decision to not use the manual voter register for the 9 August, 2022 general elections was unconstitutional and quashed it. The IEBC was ordered to comply with Regulation 69 of the Elections (General) Regulations, 2012 in conducting the general elections. Finally, as this was a public interest case, the court declined to award costs.

United Democratic Alliance Party v Kenya Human Rights Commission & 8 others

Civil Application E288 of 2022

Court of Appeal of Kenya at Nairobi

FA Ochieng', LK Kimaru & PM Gachoka, JJA

8 August 2022

Summary of facts

The Court considered the Applicant's application following the provision of Rule 5(2)(d) of the Court of Appeal Rules among other provisions of the law. It referred to its decision in the case of ***National Super Alliance Kenya (NASA) v IEBC & 2* others [2017] eKLR** and gave a short ruling subject to Rule 34(1) of the Court of Appeal Rules, considering the urgency of the matter, and the fact the general elections were scheduled to be held the following day.

Issues for Determination

1. Whether the Court of Appeal had jurisdiction to hear and determine an appeal from the High Court in an election petition concerning the nomination of a member of the County Assembly.

Decision of the Court

The Court stated that it had considered that opinion raised by the applicant's case for a stay of judgement be granted in ***Kenya Human Rights Commission & 6 Others v IEBC & 2 Others*, Nairobi Petition No. E306 of 2022,**

pending the hearing and determination of the intended appeal. It reiterated the case of ***National Super Alliance Kenya (NASA) v IEBC & 2 Others*** with respect to the identification of voters shall guide the IEBC.

The decision incorporated a Memorandum of the Commission, which both parties consented to, outlining several key provisions regarding the conduct of elections. Firstly, it mandated that presiding officers ensure voters are identified through biometric verification, using the identification documents presented during registration, establishing biometric verification as the primary method for voter identification. In cases where biometric identification fails, presiding officers are required to implement a complementary alphanumeric search mechanism in the presence of agents, with voters filling out Form 32A before receiving their six ballot papers.

Furthermore, the Memorandum stipulates that presiding officers may resort to using the printed voter register only after obtaining approval from the Commission, confirming that the KIEMS Kit has completely failed and cannot be repaired or replaced. Lastly, it emphasized that all parties involved must adhere to the contents of the Memorandum dated 27 July 2017, in the application of Regulations 69 and 83 of the Elections (General) Regulations, 2012. The court also determined that the costs of the application would abide by the outcome of the intended appeal.

3.5 Independent candidates versus political party candidates

Free Kenya Initiative & 6 Others v Independent Electoral and Boundaries Commission & 4 Others; Kenya National Commission on Human Rights (Interested party)

Constitutional Petition E160 of 2022

High Court of Kenya at Nairobi

AC Mrima, J

5 July 2022

Summary of Facts

The Petitioners challenged the constitutionality of Regulations 18(2)(c), 24(2)(c), 28(2)(c), and 36 (2)(c) of the (General) Regulations, 2012 (as amended in 2017) (impugned Regulations) which required independent candidates to tender copies of the identification documents of their supporter. It was the Petitioners' view that the aforementioned Regulations were redundant and only served the purpose of frustrating independent candidates. They further averred that said regulations were inconsistent with articles 2(4), 10, 27, 38(3), 83(3), 99(1)(c), 137(1)(d) and 193(1)(c) of the Constitution of Kenya (2010) and provisions from the Data Protection Act.

The Petitioners argued that by dint of requiring independent candidates to submit copies of the national identity cards (ID cards) of their supporters as opposed to candidates who formed part of political parties the impugned regulations violated their right to privacy. Additionally, the Petitioners further challenged the manner in which the regulations were passed, highlighting a lack of public participation.

The Petitioners therefore sought a declaration that the impugned regulations 18(2)(c), 24(2)(c), 28(2)(c), and 36 (2)(c) of the (General) Regulations, 2012 (as amended in 2017) were in contravention of the Constitution and the Data Protection Act. They further sought an order to quash said regulations pending amendments.

In response, the Respondents presented several arguments against the Petitioner's claims regarding the constitutionality of certain regulations governing independent candidates in elections. The primary contention from the Respondents, particularly the IEBC, was that the regulations requiring independent candidates to submit copies of identification documents for their supporters were necessary for ensuring the integrity of the electoral process. They argued that these requirements were in line with the provisions of the Elections Act and were aimed at preventing electoral fraud and ensuring that only legitimate candidates could contest elections.

The Respondents also asserted that the impugned Regulations did not violate the rights of independent candidates or their supporters, as they were designed to enhance transparency and accountability in the electoral process. They contended that the requirement for identification documents was not discriminatory since all candidates, including those from political parties, were subject to similar verification processes. Furthermore, the Respondents argued that the Regulations were enacted following proper legislative procedures, including public participation, which was necessary to ensure that the voices of stakeholders were considered in the formulation of electoral laws.

Additionally, the Respondents highlighted that the Regulations were consistent with the constitutional provisions that govern the eligibility of candidates. They emphasized that the Constitution allows for reasonable restrictions on the right to vie for public office, particularly when such restrictions serve a legitimate public interest, such as the need for a fair and credible electoral process. The Respondents maintained that the Regulations were not only lawful but essential for maintaining the rule of law and democratic principles in Kenya's electoral landscape.

Issues for Determination

1. The principles of constitutional interpretation.

2. Whether Regulations 18(2)(c), 24(2)(c), 28(2)(c) and 36(2)(c) of the Elections (General)

Regulations, 2012 contravene articles 2(4), 10, 27, 38(3), 83(3), 99, 137 and 193 of the Constitution and the Data Protection Act.

3. Whether the Political Parties Act should be amended to variously provide for independent candidates.

Decision of the Court

The court highlighted the case of ***David Ndii and others v Attorney General and other* [2021] eKLR** (famously referred to as 'the BBI case') which captured the manner in which the transformative Constitution ought to be interpreted. Subject to the foregoing, it was mentioned that the Constitution must be interpreted holistically as this breathes life to it as was intended by the framers. Also, it was established that the Constitution does not allow a formalistic approach to its interpretation as indicated in Articles 20(4) and 259(1). Finally, the court opined that the Constitution has indicated its own theory of interpretation to entrench its values, objects and purpose and acknowledged the retired CJ Mutunga's sentiments in ***Re Speaker of the Senate and another v Attorney General and 4 others, Supreme Court Advisory Opinion* No. 2 of 2012.**

The court stated that said theory is premised on the emerging human rights jurisprudence based on the Bill of Rights, particularly in this case Articles 4(2), 33, 34 and 35 of the Constitution. Therefore, the court adopted these canons in interpreting the Constitution and providing its determination in the following issues.

On the second issue, the court indicated that the Constitution intends that as many as those willing to take part in the elections should not unreasonably be hindered deriving from the canons of interpretation and weighed the impugned Regulations against the constitutional parameters. It highlighted Article 83 of the Constitution, stipulating the qualifications of a registered voter, Article 260 which defines an adult and section 2 of the Elections Act which defines a voter. It was stated that after an individual is registered as a voter the IEBC retains the personal details of the National Identity Card or Kenyan Passport used during registration.

Following the above, the court resolved the fact that the requirement that independent candidates supply the identification documents of their supporters was unnecessary. It further cemented this position by highlighting provisions of the Political Parties Act which obligate political parties to retain the identification details of their members and only submit their identification particulars. This was subject to sections 7(2)(f)(i) and 34 of the Political Parties Act.

Regarding the issue as to whether the impugned regulations were subject to public participation, stakeholder consultation and administratively fair procedures, the court recognized several cases including the case of ***William Odhiambo Ramogi and others v Attorney General and others, Consolidated Constitutional Petition Nos 159 of 2018 and 2019, IEBC v National Super Alliance (NASA) Kenya and 6 others,***

Civil Appeal No224 of 2017 and ***Robert Gakuru and others v Governor of Kiambu County and 3 others*** **[2014] eKLR.** The court defined public participation as the process of engaging the public or a representative sector while developing laws and formulating policies that affect them. Despite the Petitioners raising this issue, none of the Respondents and interested parties responded to it, consequently making the issue uncontroverted.

The court concluded that there is no doubt that that once a person is registered as a voter, the IEBC retains the particulars of the voter including the details of the National Identity Card or Kenyan passport used in the registration. Such details are sufficient to enable the Commission to ascertain the number of supporters with respect to the registration of independent candidates. The impugned regulations, therefore, place a further and unnecessary burden on the independent candidates and are inconsistent with Articles 2(4), 10, 27, 31, 38(3), 83(3), 99(1)(c), 137(1)(d) and 193(1)(c) of the Constitution and the Data Protection Act.

The court highlighted that despite the Petitioners proposing an amendment of the Political Parties Act to accommodate independent candidates, it did not fall within the court's radar and could properly be dealt with by Parliament under article 119 of the Constitution which stipulates for the right to petition Parliament to either enact, amend or repeal any legislation. It cemented said opinion with the case of ***Okiya Omtatah Okoiti and others v Attorney General and others, Consolidated Constitutional Petition*** **No E090 of 2022,** where it was indicated that the primary purpose of courts is to resolve actual disputes and not to engage in academic or abstract discourse that is not premised on disputed facts.

The court issued several final orders regarding the Elections (General) Regulations, 2012, as amended in 2017. Firstly, it declared that Regulations 18(2)(c), 24(2)(c), 28(2)(c), and 36(2)(c) contravened multiple Articles of the Constitution, including articles 2(4), 10, 27, 38(3), 83(3), 99(1)(c), 137(1)(d), and 193(1)(c). Secondly, the court found these Regulations also violated article 31 of the Constitution and the Data Protection Act. Consequently, an order of certiorari was granted, quashing the aforementioned regulations. Lastly, since this was a public interest litigation, the court ordered that each party bear its own costs.

3.6 Election campaign finance regulations

Katiba Institute & 3 others v Independent Electoral Boundaries Commission & 3 Others; Law Society of Kenya & another (Interested Parties) Consolidated Constitutional Petitions No. E540 & E546 of 2021

High Court of Kenya at Nairobi

A.C. Mrima, J.

5 May 2022

Summary of the facts

The 1st and 2nd Petitioners challenged the constitutionality of Section 29(1) of the Election Campaign Financing Act (ECF Act), arguing that it improperly requires mandatory approval from the National Assembly for regulations made by the Independent Electoral and Boundaries Commission (IEBC). They contended that this requirement led to a lack of necessary rules governing election campaign financing, violating their rights under the Constitution and the ECF Act.

The 3rd and 4th Petitioners supported the first two, asserting that the regulations should be considered statutory instruments, not constitutional instruments, and criticized the National Assembly for not inviting the IEBC to provide information relevant to the ECF Act's implementation over several years. They argued that the Assembly's failure to approve the Regulations violated statutory requirements and claimed that the National Assembly acted beyond its authority when it suspended the ECF Act.

The Law Society of Kenya, represented by Florence Wairimu Muturi, backed the Petition, asserting that the IEBC's regulatory decisions under Article 88(4)(i) were independent and not subject to parliamentary oversight. Community Advocacy and Awareness Trust, represented by Daisy Amdany, also supported the Petition, highlighting that without these Regulations, the electoral process would favor the wealthy and marginalize vulnerable groups, particularly women.

The 1st Respondent (IEBC) defended its actions by stating that it had attempted to introduce Regulations but was hindered by the National Assembly's inaction. They contended that the regulations required parliamentary approval but also maintained that certain spending limits could be published without such approval.

The National Assembly and the Speaker (2nd and 3rd Respondents) opposed the Petition, emphasizing their oversight role as mandated by the Constitution and asserting that the regulations were statutory instruments requiring their approval. They argued that the National Assembly had not acted unfairly in rejecting the proposed regulations.

The Attorney General aligned with the National Assembly's stance, asserting that the Assembly retains ultimate legislative authority and that the the contribution and spending limits were null and void since they were informed by the enactment of the Election Campaign Financing Regulations, 2020 which were revoked by the National Assembly.

Issues for determination

1. Principles of Constitutional and statutory interpretation.

2. Whether the Regulations contemplated under Article 88(4)(i) of the Constitution are 'Constitutional instruments' or 'statutory instruments.

3. Whether the Election Campaign Financing Regulations, 2016 and the Election

Campaign Financing Regulations, 2020 complied with the Constitution and the law.

4. The constitutionality of section 29(1) of the Election Campaign Financing Act with respect to whether Parliament usurped the powers of the Independent Electoral and Boundaries Commission in requiring the mandatory approval of the Regulations by the National Assembly.

5. Whether Sections 12, 18, and 19 of the Election Campaigns Financing Act, 2013 required the approval of the National Assembly as a condition precedent to implementation.

6. What remedies, if any, ought to issue?

Decision of the court

The principles of constitutional and statutory interpretation emphasizes the supremacy of the Constitution, as articulated in Article 2(1), which binds all persons and state organs. Article 259(1) mandates that the Constitution be interpreted to promote its purposes, values, and principles, ensuring alignment with the rule of law and human rights. This purposive approach, which views the Constitution as an integrated whole, is exemplified in ***Communications Commission of Kenya v Royal Media Services Limited*** **[2014] eKLR**.

Statutory interpretation requires consideration of the legislation's purpose and effect, as demonstrated in ***R v Big M Drug Mart Ltd*** **[1985] 1 SCR 295**. The proportionality test is crucial for assessing limitations on rights, as established in ***R v Oakes*** **[1986] 1 SCR 103**. Additionally, the importance of public interest and legal history in interpretation was highlighted in ***John Harun Mwau v Independent Electoral & Boundaries Commission*** **[2013] eKLR**, where the court acknowledged the need for laws to reflect society's aspirations.

The court addressed whether the Regulations under Article 88(4)(i) of the Constitution were constitutional or statutory instruments. The Petitioners argued that these Regulations, similar to rules made by the Chief Justice under Article 22(3) and the Supreme Court under Article 163(8), derive legitimacy directly from the Constitution. In contrast, the Respondents contended they were statutory instruments requiring parliamentary approval.

Referencing ***Hon. Sabina Wanjiru Chege v Independent Electoral and Boundaries Commission,*** **Nairobi HC Pet E073 of 2022,** the court differentiated constitutional instruments, which do not require parliamentary approval, from statutory instruments that must comply with legislative processes. The court concluded that the Regulations are statutory instruments, as they pertain to the electoral process encompassing various stages, including campaign expenditure control, following the holistic approach established in ***Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 Others*** **[2017] eKLR**.

The court examined the compliance of the 2016 and 2020 Election Campaign Financing Regulations with the Constitution and the Statutory Instruments Act, which mandates public consultation and parliamentary oversight. The 2016 Regulations were initially submitted to the National Assembly but not returned, leading to publication under the Election Campaign Financing Act, while the 2020 Regulations were revoked due to procedural deficiencies, including inadequate public consultation. The court emphasized the necessity of public participation in the legislative process, citing ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR** and ***Legal Advice Centre & 2 Others v County Government of Mombasa & 4 Others* [2016] eKLR**.

The court also addressed Section 29(1) of the Election Campaign Financing Act, which it found usurped the powers of the IEBC by requiring mandatory parliamentary approval of the Regulations. It determined that compliance with Article 88(4)(i) necessitated the IEBC to develop and submit Regulations for parliamentary scrutiny, declaring Section 29(1) unconstitutional.

Ultimately, the court ruled that the Regulations under Article 88(4)(i) are statutory instruments; that Section 29(1) of the Election Campaign Financing Act is unconstitutional; and that the spending limits in Sections 12, 18, and 19 do not require parliamentary approval but must involve public engagement. The remaining prayers in the consolidated petitions were disallowed, with each party to bear its own costs. The court urged the IEBC to expeditiously develop the necessary regulations to enhance constitutionalism and electoral governance.

3.7 Political party disputes

3.7.1 Jurisdiction of PPDT

Ntabo v Maranga & 2 Others

Civil Appeal No. 26 of 2022

High Court of Kenya at Kisii

REA Ougo, J

2 June 2022

Summary of the Facts

The case relates to ODM nominations for the Member of County Assembly in Gesusu Ward. ODM granted a direct ticket to the Appellant without having a consensus or considering the results of the opinion poll. A complaint challenging the nomination process was filed before the PPDT in PPDT complaint No. E011 of 2022. PPDT assumed jurisdiction and allowed the complaint against the direct ticket to the Appellant without having a consensus or considering an opinion poll. The appellant, being dissatisfied, appealed against the decision of PPDT at the High Court.

Issues for Determination

1. Whether the PPDT had the jurisdiction to determine PPDT Case No. E011 of 2022.

2. Whether the prayer to annul the nomination of the Appellant was properly issued and/or justified.

Decision of the Court

The court noted that PPDT was clothed with the requisite jurisdiction to entertain the 1st Respondent's claim touching on the method of nomination by the ODM party. Therefore, the Tribunal had the jurisdiction to determine PPDT case No. E011 of 2022. The Court stated that the ODM party did not comply with section 38G of the Political Parties Act. Hence the nomination process was unprocedural.

Namunyu & 3 others v Ndonji & 3 others; Namunyu & 2 others (Interested Parties)

Civil (Election) Appeal Nos. E413, E414, E430 & E433 of 2022 (Consolidated)

High Court of Kenya at Milimani

JK Sergon, J

18 July 2022

Summary of the Facts

The case arose from a dispute resulting from fresh nominations by ODM for the Umoja II ward in Embakasi, Nairobi. The repeat nominations were ordered by the PPDT. PPDT found ODM in contempt in nominating Shadrack (one of the candidates) and nullified the nomination of Shadrack and recognized Joseph Ouma Ndoji as duly nominated. At the time PPDT made this decision, an issue was pending before the IEBC Dispute Resolution Committee. Therefore, there was a dispute about whether PPDT had jurisdiction over the issues that arose from the second nomination and whether it could entertain the contempt application for non-compliance with its orders. There were also complaints that the issue raised in the appeals was res judicata owing to the pending appeal.

Joseph Ouma Ndoji and ODM filed Civil (Election) Appeal No. E430 of 2022 and Civil (Election) Appeal No. E433 of 2022 challenging the decision of the IEBC DRC. Shadrack Machanje Namunyu and Catherine Mumma also filed the Civil (Election) Appeal No. E413 of 2022 and Civil (Election) Appeal No. E414 of 2022 challenging the ruling and order delivered by the PPDT on 14 June 2022 in Tribunal Case No. E044 of 2022. The appeals were consolidated and heard at the High Court against the judgment and decree delivered by the PPDT on 14 June 2022 in Tribunal Case No. E044 of 2022. The High Court ruled that the PPDT had no jurisdiction in the matter as the IDRM had not been attempted. During the proceedings, John Ouma Ndonji, the Appellant in H.C.C.A NO. E430 of 2022, filed an application for review through the motion dated 4 July 2022. The Applicant sought a review of the Court's finding, arguing that the Court had misapprehended the facts and misapplied

the law. The Applicant contended that the Court's conclusion that a fresh nomination was conducted by the ODM party on 31 May 2022, thereby necessitating the invocation of IDRM, was incorrect.

The Applicant submitted that there was an error apparent on the record in that had this court considered the material on record, it could have appreciated the fact that ODM IDRM was sought, and thus the law was complied with. Shadrack Machanje Namunyu defended the application arguing that the application for review is more of an appeal and does not meet the requirements necessary to be regarded as an application for review. They further stated that the PPDT decision did not bar Shadrack from vying. Catherine Mumma opposed the application on grounds and insisted that the applicant should have approached the ODM party IDRM before approaching the PPDT.

Issues for Determination

1. Whether PPDT had jurisdiction over the nomination of the candidate

2. Whether the IEBC Committee had jurisdiction to revoke the clearance of Shadrack as a candidate and order for a fresh nomination

Decision of the Court

The Court considered that the substantive matter before this court was an application for review. The Court carefully examined the record of appeal and noted that it was apparent that the ODM party IDRM in respect of the nomination certificate issued to Shadrack Machanje Namunyu was sought, as shown by the further affidavit filed before the PPDT which the Tribunal considered on its merits. The Court concluded that it was clear that the Court made a factual mistake when it concluded that a fresh nomination was conducted on 31 May 2022, which therefore required parties wishing to challenge the same to first approach the party IDRM.

The Court also re-examined the records and considered that the nomination certificate of 31 May 2022 issued to Shadrack Machanje Namunyu could not arise vide the judgment of PPDT of 14 May 2022, because the ODM party was barred from forwarding his name since he did not meet the requirements of the provision of Regulation 15(5) (b) of the ODM Party Nomination Rules.

In the end, the Court found the application for review to be meritorious. It therefore ordered a review of its decision in Nairobi HCCA No. E413 of 2022 and Nairobi HCA E414 of 2022 and substituted the order with an order dismissing the appeals. The Court upheld the decision of the PPDT delivered on 14 June 2022. Consequently, the Court substituted the decision of the IEBC DRC delivered on 20 June 2022 with an order upholding the decision of PPDT's decisions of 14 May 2022 and 14 June 2022.

Odongo v Murimi & Another

Civil Appeal No. 72 of 2022

High Court of Kenya at Mombasa

OA Sewe, J

14 June 2022

Summary of the Facts

This was an appeal from the decision of PPDT. Both the Appellant and Respondent applied to ODM for nomination to contest for the Mkomani Ward seat as a member of the County Assembly of Mombasa. The Appellant won the nomination and was issued with an interim certificate of nomination. The 1st Respondent moved to the ODM Appeals Tribunal claiming that the Appellant was issued the certificate irregularly. He served the Appellant with the complaint but did not appear for the hearing. The ODM Tribunal rendered a judgment upholding the appeal. The National Elections Board and ODM ignored the decision of the ODM Tribunal, prompting the 1st Respondent to move to PPDT claiming that the ODM failed to comply with the direction of its ODM Appeals Tribunal. PPDT ordered ODM to comply with the orders of the ODM Appeal Tribunal and issue the certificate of nomination to the 1st Respondent.

The Appellant moved to the High Court to challenge the decision of the PPDT claiming that it erred in invalidating his nomination. He submitted that he was denied the right to be heard at the ODM Appeals Tribunal.

The 1st Respondent urged the Court to dismiss the appeal because the primary judgement from the ODM Appeals Tribunal was not enforced and the appellant ignored the service and did not appear for the hearing at the ODM Appeals Tribunal.

The 2nd Respondent (ODM Party) urged the Court to allow the appeal and direct a re-hearing of the dispute at the ODM Appeal Tribunal because such an order will enhance the right to access justice and fair administrative action under the Constitution.

Issues for Determination

1. Whether the appellant was condemned unheard.

2. Whether PPDT erred in invalidating the nomination of the Appellant.

Decision of the Court

The Court found that the Appellant was given a fair hearing. He had an opportunity under the rules of procedure to present and argue his case at the ODM Appeals Tribunal and PPDT. The Appellant had the opportunity to take advantage of and fully exhaust the dispute resolution mechanisms provided for under the internal party structures of the ODM party as well as under the Political Parties Act before approaching the Court for relief. In both instances, the appellant was served but he neither filed a response nor appeared for the hearing of the matter. He ignored service from ODM Appeals Tribunals and PPDT to appear and prosecute/defend his case.

The Court stated that the decision of PPDT to invalidate the appellant's nomination was proper because it was enforcing the decision of the ODM Appeals Tribunal which had not been set aside or reviewed. Therefore, the Court found no merit in the appeal and dismissed it with an order that each party shall bear its own costs of the appeal.

Cross-reference: See also the decision of ***Ondiek v Omar & another (Civil Appeal 73 of 2022)* [2022] *KEHC 12157 (KLR)*** a matter arising from ODM nominations where the Court affirmed the principle of exhaustion of IDRM.

Decisions of the IDRM cannot be overturned by other party organs

Midiwo v. Odhiambo & 2 Others

Civil Appeal No. 26 of 2022

High Court of Kenya at Siaya

RE Aburili, J

27 May 2022

Summary of the Facts

Dr. George Jalang'o Midiwo (Appellant) challenged the nomination of Hon. Elisha Ochieng Odhiambo (1st Respondent) to vie for the position of member of the National Assembly for Gem Constituency in the August 2022 general elections under ODM party ticket. The 1st Respondent was declared the winner of the nomination and issued with an interim nomination certificate. The appellant was aggrieved with the outcome of the nomination and challenged the decision at the ODM Appeals Tribunal. The ODM Tribunal dismissed his claim and upheld the nomination of the 1st Respondent. The Appellant filed an application with the ODM Appeals Tribunal to review its decision. The Tribunal dismissed the application for review.

The ODM Central Committee met and declared the nomination null and void and directed the ODM National Elections Board to issue a direct ticket to the Appellant. The 1st Respondent filed a complaint with PPDT to uphold the decision of the ODM Appeals Tribunal. The Appellant argued that PPDT had no jurisdiction to hear the matter because the ODM party was still addressing the issue. PPDT held that it had jurisdiction to entertain the complaint, and the matter was ripe for its determination. It directed that the decision of the ODM Appeals Tribunal be implemented, and the ODM Central Committee had no power to review the decision of the ODM Tribunal. The Appellant appealed against the decision of PPDT and argued that it lacked jurisdiction to hear the matter and to direct the National Elections Board and ODM Party to issue a nomination certificate to the 1st Respondent.

The Respondents submitted that PPDT had jurisdiction to hear and determine the matter and issue orders in line with section 40 of the Political Parties Act.

Issues for Determination

1. Whether PPDT had jurisdiction to hear and determine the matter.

2. Whether the IDRM had been exhausted.

3. Whether the Central Committee had jurisdiction to overturn the ODM Appeals Tribunal decision.

Decision of the Court

The Court stated that PPDT had the jurisdiction to hear and determine the matter in line with section 40 of the Political Parties Act. It stated that IDRM was exhausted as the Central Committee lacked jurisdiction per the Party Nomination rules to review a decision of the ODM Appeals Tribunal. Therefore, the decision of the ODM Appeals Tribunals was final and no one could purport to appeal to the Central Committee. The appeal was dismissed for lack of merit.

Ochola v Odhiambo & 2 Others; IEBC (Interested Party)

Civil Appeal No. E389 of 2022

Court of Appeal at Nairobi

Karanja, Mohammed, and Laibuta, JJA

8 July 2022

Summary of the Facts

This case relates to the ODM Party nomination for the position of the Member of County Assembly, North Gem Ward, Siaya County. ODM issued a certificate to Ted Marvin Odhiambo. The challenge against the interim certificate was filed at the National Appeals Tribunal unsuccessfully. However, the IEBC timetable showed the certificate was issued to Nick Ochola, the Appellant. This prompted the 1st Respondent to appeal against the NAT decision at the PPDT. PPDT heard the appeal and ordered that ODM forward the name of the 1st Respondent to IEBC. The Appellant (Mr. Nick Ochola) appealed to the High Court. The High Court upheld the PPDT decision and directed each party to bear their own costs. The Appellant further appealed against the decision of the High Court to the Court of Appeal.

At the Court of Appeal, the Appellant submitted on the issue of law that PPDT did not have jurisdiction to hear and determine the complaint before it. The ground of the submission was that the matter had transited from 'party primary' to 'nomination' over which PPDT had no authority.

The 1st Respondent opposed the appeal. The 1st Respondent submitted that the PPDT had jurisdiction to determine the complaint that was filed before it by the 1st Respondent according to Section 40(1) and (2) of the Political Parties Act as amended in 2022, since this was a dispute between a party and

its members. The Respondent further noted that forwarding the 1st Respondent's name to the IEBC following a successful nomination process was an administrative exercise as the ODM Appeals Tribunal had the final say on the issue of nomination. The 2nd and 3rd Respondents submitted that they would abide by the outcome of the appeal.

Issues for Determination

The Court was to determine whether, based on the facts on record, the PPDT had jurisdiction to hear the complaint placed before it on 27 May 2022 when it made the decision which was upheld by the High Court.

Decision of the Court

The Court noted that the issue at the heart of the appeal was whether the PPDT has jurisdiction to remove the name of a candidate whose name had been submitted to the IEBC as well as how a matter had transited from party primary to nomination. The Court of Appeal noted that the appellant's name had been submitted to the IEBC as ODM's nominee. It observed that pursuant to this submission of the name, the process had transited from party primary to nomination as by law defined. Owing to the observations, the Court concluded that the proper way to approach the matter was by challenging the nomination with the IEBC.

In the end, the Court found the appeal was merited. The Court of Appeal set aside the High Court judgment. The Court also directed that the Appellant, Mr Ochola be deemed as validly nominated as the ODM Party nominee for the position of the Member of County Assembly, North Gem Ward, Siaya County. The Court directed that the 1st Respondent bear the costs of the appeal.

3.7.2 Internal Dispute Resolution Mechanism (IDRM)

The requirement for attempt of IDRM applies equally to political parties and coalition partners under section 40 (2) of the Political Parties Act.

Maina v Registrar of Political Parties & Another; Maendeleo Chap Chap (Interested Party)

Civil Appeal No. E303 of 2022

High Court of Kenya at Nairobi

JK Sergon, J

30 May 2022

Summary of the Facts

Maendeleo Chap Chap was the complainant in Nairobi PPDT complaint NO E060 of 2022 while Martin Mugo Maina, the Appellant was the complainant in Nairobi PPDT complaint No. E016 of 2022. These appeals were consolidated, heard and determined by the PPDT. The gist of the appeal was the inclusion of Maendeleo Chap Chap in Azimio Law Umoja One Kenya Coalition Party. The complaints urged the PPDT to

find that the inclusion was null and void for procedural and statutory compliance with party rules, and the Constitution. The PPDT struck out the complaint based on the ground that PPDT did not have jurisdiction to hear the dispute between coalition partners in Azimio La Umoja One Kenya Coalition on the basis that the parties had not attempted IDRM. The complainants filed an appeal against the decision of PPDT. At the heart of the challenge was that the validity of the coalition of the agreement of Azimio La Umoja One Kenya Coalition and its validity was challenged in its entirety and thus invoking IDRM could have been impossible.

Issue for Determination

The Court was to determine whether the Interested Party (Maendeleo Chap Chap) should be allowed to withdraw as a member of the 2nd Respondent (Azimio La Umoja One Kenya Coalition Political Party)

Decision of the Court

The Court considered two main limbs of the dispute. One, it noted that the issues raised regarding actions and inactions of political party officials fall within the IDRM. Though Maendeleo Chap Chap submitted that the coalition agreement had not been disclosed, the Court was of the view that Maendeleo Chap Chap should have attempted to rely on Article 35 to request access to information to obtain the coalition agreement. In the end, the Court affirmed that the validity or otherwise of the coalition agreement, are issues which ought to be resolved within the Coalition Internal Dispute Resolution Mechanism and the Interested Party's IDRM. In conclusion, the Court dismissed the appeal.

Munene & Another v Muturi & 7 Others

Civil Appeal No. E350 of 2022

Court of Appeal at Nairobi

Makhandia, Murgor & Ole Kantai, JJA

22 July 2022

Summary of the Facts

The Petitioner challenged the inclusion of the Democratic Party (DP) as a member of the Kenya Kwanza Coalition. The complaint was based on the ground that the officials of the Democratic Party did not have the authority to resolve to join the coalition. Furthermore, the complainant challenged the validity of the appointment of Justin Muturi as the leader of the DP party at the party's National Delegates Conference (NDC). The complaint was submitted to the PPDT. The Appellants asked the PPDT to declare that the coalition agreement between the 7th and 8th Respondents was null and void and equally, the appointment of the JB Muturi, who had been a member of the party for barely two months, as party leader faced the same fate. The matter was heard at the PPDT which

ruled that the purported Coalition agreement entered into was null and void. The Tribunal further directed that the appointment of J B Muturi as the leader of the DP party at the party's NDC was equally null and void. The PPDT, however, dismissed the Preliminary objection that the PPDT complaint was filed outside the timelines primarily because it was raised late in the proceedings.

The Respondents were dissatisfied with the outcome of the PPDT and appealed to the High Court. The appeal was granted on the fact that the Tribunal had erred in not upholding the preliminary objection, and erred in failing to establish whether it had jurisdiction to entertain the complaint before it. The High Court allowed the appeal on the ground that the complaint was not filed within 30 days of the decision complained of, as is required under Regulation 7 of the Political Parties Disputes (Procedure) Regulations, 2017. The High Court noted that a preliminary objection can be raised at any time in the proceedings.

The Appellants were dissatisfied with the determination and challenged the judgment of the High Court at the Court of Appeal. The main ground of the appeal was that the High Court erred when it allowed the appeal based on the preliminary objection raised under Regulations 7 (ii) of the PPDT Regulations 2017 and failed to consider Regulations 8(3), 40 and 37 of the said Regulations. The Appellants submitted that Rule 8(3) of the PPDT Regulations grants the PPDT power to extend timelines without undue regard to technicalities. The 1st to 5th Respondents submitted that the record of appeal was incomplete. They further noted that the Appellants should have made an application for an extension of timelines before the PPDT.

Issues for Determination

1. Whether the PPDT erred in dismissing the preliminary objection which touched on the jurisdiction of the Tribunal to entertain the complaints

2. Whether, based on the facts on record and the law, PPDT indeed had jurisdiction to hear the complaints placed in light of the state of exhaustion of IDRM.

Decision of the Court

The Court considered section 40 of the Political Parties Act on the jurisdiction of the PPDT. Considering the timelines, the Court observed that the provisions are couched in mandatory terms and there is no room for the exercise of discretion. The Court noted further that even if PPDT had the discretion to extend time or waive the requirement, it cannot do so on its own without an application. In this case, no application for an extension was in the record. Furthermore, Regulation 8(3) Political Parties Disputes (Procedure) Regulations, 2017 which the appellants sought refuge in was not useful to their case as it deals with disputes relating to party nominations which was not the case here. Accordingly, the Court found that the PPDT erred in dismissing the preliminary objection which touched on the jurisdiction of the Tribunal to entertain the complaints.

Therefore, the Court of Appeal concluded that the High Court was right in upholding the preliminary objection in allowing the appeal.

The Court ruled that the complaint regarding the 7th and 8th Respondents entering into a pre-election pact ought to have been taken up first with the 7th Respondent's IDRM. It was thus premature for the Appellants to have moved directly to PPDT without first exhausting the party's IDRM.

In the end, the Court dismissed the Appellants' appeal on 29th June 2022. As the dispute involved wrangles within the party amongst members, the court made no order as to costs.

Republic v Registrar of Political Parties & 3 Others; Hassan (Ex parte)

Judicial Review Miscellaneous Application No. E048 of 2022

High Court of Kenya at Nairobi

AK Ndungu, J

8 June 2022

Summary of the Facts

Mahat Rashid Hassan challenged the decision of Azimio la Umoja One Kenya coalition party to include Maendeleo Chap Chap political party as a member of the Coalition. The Applicant submitted that the due procedure as set in the Maendeleo Chap Chap Constitution was not followed before the coalition agreement between the Azimio la Umoja One Kenya coalition party and Maendeleo Chap Chap party, which resulted in Gazette Notice no. 4442 of 14 April 2022, whose effect was to include Maendeleo Chap Chap in the coalition political party compromising 26 political parties.

The Applicant complained that there was no involvement of Maendeleo Chap Chap's Special National Delegates Conference. Furthermore, they noted that the relevant forms were filled in by unauthorized persons. The Applicant informed the Court that attempts had been made to have the Office of the Registrar of Political Parties withdraw Maendeleo Chap Chap from Azimio La Umoja One Kenya political party by writing a letter dated 27 April 2022 to the office. The Court was informed, however, that despite receiving the letter from Maendeleo Chap Chap disputing its inclusion as part of Azimio, the Registrar declined to entertain the withdrawal request of the Maendeleo Chap Chap from the Azimio Coalition Political Party, citing a lack of power to withdraw Maendeleo Chap Chap as Azimio was registered under section 7(7) of Political Parties Act 2011 (as amended in 2022).

Issues for Determination

1. Whether the High Court has jurisdiction to entertain the matter.
2. Whether the issue raised was *res judicata*.
3. Whether the applicant had made a good case for the grant of judicial review orders.

Decision of the Court

The Court stated that the dispute between Maendeleo Chap Chap and the Registrar should trigger an appeal before the Political Parties Disputes Tribunal, not the High Court. Besides, the Court noted that section 9(2) of the Fair Administrative Action Act 2015 requires the High Court not to review an administrative action or decision under the Act, unless the mechanisms, including internal mechanisms for appeal or review, and all remedies available under any other written law are first exhausted. Furthermore, the Court noted that section 9(3) of the Fair Administrative Action Act 2015 requires the High Court, if it is not satisfied that the remedies referred to in section 9(2) of the Fair Administrative Action Act 2015 have been exhausted, to direct that the applicant shall first exhaust such remedy before instituting proceedings under the Fair Administrative Action Act 2015. The Court also stated that the Applicant should have exhausted the IDRM of the political party and coalition party as per the coalition agreement. Therefore, the Court concluded that the Applicant approached the High Court in contravention of Section 9(2) of the Fair Administrative Action Act 2015 as read with Section 40 of the Political Parties Act. The jurisdiction of the court was ousted by Section 9(2) in light of the available mechanisms for appeal available to the applicant. Without jurisdiction, the court must bring down its tools.

As this finding disposed of the entire suit, the Court observed that it was not necessary to delve into the two other issues on whether the issue raised was res judicata and whether the applicant had made a good case for the grant of judicial review orders.

National Elections Board, Orange Democratic Movement Party v Odongo & Another

Civil Appeal No. E317 of 2022

High Court of Kenya at Nairobi

PM Mulwa, J

3 June 2022

Summary of the Facts

This was an Appeal from the Judgment and Decree of the Political Parties Disputes Tribunal at Kakamega delivered in PPDT Complaint No. E001 of 2022. Kepher Odongo wrote to ODM expressing his interest in contesting for the MCA for Luanda South Ward, Luanda Constituency in Vihiga County. His nomination was to be done through universal suffrage on 12th April 2022. Before that, Kepher Odongo heard a rumour that another prospective nominee had been granted a direct ticket prompting him to file a complaint before the PPDT. The PPDT heard the complaint. ODM submitted that PPDT did not have jurisdiction as the matter was filed prematurely. PPDT ordered ODM to conduct the nominations according to its rules.

ODM Elections Board was dissatisfied with the PPDT decision and appealed against it at the High Court. The Appellant submitted that the PPDT did not have jurisdiction as the dispute was to be addressed by the ODM National Appeals Tribunal and was not capable of being determined by the Tribunal. It further submitted that the order was usurping the party autonomy and that the order to conduct nominations through rule 18 of the ODM Elections and Nominations Rules as adopted in 2014 was wrong, as the rule was no longer in force and such an order was neither pleaded nor prayed for. During the proceedings, the Appellant also informed the Court that it had since learnt that the 1st Respondent was no longer a member of the ODM Party as he resigned to vie for the MCA position in Luanda South Ward as an independent candidate.

The 1st Respondent responded to the appeal noting that ODM owed him a duty to conduct fair nominations. The 2nd Respondent submitted that the orders made in the PPDT judgment were unwarranted. He associated himself with the submissions of the Appellant.

Issue for determination

1. Whether the PPDT had jurisdiction to hear and determine the dispute filed before party nominations and dictate the method of nomination.
2. The effect of a candidate contesting for a party ticket in party nominations being gazetted as an independent candidate.
3. Whether the 1st Respondent had demonstrated an attempt to subject the dispute to the internal dispute resolution mechanism

Decision of the Court

The Court stated that PPDT had jurisdiction to hear and determine the dispute filed before party nominations and dictate the method of nomination. The Court noted that the PPDT's role is limited to ensuring that the nomination method used by parties complies with the party's Constitution and rules but not to dictate to parties which method to adopt. The party is a liberty to select a method to nominate a candidate to contest for a political seat in line with party Constitution and rules.

The Court observed that the exhaustion of party IDRM happens when a complainant uses the prescribed format in line with the party Constitution and nomination rules in complaining about the party process.

The Court further noted that the gazettement of a candidate by IEBC to contest for the seat as an independent candidate bars him or her from participating in any party nominations.

3.7.3 Party autonomy versus legitimate expectations of party members in choosing nomination method

Salesio Mutuma Thuranira & 4 Others v Attorney General & 2 Others; Registrar of Political Parties & 4 Others

Petition E043, E057 & E109 of 2022

High Court at Nairobi

EN Maina, DO Ogembo & HI Ong'udi, JJ

20 April 2022

The Petition emanates from the Political Parties (Amendment) Act, 2022 where the crux of the petition was that the Parliament while assenting to the Act did not consider the stakeholder's objections and concerns before passing the bill into law.

The 1st Petitioner challenged the constitutionality of the impugned Act, as follows; section 2 of the impugned Act provided a new definition of a political party and introduced a statement of ideologies; and that the new definition introduced a coalition polital party that provided an expansive definition contrary to the meaning encapsulated under article 260 of the Constitution.

The 1st Petitioner was apprehensive that his political right and that of others under Article 38 of the Constitution would be violated with the expansion of a political party to include a coalition since it would take away the individual right to be a part of a political party of their choice without the inclusion of other political parties through a coalition. Also, it was their case that the requirement of a statement of ideologies under section 6(2) contravened article 91(2) of the Constitution.

Section 7 added sub-sections 6 and 7 which exempted coalition political parties from the registration requirements of political parties averring that it provided preferential treatment, thus it was also argued that violating article 27 of the Constitution, there were no guidelines by the Registrar of Political Parties in determining whether the coalition agreement was appropriate.

Section 14A which provided for 'Deemed Resignations' where a member promoted the ideology of another political party, was challenged for the reasons that it violated a member's right to fair administrative action and fair hearing under Articles 47 and 50 of the Constitution. The 1st Petitioner also challenged the superfluous powers of the Registrar under section 34 to regulate party nominations and training which was a preserve of the IEBC.

The Petitioner also challenged section 14B which provided for the expulsion of a member from a political party, if that person contravened the provisions of the Constitution of the political party as well as Sections 24 and 31 of the Act that gave the Registrar of Political Parties broad powers which usurped the powers of the IEBC.

The Petitioner confronted the dispute resolution process under section 40 of the

impugned Act. He stated it provided that a coalition agreement provides for internal dispute resolution mechanisms while a political party's disputes were to be resolved by the Political Parties' Dispute Tribunal. The differentiation as highlighted under section 40 in the resolution of disputes was discriminative.

Finally, the 1st Petitioner took issue with section 41 of the Act which provided that the Court of Appeal will be the last stage of an appeal. He stated that the provision limit infringed on an individual's right to explore appellate options in the judicial process.

The 2nd Petitioner to the 5th Petitioner's case was premised on the same facts as those of the 1st Petitioner and supported by Jill Cottrell Ghai's affidavit in which she averred that the Political Parties (Amendment) Act critically altered some sections of the Principal Act that introduced significant changes to the formation, operation, and regulation of political parties less than 7 months before the August 2022 elections.

In challenging section 2 of the Political Parties Amendment Act, the Petitioners stated that the amendment created two sets of meanings as provided under the Constitution and the Elections Act. While it was provided under the Constitution and the Principal Act that that political parties could form coalitions, the Amendment Act turned on alliance of parties into a separate and distinct political party under section 2 without the need for registration which was a key requirement under article 91(1) of the Constitution and section 6 of the Principal Act. It was noted that a coalition political party need only submit a coalition agreement with the Registrar of Political Parties to be fully registered.

The Petitioners also challenged section 10 that provided that political parties and coalition political parties could form a coalition hence the amendments were far from being clear since section 10 used the terms 'political party', 'coalition political party', and 'coalition' in ways that made the section nearly impossible to construe, while allowing for unchecked formation of coalition political parties.

The Petitioners also argued that the inclusion of coalition political parties at that stage undermined a citizen's ability to make informed and meaningful choices under Article 38 of the Constitution. This was because if a citizen knew that the political party it joined could become a part of a separate and distinct coalition political party, it would likely affect the person's decision on whether to join a political party, whether to form a political party and how to structure that party.

To the second issue of indirect nomination, the amendment included a provision under section 38G that required a political party to select delegates and then nominate candidates on behalf of the political party without following through with a vote or the full democratic process. The provision was contended by aguing that the same will curtail the registered

political members of the particular party from having a say in the nominations and in the event the delegates were nominated in that style and manner, accountability may be a challenge as they would not be directly accountable to the citizens, hence violating article 38 of the Constitution.

That application of the indirect and direct party nomination processes to the upcoming general elections would throw the election process into turmoil as it would create an irreconcilable conflict with section 27 of the Elections Act, which requires a party to submit its nomination list to the IEBC at least six months before the nomination of its candidates' which considering the nomination deadline set for 30 April, would be long past.

The Petitioners also contended that section 4A(c) of the Amendment Act purported to absolve political parties of their constitutional mandatory requirement for diversity and inclusivity due to its wording 'may'. It was their case therefore that relegation of gender equity and representation of persons with disabilities, youth, ethnic, and other minorities to a discretionary matter violates Articles 10, 91(1) (f) and 91(2)(a) of the Constitution, which make inclusivity mandatory.

Regarding the audit of political parties' accounts, the Petitioners averred that the Amendment Act under section 22 deleted section 31(3) of the Principal Act that required accounts of every political party to be audited annually by the Auditor-General and submitted to the Registrar. This in effect prevented the Registrar of Political Parties and Parliament from overseeing political party accounts even though these political parties may be the recipients of public funds.

Finally, the Petitioners averred there was no sufficient public participation since the National Assembly failed to provide a meaningful opportunity for the public to participate and that although the Senate allowed for an opportunity to submit written comments, it gave the public one week to do so and limited the opportunity to email submissions.

The 6th Petitioner contended that sections 28(1) and 28(A) of the Elections Act, 2011 were unconstitutional. The 6th Petitioner averred that the 2nd interested party issued Gazette Notices Nos.430 to 435 on 20 January 2022, giving timelines for compliance with the legal requirements applicable to all candidates desirous of participating in the general elections. The relevant one is that all political parties were to submit the party membership lists to the 2nd interested party before 9 April 2022.

It was therefore a requirement that any person intending to participate in the general elections had to be a member of a political party before 26 March 2022, being the date by when all political parties had to have submitted their party membership lists to the Office of the Registrar of Political Parties for certification before submission of the same to the 2nd interested party before April 9, 2022.

In view of the stated deadlines, it followed that any person intending to participate in the general elections through nomination by a political party had to be a member of a political party. Consequently, if such a person failed in the party nominations, they would not have a chance of joining another political party.

The Petitioner noted that the party nominations ought to be concluded and finalized before 22 April 2022. On the contrary, the Petitioner averred that Article 85(a) of the Constitution allowed for independent candidates to participate in the general elections without the need to be members of any registered political party.

He contended that section 28A, in issuing time deadlines was, therefore, unconstitutional for reasons that it discriminated against persons hopeful of joining other political parties to participate in the general elections. This is because it restricted them from joining another political party even if they lost in the party nominations, while it allowed such persons to still contest in the elections as independent candidates. According to him, the status of an independent candidate is equal to that of a nominated candidate and so there should be equality in time and opportunity in law for all to participate in the general elections.

The 1st Respondent swore and filed a replying affidavit by Kennedy Ogeto CBS, sworn on 15 February 2022, deposing that the petition was deficient and fell outside the honourable court's jurisdiction under article 165 (3)(d)(i) of the Constitution for the reasons that: it did not challenge the constitutionality of the impugned provisions of the Political Parties Act as amended by the Political Parties (Amendment) Act 2022 (the impugned Act) but sought an alternative interpretation of articles 38, 91, 92 and 260 of the Constitution.

Further, the petition did not provide any particulars to demonstrate how the impugned provisions of the Political Parties Act as amended by the impugned Act were inconsistent with or contravened any provisions of the Constitution; it did not demonstrate with sufficient particularity how the purpose and the effect of the impugned provisions of the Political Parties Act as amended by the impugned Act violated and/or were inconsistent with any provision of the Constitution; and, it did not disclose with sufficient particularity the rights or freedoms under the Bill of Rights that had been violated or are threatened with violation by the impugned provisions of the Political Parties Act as amended by the impugned Act.

He averred that the impugned Act was enacted in strict compliance with the Constitution and all relevant legislation and that the amendments to the Political Parties Act by the impugned Act were intended to give full effect to Articles 91 and 92 of the Constitution.

He also stated that section 2 of the Political Parties Act as amended by the impugned Act gave formal recognition to political coalitions formed by like-minded political parties making

them registrable by the Registrar of the Political Parties. Further, article 260 of the Constitution provided a sufficient definition of a political party to include political parties such as those envisaged by the amendment to section 2 of the Political Parties Act.

He deposed that he reckoned that the petition did not demonstrate how a coalition political party contravened the provisions of part 3 of Chapter Seven of the Constitution and that a coalition political party meets the basic requirements of a political party contemplated in the said provisions as it is formed by an amalgamation of duly registered political parties who have already complied with the provisions of the Political Parties Act.

Contrary to the Petitioner's claim that the formation of a coalition party would take away the right of individual citizens to form a political party, he deposed that individual citizens were granted the right under Article 38 of the Constitution to form political parties whose said right is not affected by the ability of political parties to form a coalition political party.

On the assertion that section 7 of the Political Parties Act as amended by section 7 of the impugned Act discriminated against stand-alone political parties by exempting coalition political parties from sections 5 & 6 of the Political Parties Act, he stated that a coalition political party is a coalition of duly registered political parties that had been subjected to full compliance of Political Parties Act including sections 5 and 6 of the said Act. Hence it was unnecessary to subject them to a second round of compliance.

He further averred that section 14A of the Political Parties Act as amended by section 11 of the impugned Act did not infringe on Articles 47 and 50 of the Constitution. He affirmed that section 14A (2) of the impugned act provided that members who contravened section 14A (1) were given notice of their deemed registration. In addition, they were granted an opportunity to be heard by their party in accordance with its political party constitution.

He asserted that the purpose of section 40(3) of the Political Parties Act as amended by section 27 of the impugned Act was to ensure that coalition political parties handled their disputes internally before being referred to the Political Parties Dispute Tribunal.

The 2nd Respondent filed its response through Michael Sialai CBS on 15 February 2022 deposing that the impugned Act which originated from the National Assembly as Political Parties (Amendment) Bill (National Assembly Bill No. 56 of 2021) (the Bill), underwent its first reading on December 2, 2021 and was committed to the National Assembly departmental committee of Justice and Legal Affairs (JLAC) for review and report pursuant to Standing Order 127 (1).

The 2nd Respondent stated that the Bill sought to amend the Political Parties Act, 2011, to address the overlapping mandate between the Office of the Registrar of Political Parties,

and the Independent Electoral and Boundaries Commission; enhance effective management of political parties and define the role of the 1st interested party regarding independent candidates; implement the Constitution of Kenya including articles 82, 90, 91, 92, 93, 103 and 194; address the gaps identified in execution of the 1st interested party's mandate from lessons learnt and past experiences; address the needs of Kenyans as drawn for stakeholder engagements; and address domestic and international jurisprudence.

The 2nd Respondent stated that JLAC facilitated public participation through an advertisement in the local daily newspaper of 7 December 2021 as required under article 118 of the Constitution of Kenya and National Assembly Standing Order 127(3) but did not receive a single memorandum from any member of the public including the Petitioners. It also held consultations with key stakeholders including, the 3rd Respondent, the 1st interested party, and the Political Parties Dispute Tribunal among others.

Subsequently a joint meeting was held with the 1st interested party (the Registrar of Political Parties), the Chairperson of the Political Parties Disputes Tribunal, and a representative from the 1st Respondent had them make joint submissions in support of the Bill and proposed some amendments.

From the deliberations and consultations, the proposals and submissions made established a new distribution criterion for the Political Parties Found as well as the changes submitted on the Political Parties Amendment Bill and that most of the proposals in the bill were accepted, save for the termination of disputes hearing at the Court of Appeal that was returned as a concern.

The 2nd Respondent deposed that each amendment was made with a specific objective. Section 2 of the Act was amended to replace the definition of a political party with a new definition, eliminating the need for cross-references to Articles 91 and 260 of the Constitution. Section 10(1) introduced Sections 14A and 14B into the Act. Notably, Section 14A(1) mirrored the provisions of the former Section 14(5), which addressed the circumstances under which a member of a political party is deemed to have resigned.

It was stated that before a political party could deem a member to have resigned, it was required to notify the member and offer them a fair opportunity to be heard. The provisions, it was noted, were similar to the former section 14(5A) but had omitted the time limit for notifying the Registrar of Political Parties regarding such resignations. Additionally, political parties were required to request the Registrar to remove the member's name from the party register.

The amendments, it was explained, mandated that if the Registrar was satisfied with the procedure for removing a member, the Registrar would delete the member's name from the register within seven days

of the notification and notify the member in writing. However, if the procedure was deemed unsatisfactory, the Registrar would refer the matter back to the political party. It was highlighted that exemptions existed for members of political parties involved in or proposing mergers or coalitions, similar to the provisions under the former section 14(6). The amendments also retained provisions on the expulsion of members akin to the previous section 14(7). Furthermore, it was noted that section 22 had been amended to remove requirements already addressed in the Constitution, while section 24 introduced a comprehensive framework for political party nominations, outlining both direct and indirect nomination methods.

He finally concluded that a law was presumed constitutional until declared unconstitutional by the orders of the court and that the Petitioners had failed to discharge the burden of proof to test the constitutionality of a statute.

The 2nd Respondent argued that in determining the constitutionality of a statute, the court was required to first examine the object and purpose of the impugned statute. They contended that this requirement had been satisfied and further asserted that the Petitioners had failed to establish how the contested provisions of the Act were unconstitutional, thereby not meeting the threshold for the issuance of conservatory orders.

The 3rd Respondent filed grounds of opposition dated 15 February 2022 to the application and replying affidavit by Jeremiah Nyegenye. He admitted that the Political Parties (Amendment Bill) National Assembly Bill No 56 of 2021 was published on 26 November 2021 vide a message dated 3 January 2022 from the Speaker of the National Assembly to the Speaker of the Senate. The Political Parties (Amendment) Bill, 2021 (the Bill) was then transmitted to the Senate.

Subsequently, the Speaker of the Senate convened a special sitting of the Senate on 11 January 2022 vide Kenya Gazette Notice No 63 of 7 January 2022. On the said date, the Senate convened for a special sitting and the Bill was read for the first time. It was then referred to the Committee on Justice, Legal Affairs and Human Rights, which published advertisements in the Daily Nation and the Standard on 12 January 2022 inviting members of the public to submit written memoranda on the Bill and to appear before the Committee during the public hearings on the Bill.

The Committee held public hearings on 20 and 21 January 2022 and in total received written and oral submissions from twenty-eight stakeholders, including the IEBC, the Council of County Governors, the County Assemblies Forum, the Attorney General, the Registrar of Political Parties, the Judiciary Committee on Elections, the Political Parties Liaison Committee, and the Kenya Law Reform Commission.

In inviting different stakeholders to make their submissions, the 3rd Respondent responded to the issues raised in the petition in the following manner, that Article 38 of the Constitution guaranteed political rights, Article 92 provided for legislation on political parties and in determining the constitutionality of an Act of Parliament, the court should look at the purpose and effect of the impugned statute if the purpose and, or the effect of the statute did not infringe on a right guaranteed by the Constitution, the statute was not unconstitutional.

He further added that section 2 was not unconstitutional because it did not limit the political party definition to mean a coalition but merely permitted a coalition to be recognized as a political party. Article 36 of the Constitution guarantees every person the freedom of association and therefore, the members of a political party could opt to enter into coalition agreements with other political parties and any member who was disfranchised by the decision of the party to form coalitions could resign from the party if the decision by the majority was unacceptable to them. Therefore he aguerd there was no limitation of rights under Article 38.

Further, the indirect and direct nominations did not violate any constitutional rights as it was incumbent upon the political parties to elect either the direct or indirect mode of nomination for their party of choice.

He denied that it was unconstitutional for political parties to be required to have a statement of ideology setting out the doctrine, ethics, ideas and principles of a party and in setting out such a statement of ideology, political parties must comply with article 91 of the Constitution.

The amendment to section 31 of the Political Parties Act on the mandate of the Auditor-General did not nullify article 229(4) (f) of the Constitution as a statute could limit a constitutional obligation.

Finally, the provision to have the Court of Appeal as the final court to determine disputes that commence at the Political Parties Disputes Tribunal did not curtail access to justice as the proposal did not nullify Article 163(4) of the Constitution on appeals from the Court of Appeal to the Supreme Court.

The 1st Interested Party deposed that the amendment of section 2 to include a coalition political party did not irregularly expand the definition but made it clear what a political party was and it was further within the description contemplated under part 3 of Chapter Seven of the Constitution.

The interested party asserted that coalitions had existed since 2002 and argued that the concept of a coalition provided citizens with autonomy and the freedom to choose candidates and their deputies from constituent parties within the respective coalition political party. They further contended that coalitions facilitated easier regulation and supervision, as they were required to comply with Article 91 of the Constitution.

She deposed that mergers and coalitions were recognized even before these particular amendments under sections 10 and 11 of the Act. Further, before any party enterd into a coalition, the party Constitution would provide for any such process and the amendments did not call for the delegation of any political rights under Article 38.

It was also submitted that party ideology existed under sections 14 and 27 of the 2011 Act and the new amendments brought clarity to what ideology would mean under the Act as the same was not previously defined. The Petitioner had also failed to show any contravention of Article 91(2) of the Constitution by having the inclusion of what a statement of ideology is.

She also deposed that before a coalition political party was registered, the applicant party, had to be registered as a political party therefore, to make coalition political parties go through the process again would be unreasonable and unjustified. Further, the Petitioner ought to have raised the issue of the coalition process with his respective coalition party as the Registrar did not control how parties enterd into coalitions.

Speaking to the amendments in light of the public, she deposed that the relevant parties who would be affected when it came to entering into coalitions were the registered members of the party, not the public. She went on to state that section 40 of the Act provided an elaborate process of challenging the decisions of the 1st interested party. Accordingly, a party aggrieved by the registration of a coalition political party could invoke this provision. In this context, she asserted that the Petitioner had failed to show specifically how Article 47 of the Constitution would be violated as alleged.

She further deposed that the Petitioner failed to appreciate the import of section 14A (2) of the impugned Act where the political party had to conduct a hearing on an allegation of deemed resignation. Further she, assarted and that the 1st Interested Party was not usurping the powers of the IEBC but rather established the existing symbiotic relationship between the two distinct institutions.

On the amendment to section 41 of the Act on appeals from the tribunal being final at the Court of Appeal, she stated that it was necessary to keep the electoral processes short and that litigation must come to an end.

The 2nd Interested party in the same manner submitted that the petition as framed did not disclose any constitutional issues within the principles set in the case of ***Anarita Karimi Njeru v Republic*** [1979] eKLR and further that this Court lacks jurisdiction to entertain the matter by virtue of the res judicata doctrine. He avers that the impugned Sections were dealt with and determined in the case of ***Council of County Governors v Attorney General & another*** **[2017] eKLR**.

The 3rd interested party by its grounds of opposition stated that the matter was res judicata by stating that the issues raised

pertaining to the constitutionality or otherwise of the provisions of section 28 of the Elections Act, 2011 have been heard and determined by the court in ***Council of County Governors vs Attorney General & another*** **Petition No 56 of 2017, [2017] eKLR** and ***Maendeleo Chap Chap Party & 2 others v IEBC & another*** **Petition No 179 Of 2017 [2017] eKLR** hence this court is devoid of jurisdiction.

In response to the petition, the 3rd interested party stated that the impugned Act created legal mechanisms to enable political parties to register as coalition and participate in elections as such and hence providing an exclusive non-discriminatory regime for all to exercise their political rights guaranteed under article 36 and 38 of the Constitution.

On public participation, he averred that a reasonable opportunity was afforded in the circumstances of the impugned legislation herein and various interested parties participated by submitting and giving their views on the bill. Further, the Petitioner's apprehension was misapprehended and merely speculative and without any evidence nor pleaded with specificity.

He deposed that the formation of coalitions is left to the discretion of political parties and who would decide on their rules of engagement and any such coalition agreements to guide the relationship.

He further submitted that the statement of ideologies under section 2 merely supplemented the law and infused discipline, and clarity of ideologies, ethics and principle as one of the cultures of political parties. Further, contrary to the Petitioner's assertion, the requirement of a statement of ideologies did not limit a person's right to form, join and participate in the affairs of any political party.

The 4th interested party averred that there was adequate public participation in the amendment of the Political Parties Act noting that the National Assembly gazetted the Political Parties Amendment Bill 2021 on November 26, 2021.

It was also stated that the term coalition political party did not introduce anything new, since the issue of a coalition of political parties and mergers was provided under section 2 of the Political Parties Act, 2011 which defined coalition as an alliance of two or more political parties formed to pursue a common goal.

Finally, the insertion of section 4 of the amendment act did not contravene Aarticle 91(1) (f) of the Constitution, since the said insertion could not stand on its own to mean otherwise. It must be read together with Articles 27 and 91(1) (f) of the Constitution and section 26(1)(a) of the Political Parties Act 2011.

The 5th interested party in support of the Petition reiterated what was similarly stated by the Petitioners.

Issues for determination

1. The constitutionality of the following sections: 2, 4A, 6(2) (a), 7(6), 14A, 22, 31,

34, 38A, 40(3), 41(2) of the Political Parties (Amendment) Act, 2022 and the proposed amendments to sections 28(1) and 28A of the Elections Act No 24 of 2011.

2. Whether there was public participation prior to the enactment of the impugned amendments.

3. Whether the Political Parties (Amendment) Act, 2022 was ambiguous, uncertain, imprecise and overbroad.

4. Whether the Petitioners were entitled to the orders sought.

5. Who should bear the costs of the petitions.

Decision of the court

The court dismissed most of the petitions challenging the Political Parties (Amendment) Act, 2022, while ruling certain sections unconstitutional. The judge began by noting that neither the Constitution nor the Political Parties Act of 2011 provided a direct definition of a political party. Article 91 of the Constitution outlined what a political party should or should not be but did not define it. Parliament addressed this gap by defining the amended Act, which the court found consistent with the general understanding of political parties and not in violation of Article 260 of the Constitution.

The court upheld the inclusion of political ideologies for parties, stating that the Constitution did not prohibit ideologies, as long as they did not violate Article 91(2), which bans ideologies based on religion, ethnicity, race, gender, or region. The court found that party ideologies could advance the rule of law and good governance, thus supporting constitutional principles.

Regarding coalition political parties, the court noted that coalitions have existed in Kenya for years, but the amended Act formalized this practice through legislation. The court ruled that forming a coalition political party did not infringe on citizens' political rights under Article 38 of the Constitution. Individual political parties within a coalition maintain their operational constitutions and rights, allowing their members to continue participating in their activities. Therefore, the amendment did not curtail political freedoms.

On indirect nominations, the court upheld section 38A of the amended Act, finding it constitutional as it enhanced each party's delegate system. These delegate systems, enshrined in party constitutions, allowed members to select delegates, preserving their political rights under Article 38.

The court addressed concerns about the use of the word "may" instead of "shall" in section 4A of the amended Act, which petitioners claimed could lead to gender discrimination. The court rejected this argument, citing previous case law where the terms "may" and "shall" were used interchangeably, depending on the context. The court interpreted "may" as sufficient to comply with constitutional

principles, including those under Articles 27 (equality and non-discrimination) and 91.

Regarding section 6(2)(a), which required political parties to deposit a statement of ideology with the Registrar of Political Parties, the court ruled that the Registrar had the authority to collect and keep party documents, as outlined in section 34 of the principal Act. Therefore, the requirement was found constitutional.

On the issue of discrimination, petitioners argued that exempting coalition political parties from certain registration requirements under sections 5 and 6 of the principal Act violated Article 27 of the Constitution. The court disagreed, ruling that coalition political parties are unique entities and not subject to the same rules as ordinary political parties. Since coalition parties are made up of already registered political parties, they do not require individual membership lists, and this difference does not amount to discrimination.

The court also addressed section 14A on deemed resignation, which petitioners argued violated the right to a fair hearing. The court upheld the provision, stating that resignation was automatic when conditions were met, but the Registrar could still review the process to ensure fairness. Therefore, the deemed resignation process was constitutional.

The court found an issue with the deletion of section 31(3), which had exempted certain political parties from audit requirements. The deletion conflicted with Article 229 of the Constitution, which mandates that political parties receiving public funds be audited by the Auditor General. Thus, the court declared the deletion unconstitutional.

Regarding the role of the Registrar of Political Parties in regulating political party nominations, the court upheld the Registrar's limited responsibilities, such as verifying symbols, while maintaining that the Independent IEBC retained its constitutional mandate over election processes. However, the court found section 34(d) of the amended Act unconstitutional, because it gave the Registrar powers over political party nominations, a role reserved for the IEBC under Article 88(4) of the Constitution.

The court also dismissed concerns about public participation, stating that it had been meaningful and adequate. Consultative meetings took place between 2017 and 2022, involving a wide range of participants, including written and electronic submissions, which were appropriate given the COVID-19 restrictions. The court found no evidence of inadequate public participation and concluded that the process met constitutional standards.

In its final decision, the court ruled that there was no unconstitutionality in sections 2, 4A, 6(2)(a), 7(6), 14A, 22, 34(da), (fa), (fb), (fc), (fe), 40(3), and 41(2) of the Political Parties (Amendment) Act, 2022, nor in sections 28(1) and 28A of the Elections Act. However, it declared the deletion of section 31(3) and section 34(d) of the Political Parties (Amendment) Act unconstitutional. The court found that public

participation was consultative, meaningful, and adequate, and that the amendments did not render the principal Act ambiguous or vague. Consequently, most of the petitions were dismissed, except for the specific sections ruled unconstitutional.

Khala v National Elections Board Orange Democratic Movement Party (ODM) & 2 Others IEBC (Interested Party)

Civil Appeal No. E314 of 2022

High Court of Kenya at Nairobi

JK Sergon, J

30 May 2022

Summary of the Facts

Khala participated in the nomination exercise of the ODM party for the position of Member of the National Assembly for Mandera East Constituency. She was issued with an official nomination certificate from the ODM party. The certificate of nomination was later rescinded in favour of the 2nd Respondent in what was said to be in 'the best interest of the ODM Party'. Khala filed a complaint before PPDT challenging the issuance of the direct ticket by the ODM party to the 2nd Respondent. PPDT heard the dispute and concluded that the nomination issued to the 2nd Respondent was null and void because the same was issued contrary to principles of fair administrative justice. Further, the PPDT noted that the procedure which ODM followed in declaring the winner was not adequately explained. PPDT stopped IEBC from accepting or getting the name of the 2nd Respondent. Consequently, PPDT ordered ODM to apply provisions of its Constitution to expeditiously undertake fresh nominations to decide who between the Appellant and the 2nd Respondent was to be issued with the final nomination certificate within 48 hours from the date of judgment.

The Appellant challenged the PPDT decision that required ODM to conduct a fresh nomination exercise. The Appellant was of the view that PPDT ought to have reinstated her nomination certificate instead of ordering a fresh exercise. ODM filed a cross-appeal on the ground that PPDT had no jurisdiction to hear and determine the appeal since the complaint was filed out of time contrary to rule 8(1) and (4) of Political Parties Disputes Tribunal (Procedure) Regulations. The cross-appeal also relied on the ground that because the Appellant had failed to exhaust the ODM party IDRM.

Issues for Determination

1. Whether PPDT had jurisdiction to hear the appeal under section 40 of the Political Parties Act.

2. Whether the PPDT acted lawfully in allowing the filing of the complaint.

3. Whether it was right for the Tribunal to make an order directing the 1st Respondent to conduct a fresh nomination for Member of National Assembly for Mandera East Constituency.

4. Whether the 2nd Respondent was ineligible to contest as a member of the National Assembly, Mandera East Constituency due to party hopping from the Jubilee party to the ODM party.

5. Whether the PPDT order that each party bear its own costs was fair.

Decision of the Court

The Court noted that the PPDT had addressed the 1st Respondent's claim that the Appellant had failed to seek an extension of time to file her complaint and the related allegation that the PPDT had improperly granted an extension without a formal application. This, according to the Respondents, had denied them an opportunity to respond to the request for an extension. The Court agreed with the PPDT's reasoning that the timelines for filing a complaint before the PPDT that was fixed by rule 8 of the Political Parties Disputes Tribunal (Procedure) Regulations is inconsistent with the timeline fixed by section 31 of the Elections Act. The Court found that the PPDT correctly interpreted the law in failing to uphold the preliminary objection that ODM filed before it. On the second preliminary issue of exhaustion of IDRM, the Court agreed with the PPDT's findings that the appellant had made various attempts to approach ODM IDRM, but the same was inoperative as of 28 April 2022. Therefore, the appellant had no option but to approach the PPDT.

The Court also noted that there was no voting by universal suffrage in Mandera County where the constituency is located. As such, there was no clear evidence explaining the process that was used to issue the Appellant with the nomination certificate. The Court found that upon nullifying the certificate of nomination given to the 2nd Respondent, the PPDT should have granted the Appellant the order to revoke, cancel, and recall the certificate of nomination issued to the 2nd Respondent, as prayed by the Appellant. The Court reasoned further that since ODM had stated that the 2nd Respondent was its preferred candidate, the order for fresh nomination would give it a chance to nominate the 2nd Respondent. The Court, therefore, found that PPDT erred in ordering the repeat nomination when there was no evidence that the nomination certificate issued to the Appellant had been formally nullified. Furthermore, the Court noted that the ODM only sought the order for fresh nominations through its submissions and not pleadings.

The Court further noted that the ODM and the 3rd Respondent tendered evidence to show that the 2nd Respondent was a member of the ODM party. The 2nd Respondent had resigned from the Jubilee party and joined the ODM party within the statutory timeline stipulated under section 28A of the Elections Act, 2011. As such, the PPDT's finding that the 2nd Respondent was eligible to contest was correct.

In conclusion, the Court held that the cross-appeal by ODM lacked merit and dismissed it. The Court found the appeal was partially merited. The Court substituted the PPDT order for fresh nominations with an order directing

the ODM party to declare the Appellant as the only validly nominated ODM candidate for Mandera East Constituency as per the original certificate of nomination. Each party was ordered to bear its own costs.

Kariuki v Anunda & 3 Others

Civil Appeal No. E404 of 2022

High Court of Kenya at Nairobi

AN Ongeri, J

6 July 2023

Summary of the Facts

Peter Gatirau Munya, the party leader of the Party of National Unity announced the removal of six party officials. That prompted the Deputy Secretary General, who was one of the removed officials, to Complain. The complainant filed a case before the PPDT in PPDT complaint no. E006 of 2022. After being aggrieved by the ruling of the PPDT, the complainant appealed to the High Court. The appeal was based on grounds that the removal of the appellant was unprocedural in that it was based on an additional agenda than those which were to be discussed during the party National Delegates Conference (NDC).

Issues for Determination

1. Whether the court had jurisdiction to hear the appeal.
2. Whether the removal of the appellant was procedural.
3. Whether the presentation of additional agenda at the NDC was procedural.

Decision of the Court

The Court found that it had jurisdiction over the matter. The reason for this conclusion was that this matter was an appeal from PPDT.

The Court considered that the removal of the party officials was in accordance with the PNU Constitution. As such, the presentation of an additional agenda at the NDC was procedural.

The Court considered that the additional agenda was ratified by the PNU's National Delegates Conference. As such, the Court concluded that the additional agenda was ratified by NDC and was thus procedural.

In the end, the Court found that the appeal lacked merit and dismissed it.

Jubilee Party of Kenya v Ouma; Gichangi & Another (Interested Parties)

Election Petition Appeal No. E327 of 2022

High Court of Kenya at Nairobi

Mulwa, J

7 June 2022

Summary of the Facts

Paul Bwire Ouma allegedly won the Party opinion poll conducted by the Jubilee party. As a result, the Jubilee Party decided to issue him a certificate of nomination as an MCA candidate for Umoja I ward in Nairobi City County. He was told to collect his certificate. Charles Nderitu challenged the nomination process in Complaint No. 104 of 2022 in the Jubilee Party's National Elections Appeals Tribunal (NEAT). The challenge by Charles Nderitu was successful, and he (Nderitu) was issued with a certificate. Paul Bwire Ouma contested the NEAT decision of the Jubilee Party of Kenya to nominate Charles Nderitu Gichangi as its MCA candidate for Umoja I ward before the PPDT in Political Parties Dispute Tribunal Cause No. E006 of 2022. In the judgement, the PPDT ruled that the process for nomination that resulted in forwarding the name was null and void. PPDT revoked the nomination of Charles Nderitu Gichangi and ordered the nomination certificate to be given to Paul Ouma Bwire. This is an appeal by the Jubilee Party against the judgment and decree of the PPDT.

The Jubilee Party submitted that the PPDT errored in law by dictating to the party who it should nominate to represent it in the general elections. It further submitted that Paul Bwire did not exhaust the appeal process in the IDRM process and the letters that he drew did not constitute the laid down requirements for appeal under the Jubilee Party Nomination Rules. They also stated that the name of Mr. Nderitu had been submitted to IEBC, so the PPDT had no jurisdiction in the matter. The Appellant further submitted that the candidates failed to agree on the nomination by consensus and agreed that the Party should proceed and nominate either one of them which is what the Party National Elections Board did.

The Respondent (Paul Bwire) submitted that there was an initial decision to nominate him and the candidate. Paul Bwire Ouma questioned the parameters that the Appellant political party used to change its initial decision to nominate him. He submitted further that the failure to provide the reasons for the change amounted to an unfair administrative action and was contrary to Article 47 of the Constitution as read together with the Fair Administrative Action Act 2015. The Respondent further noted that the decision of the Jubilee party to nominate should be subject to the guarantee of rights including political rights and rights to fair administrative action.

Issues for determination:

1. Whether the PPDT had jurisdiction over the manner that had allegedly not been fully subjected to the IDRM dictated by the Jubilee Party Nomination Rules

2. Whether PPDT had jurisdiction to deal with the matter after the name of the nominee had been submitted to the IEBC.

3. Whether Jubilee Party of Kenya fairly nominated the 1st Interested Party as the MCA Umoja I ward

4. Whether PPDT erred by ordering the Appellant to issue the nomination certificate to the Respondent

Decision of the Court

The Court considered Paul Bwire Ouma's letter had been addressed to the Jubilee Party regarding the nominations for the position of MCA for Umoja I Ward. He laid out his complaints and urged that the matter be addressed with utmost speed. The Court observed that this letter elicited no response. The Court was satisfied that this sufficed as an attempt to subject the dispute to the IDRM of the Jubilee Party. Furthermore, the Court observed the party's position at the PPDT hearing was that the matter could not be subject to hearing because the Party had decided to subject the matter to further hearing. Therefore, the issue of non-exhaustion of IDRM could not arise.

The Court noted that PPDT only had jurisdiction over disputes arising from party nominations while IEBC has jurisdiction over other nomination disputes. The Court ruled that PPDT has jurisdiction to hear and determine a matter after the names have been submitted to the Commission. The Court reasoned that based on the developments in the amendment of section 40(10) (fa) of the Political Parties Act by 2022 amendments, the term 'party primaries' was deleted and replaced with party nominations. The Court found that the PPDT had jurisdiction to deal with the complaint filed by the Respondent as it was in respect of the nominations of the 1st Interested Party by the Jubilee Party.

The Court noted that the prospective candidates agreed on the use of opinion polls as the parameters for nomination after the consensus failed. The Respondent was nominated first by the Jubilee Party. This is the nomination that Nderitu, the 1st Interested Party, challenged before the NEAT, but which was later dismissed for want of prosecution. The Court observed that the Appellant did not produce any evidence to show the parameters that NEB used to settle on the 1st Interested Party as the final nominee instead of the Respondent. In the end, the Court found that the PPDT did not error in ordering the Appellant to issue the nomination certificate to the Respondent. All it did was to confirm the nomination which was not cancelled.

The Court noted that political parties reserved the right to choose who to represent them in an election. The Court noted, however, that such choice had to be in line with the Party Constitution, Rules as well as the candidate's constitutional rights. In the instant case, the Respondent was validly nominated before the Jubilee Party unprocedurally changed its mind and decided to issue the nomination certificate to the 1st Interested Party. The Court concluded that the PPDT was right as all it did was affirm the Respondent's nomination since there was no evidence that it had been cancelled in favour of the Interested Party.

Kilonzo v Wiper Democratic Movement & 3 Others

Civil Appeal No. E132 of 2022

High Court of Kenya at Nairobi

CW Meoli, J

3 June 2022

Summary of the Facts

After consensus building, the Wiper Democratic Movement issued a certificate to Dr Julius Malombe as the nominee for the Kitui County gubernatorial seat. Kilonzo challenged the decision to nominate Dr Malombe before the Party National Elections Board and subsequently before the Political Parties Disputes Tribunal in PPDTC No. E026 of 2022. Both the NEB and PPDT dismissed the complaint of Kilonzo's challenging the party's direct nomination as unfair. Kilonzo appealed to the High Court against the judgment of the Political Parties Disputes Tribunal.

Issue for Determination

The Court determined whether the disputed nomination process was carried out in compliance with the provisions of the Political Parties Act 2011 and the Wiper Democratic Movement Party National Rules.

Decision of the Court

The Court observed that the Wiper Democratic Movement was entitled to conduct direct or indirect party nominations under rule 23 of the Party Nomination Rules. However, the Court noted that the WDP conduct of the indirect party nomination was grossly marred by substantial non-compliance with its own rules and the Political Parties Act. In the end, the Court found that the appeal was merited and allowed it.

3.7.4 Rules and Principles Guiding Fresh/ Repeat Nominations

ODM National Elections Board & Another v Gare & 2 Others

Civil Appeal Nos. 44 & 45 of 2022 (Consolidated)

Court of Appeal at Kisumu

Kiage, Ngugi and Tuiyott, JJA

22 July 2022

Summary of the Facts

John Ombewa Gare and Trufosa Osewe Ochieng were amongst five other candidates seeking to be nominated as the ODM candidate for the Member of County Assembly for West Sakwa Ward. The Party conducted the nomination by way of universal suffrage. Trufosa filed a complaint in the Political Party Disputes Tribunal challenging the declaration of John Ombewa Gare as the winner. The grounds of appeal were that John Gare did not win the nomination done by universal suffrage. Trufosa sought the PPDT to order that she (the Appellant) be the winner of the nomination.

PPDT allowed the complaint and set aside the nomination of John Ombewa Gare. PPDT also ordered the ODM party to repeat the nomination process within 72 hours. The PPDT also directed the ODM party to undertake the repeat nomination exercise using universal suffrage. The Party applied for a review of the PPDT's decision to allow them more time to comply with the order of the PPDT. It also asked PPDT to allow it to conduct the repeat nomination using a different method. The PPDT refused the application to review its decision and to allow the party to repeat the nomination using any other method. ODM party moved to the High Court to challenge the decision of PPDT on its application to review its decision.

The Party insisted that it could comply with the order by conducting the nomination exercise through the several methods of nomination being consensus, direct nomination or universal suffrage. In the end, the ODM Party decided to directly nominate Trufosa in the fresh nominations. John Ombewa was aggrieved by the decision to conduct direct nominations and wrote to the ODM party and again filed a case at the PPDT seeking an order that ODM conduct nomination through universal suffrage as earlier ordered by PPDT. John filed an application for contempt before the PPDT. On the same day, ODM applied for the PPDT to review its earlier decision ordering it to conduct nominations by universal suffrage. PPDT declined to review its orders as there was no new evidence and the application did not meet the threshold for review.

John Gare appealed against the decision of the PPDT which nullified the certificate issued to him alongside the double certificate issued to Trufosa. ODM also appealed against the PPDT decision on its application for review. These appeals were consolidated and heard by the High Court of Kenya at Kisumu. The cross-appeal by John Gare was found to lack merit since the PPDT had ordered a repeat nomination exercise by universal suffrage which was yet to be done. On the appeal by ODM, the High Court found that the law does not allow the Appellants to apply any other mode of nominating a candidate other than the method applied in the first instance, in the event the nomination exercise is subsequently nullified.

ODM appealed further to the Court of Appeal. In the appeal by ODM, the party submitted that the PPDT erred when it found that the law does not allow the Appellants to apply any other mode of nominating a candidate other than the method applied in the first instance, in the event the nomination exercise is subsequently nullified. It argued that the PPDT could not choose for it the nomination method to use over the other. The party relied on Section 38A the Political Parties Act 2011 which allows a political party to use either direct or indirect nomination methods. ODM further submitted that there was new evidence that it was impossible to conduct the nomination by universal suffrage in the subsequent nomination exercise.

This was an appeal against the High Court decision, the Court of Appeal under the

provisions of section 41 (2) of the Political Parties Act which states that an appeal from the decision of the PPDT that is further appealed at the Court of Appeal shall be on points of law only and the decision of the Court of Appeal shall be final. The issue of law was whether PPDT had jurisdiction to order the party to use universal suffrage for repeat nominations.

Issue for Determination

1. Whether ODM's application for review met the requisite threshold.

2. Whether PPDT had jurisdiction to order the party to use universal suffrage for repeat nominations even though ODM party rules allow for three methods of conducting nominations.

Decision of the Court

The Court stated that the ODM's application for review was since universal suffrage was impossible. But in its response to the contempt application, the director of the ODM National Elections Board informed the court that they were ready to comply. With this, the Court concluded that the application for review was not made in good faith.

The Court stated that section 38A, which was introduced via section 24 of the Political Parties (Amendment) Act No. 2 of 2022, recognized that political parties, being akin to private clubs, had to be given latitude to chose the method of conducting party nomination. Therefore, the Court held that PPDT has no power to dictate to a party the method of conducting its nominations. However, the Court observed that the purported distinction between fresh nomination and repeat nomination is one with no difference. It noted further that the method of nomination that a political party chooses to adopt must conform to the provisions of the law and nomination rules of the party. This included notifying its members and the Registrar of Political Parties of the choice of the nomination method as required by section 38E of the Political Parties Act and adhering to the principle of public participation, legitimate expectation, democracy, as well as free, fair, and credible party nominations which are entrenched in the Code of Conduct for Political Parties. The rationale provided by the Court was that the free hand of political parties in the method for party nomination was at the discretion of the members of the party who are not mere bystanders to the process.

To change the rules of the game in a repeat nomination without good reason and without roping in or even notifying the membership was inimical to this commandment. In the end, the appellate court was in no doubt that the three decisions of the Appeals Tribunal, the PPDT, and the High Court sought to safeguard intra-party democracy in ODM for the nomination of a candidate for the position of MCA for West Sakwa. Intra-party democracy was not only good for the party, but also for the nation's democracy. The law so decrees and the courts must uphold it.

In the end, the Court of Appeal concluded that the exercise contemplated by the PPDT was a repeat of the nomination exercise. Furthermore, the Court concluded that the High Court Judge was correct when he held that when the PPDT ordered a fresh nomination by way of universal suffrage, it was in effect ordering a repeat election, which was for the process to be conducted again. Therefore, the decision of the Party Appeals Tribunal, which ordered repeat nomination, that of PPDT and the High Court only served to entrench and safeguard intra-party democracy in ODM for the nomination of a candidate for the position of MCA for West Sakwa. This was is not only good for the party but also the nation's democracy. In the end, the Court found that the Appeal had no merit and dismissed it with no order as to costs.

Cross-reference: See the discussion on legitimate expectation during the political party nomination process in ***John Millar Otieno Vs Lawrence, ODM Party and 2 Others, Civil Appeal no. E328 of 2022.***

Gideon Nzioka Susa v Mahbub Musyoka Mueni and Wiper Democratic Movement Election Board

Election Petition Appeal No. E285 of 2022

High Court of Kenya at Nairobi

JN Mulwa, J

7 June 2022

Summary of the Facts

Gideon Nzioka Susa (Appellant) and Mahbub Musyoka Mueni (1st Respondent) were both affiliated with the Wiper Democratic Movement (WDM), a registered political party. The WDM National Elections Board (NEB) was designated with the responsibility of organizing internal party nominations. During the nominations for the Member of the County Assembly (MCA) position in Eastleigh South Ward, both Susa and Mueni contested on 13 April 2022. Following the announcement of results on the same day, the 1st Respondent, Mueni, raised objections to the outcome, prompting the party NEB to order a fresh nomination exercise on 22 April 2022. Discontent with this decision, Susa, the Appellant, appealed to the Political Parties Dispute Tribunal (PPDT), challenging the fairness of the process and seeking redress. The PPDT subsequently directed for fresh nominations to be conducted by 7 May 2022

Despite the PPDT's directives, Susa failed to participate in the repeat nominations, leading to Mueni being declared unopposed. The Appellant then filed an appeal against the PPDT's decision, arguing that the Tribunal had erred in its judgment and failed to consider all relevant evidence. According to Susa. the NEB proceedings were crucial for proper evaluation by the PPDT, which allegedly overlooked key aspects of the nomination process.

Susa contended that the PPDT misinterpreted crucial evidence, including the report of the Returning Officer, and inaccurately

assessed the situation regarding violence and irregularities during the initial nominations. He submitted that the NEB proceedings should have been thoroughly reviewed to make an informed decision. Consequently, the Appellant sought the quashing of the PPDT's judgment in its entirety and requested costs for the appeal.

On the other hand, the 2nd Respondent argued that the appellant's failure to participate in the repeat nominations amounted to a waiver of his political rights. It cited legal precedents and contended that the appeal was frivolous, scandalous, and an abuse of the court process. It urged for its dismissal with costs.

Issues for Determination

1. Whether the appellant had presented a prima facie case against the PPDT's judgment.

2. Whether the appellant waived his political rights by abstaining from the repeat nominations.

3. What orders the Court should grant.

Decision of the Court

The court found that the appellant failed to demonstrate an infringement of their rights or the probability of success in their case. The court concluded that the appellant's complaints lacked merit and were not genuine or arguable as the Appellant had failed to present a prima facie case against the PPDT's judgment.

The court concurred with the 2nd Respondent's argument that the appellant's failure to participate in the repeat nominations constituted a waiver of their political rights. Citing legal principles and precedents, the court dismissed the appellant's claims of unfairness and affirmed the validity of the repeat nominations.

The court found the appellant's appeal to be without merit, frivolous, scandalous, vexatious, and an abuse of the court process. As a result, the appeal was dismissed, and each party was ordered to bear their own cost.

3.7.5 Impact of gazettement as an independent candidate on participation in party nominations

National Elections Board, Orange Democratic Movement Party v Odongo & Another

Civil Appeal No. E317 of 2022

High Court of Kenya at Nairobi

PM Mulwa, J

3 June 2022

Summary of the Facts

This was an Appeal from the Judgment and Decree of the Political Parties Disputes Tribunal at Kakamega delivered

in PPDT Complaint No. E001 of 2022. Kepher Odongo wrote to ODM expressing his interest in contesting for the MCA for Luanda South Ward, Luanda Constituency in Vihiga County. His nomination was to be done through universal suffrage on 12 April 2022. Before that, Kepher Odongo heard a rumour that another prospective nominee had been granted a direct ticket prompting him to file a complaint before the PPDT. The PPDT heard the complaint. ODM submitted that PPDT did not have jurisdiction as the matter was filed prematurely. PPDT ordered ODM to conduct the nominations according to its rules.

ODM Elections Board was dissatisfied with the PPDT decision and appealed against it at the High Court. The Appellant submitted that the PPDT did not have jurisdiction as the dispute was to be addressed by the ODM National Appeals Tribunal and was not capable of being determined by the Tribunal. It further submitted that the order was usurping the party autonomy and that the order to conduct nominations through rule 18 of the ODM Elections and Nominations Rules as adopted in 2014 was wrong as the rule was no longer in force and such an order was neither pleaded nor prayed for. During the proceedings, the Appellant also informed the Court that it had since learnt that the 1st Respondent was no longer a member of the ODM Party as he resigned to vie for the MCA position in Luanda South Ward as an independent candidate.

The 1st Respondent responded to the appeal noting that ODM owed him a duty to conduct fair nominations. The 2nd Respondent submitted that the orders made in the PPDT judgment were unwarranted. He associated himself with the submissions of the Appellant.

Issue for determination

1. Whether the PPDT had jurisdiction to hear and determine the dispute filed before party nominations and dictate the method of nomination.

2. The effect of a candidate contesting for a party ticket in party nominations being gazetted as an independent candidate.

3. Whether the 1st Respondent had demonstrated an attempt to subject the dispute to the internal dispute resolution mechanism

Decision of the Court

The Court stated that PPDT had jurisdiction to hear and determine the dispute filed before party nominations and dictate the method of nomination. The Court noted that the PPDT's role is limited to ensuring that the nomination method used by parties complies with the party's Constitution and rules but not to dictate to parties which method to adopt. The party is a liberty to select a method to nominate a candidate to contest for a political seat in line with the party Constitution and rules.

The Court observed that the exhaustion of party IDRM happens when a complainant uses the prescribed format in line with the party Constitution and nomination rules in complaining about the party process.

The Court further noted that the gazettement of a candidate by IEBC to contest for the seat as an independent candidate bars him or her from participating in any party nominations.

3.7.6 Party list disputes

Amendment of party list during the terms of the Parliament and County Assembly

Mwangi Priscilla Wangui & Another v Margaret Njeri Mwaura & 3 Others

Election Appeal No. 1 of 2023

High Court of Kenya at Nyeri

M Muya, J

1 September 2023

Summary of the Facts

Appellants had applied to be considered for the gender top-up category. They submitted that they were qualified for nomination as MCAs for Nyeri County because they were registered voters and members of the UDA party and had paid the necessary fees. They stated that they met all constitutional and legal requirements to be elected to office.

The 1st Respondent (Margaret Njeri Mwaura) filed a complaint against the Appellants seeking their nullifications as nominated MCAs of Nyeri County and a declaration that she was validly nominated by the 3rd Respondent (UDA party) to the position of MCA of Nyeri. She submitted that her name was missing from the list published in the Kenya gazette by IEBC (2nd Respondent) and instead included Appellants at positions No. 5 and 7 on the list. She stated that the removal of her name from the party list was irregular and illegal because she met all constitutional and legal requirements to be elected to office.

Issues for Determination

1. Whether the final party list could be amended during the terms of Parliament and County Assembly.

2. Whether the Trial Court had jurisdiction to hear and determine the petition owing to the timelines in election petitions.

Decision of the Court

The Cout found that section 34(10) of the Elections Act did not allow amendment of the party lists submitted to nominate a candidate for election to the National Assembly, Senate and County Assemblies during the term of Parliament or County Assembly for which candidates were elected.

The Court held that the Trial Court had no jurisdiction to hear and determine the petition because it was filed outside the 28-day

timelines provided under Article 87(2) of the Constitution.

The Court allowed the appeal and set aside the decision of the Trial Court. The Respondents were ordered to bear the costs of the appeal.

3.7.7 Qualification for Nomination on the party lists

Richard Masese Makori v IEBC & 3 Others

Election Petition Appeal No. E006 of 2023

High Court of Kenya at Kisii

LN Mutende, J

4 August 2023

Summary of the Facts

The election petition appeal arose from the judgment of the Lower Court. The Appellant (Richard Masese Makori) challenged the nomination of the 2nd and 3rd Respondents to the Kisii County Assembly under the special interest gender top-up category representing the 4th Respondent (Kenya Social Congress). He argued that IEBC erred in nominating the 2nd Respondent who came from Mandera County and was a registered voter at Dololo Primary School while the 3rd Respondent came from Nyamira County and was a registered voter at Manga ward. The Trial Court held that the 2nd and 3rd Respondents were properly nominated because they were qualified as per the party list of 4th Respondents that was submitted to IEBC. The Appellant appealed against the decision of the Trial Court at the High Court. He argued that the Trial Court erred in law in failing to appreciate the provisions of Article 90 of the Constitution in the allocation of party lists for county seats which do not require regional and ethnic diversity.

The Respondents argued that Article 177(1)(b) and (c) of the Constitution and Section 36(7)(8) of the Elections Act envisaged nomination of a gender top-up category that represented the number of special seat members necessary to ensure that there are no more than the two-thirds of the membership of the county assembly who are of the same gender. They also stated that Article 193 of the Constitution and Section 36 of the Elections Act did not require that nominated members to a county assembly come from a specific county.

Issues for Determination

1. Who qualified to be nominated for the gender top-up list.
2. Who was a registered voter and/or whether there was a multiple registration in respect of the 2nd and 3rd Respondents.
3. Whether the appellant was obligated to file the complaint with the Political Parties Dispute Tribunal.

Decision of the Court

The Court held that the 2nd and 3rd Respondents

were properly nominated to the County Assembly of Kisii in line with articles 193 and 177 of the Constitution and section 36 of the Elections Act. They were Kenyan citizens, registered voters in Kenya, and members of the 4th Respondent. Article 90 (1) of the Constitution requires every political party to have a national character. Nominating only residents and locals to the County Assembly may be discriminatory. It stated that for a voter to be nominated to a county assembly they did not have to come from a specific county.

The Court also stated that the issue of double registration was not captured in the pleadings and evidence produced at the Trial Court. It only came up at the appellate stage. It was not a matter of law to be considered by an appellate court. Section 75(4) of the Election Act provides that the appeal from the Trial Court shall lie to the High Court on matters of law only.

The Court also stated that the Appellant was not obliged to file the complaint with PPDT because he moved to court after the gazettement of the nominated members of the County Assembly under the special category. IEBC used its discretion to identify female nominees to achieve the two-third gender rule in the county assembly.

In the end, the Court dismissed the appeal for lack of merit with costs to Respondents.

Note:

1. For a similar finding on this issue, see ***Lydia Matuli & ANC v IEBC and 2 Others*** **Kapsabet High Court Election Petition Appeal No. E001 of 2022.**

2. For a contrary finding on this issue, see ***Mary Charles Kalunga v IEBC & Others*** **Mombasa High Court Election Petition Appeal No. E087 of 2023** where the court found that the nominating of persons who were neither resident nor registered as voters in Kwale County invalid.

Clare Moraa Obino v IEBC and 2 Others

Election Petition No. E002 of 2023

High Court of Kenya at Kisii

J Kamau, J

30 June 2023

Summary of the Facts

The initial Party List by Jubilee Party for nomination to Kisii County Assembly was successfully challenged by the 3rd Respondent in PPDT Complaint No. E035 of 2022. In August 2022, PPDT directed the Jubilee Party to reconstitute its nomination and issue a fresh list for nomination under Article 177 of the Constitution. The 3rd Respondent third in the list. When Hon Clare Moraa Obino's nomination

was gazetted and nominated as a member of the Kisii County Assembly, it was challenged before the Kisii SPM in SPM Court Election Petition No. E002 of 2022. Upon hearing, Hon. Ocharo invalidated the gazettement of the Hon Clare Moraa Obino as a nominated member of the County Assembly in favour of the Hon Redempta Vera Onkundi, the 3rd Respondent. The Jubilee Party was ordered to submit a fresh list per the orders of PPDT. The trial court further declared that Hon Clare Moraa's nomination was irregular, null and void. In arriving at the decision, the trial court considered that she was not a member of the Jubilee Party of Kenya. Though she had resigned from ODM, the Court found that she had not completed the process of attaining membership of the Jubilee Party as envisaged under section 14 of the Political Parties Act. Clare Moraa Obino appealed the decision to the High Court seeking for the court to overturn it and reinstate her nomination by the Jubilee Party of Kenya. She annexed a political party application form for the gender top-up list which had her membership number. She asserted that she resigned from the ODM Party.

The 1st Respondent, the IEBC, noted that the political parties enjoy the discretion and prerogative of membership drives, registration and nomination of party members. It submitted that the Trial Court misdirected itself when it found that the IEBC had a statutory duty to ensure compliance with the orders of a case it was not a party to. It stated that the issue of membership could only be addressed by the Office of the Registrar of Political Parties.

The 2nd Respondent did not participate during the trial. On its part, the 3rd Respondent blamed the IEBC and Jubilee Party for not complying with the orders issued by the PPDT. The 3rd Respondent submitted that the Appellant was an ODM member and a Nominated MCA and did not qualify for nomination in the gender top-up list by the Jubilee Party of Kenya. She prayed that the decision of the Lower Court be upheld because it was based on sound Constitutional and legal principles.

Issues for Determination

The Court identified the following issues for determination:

1. Whether the Appellant was a member of the Jubilee Party.
2. Whether the nomination of the Appellant by the Jubilee party of Kenya was lawful.
3. Who would bear the costs of this appeal.

Decision of the Court

The Court considered that the 3rd Respondent proved that the Appellant had resigned from ODM. However, the Court noted that the Appellant's application for Jubilee party membership alone was not proof of membership. The Court concluded that there was no proof that the Appellant was a member of the Jubilee Party.

The Court considered that Article 177 of the Constitution grants the political parties the mandate to nominate members to the County

Assembly. It noted further that Article 90 of the Constitution and sections 33, 34, and 35 of the Elections Act spell out the duties of the IEBC relating to the conduct and supervision of election for seats for nomination purposes

The court stated that the PPDT decision in Complaint No. E035 of 2022 was still alive bearing in mind the failure to prove membership to the party. Further, the role of IEBC in the case was limited to ensuring that the party list complied with the Constitution, the laws and regulations but did not extend to directing how the lists are to be prepared as those were matters that were within the jurisdiction of the political parties. As such, the Court reasoned that the determination by the trial court that the nomination of the Appellant was invalid was the true position of the law.

The Court stated that IEBC's submission on its role in the nomination process was the correct position of the law. However, IEBC did not participate in the appeal, making the Court's hands tied on the issue of costs that were awarded against it in the Lower Court. Furthermore, the Court could not delve deeper into whether the finding against the IEBC at the Trial Court was a legal basis since the same was not placed as an issue for determination. Having found the appeal not to be merited, the court ordered that each party would bear own costs.

Dennis Matundura Mogeni v. IEBC & 2 Others

Election Petition Appeal No. E004 of 2023

High Court of Kenya at Nyamira

H Itei, J

6 July 2023

Summary of the Facts

The Appellant (Dennis Mogeni) challenged the nomination of the 3rd Respondent (Dickson Mogaka) as the ODM party youth representative in the Nyamira County Assembly. The Trial Court dismissed the initial petition. The Petitioner appealed against the decision at the High Court.

The Appellant argued that the 3rd Respondent was not qualified to be nominated as a youth representative because he was 35 years old, which is outside the legally defined youth age bracket of 18 to 34 years. The nomination and subsequent gazettement were based on conflicting documents: a national ID showing the 3rd Respondent was born on 1 January 1987 (making him 35 years old) and a birth certificate indicating he was born on 12 December 1987 (making him 34 years old).

The Trial Court's decision was challenged because the 3rd Respondent's age was not appropriately verified using valid documents at the time of nomination. It was also contended that the birth certificate was not an acceptable document for proving age in the electoral process and that its late introduction after the nomination period was unlawful.

Issues for Determination

1. Whether the 3rd Respondent was eligible for nomination as a youth representative, given the conflicting age evidence.

2. Whether the birth certificate could be considered a valid document for age verification in the nomination process.

3. Whether the process leading to the nomination and gazettement of the 3rd Respondent was legal and compliant with electoral laws.

4. Whether the costs awarded by the trial court were justifiable and if they should be upheld or altered.

Decision of the Court

The Court held that the process that led to the gazettement of the 3rd Respondent as a nominee under the category of Marginalized (Youth) representing the 2nd Respondent (ODM party) in Nyamira County Assembly was irregular illegal, null and void. The 3rd Respondent was unqualified to be nominated as a nominee under the category of Marginalized (Youth).

The Court revoked the nomination of the 3rd Respondent as the ODM party nominee in the category of Marginalized (Youth) and directed the 2nd Respondent to conduct fresh nominations and elections for the position of Marginalized (Youth) in Nyamira County Assembly.

Amos Liyayi Munasya v Geofrey Muhongo Mitalo & 2 Others

Election Petition Appeal No. E001 of 2023

High Court of Kenya at Kakamega

PJO Otieno, J

7 July 2023

Summary of the Facts

The applicant/Appellant (Amos Liyayi Munasya) appealed against the decision of the Trial Court at the High Court at Kakamega. ODM party (Interested Party) submitted a list of 8 persons to IEBC (2nd Respondent) as nominees for the marginalized group for nomination into the Kakamega County Assembly. The list was published on the IEBC website indicating that 1st Respondent was listed second and the preferred nominee for the marginalized community while the Applicant/Appellant was listed as sixth and a nominee for the youth. The Applicant/Appellant was nominated into the County Assembly while the 1st Respondent was left out. 1st Respondent challenged the decision in the lower court. The lower court nullified the Appellant's election to the County Assembly. The Applicant/Appellant appealed against the decision of the Lower Court. In his appeal, the Applicant/Appellant argued that he was ranked first to represent youth in the amended ODM party list following the general election and the performance of the party which earned it two slots in the County Assembly for nomination. The 1st Respondent was ranked third to represent ethnicity.

The 2nd Respondent submitted that the 1st Respondent was not qualified to represent marginalized groups in the County Assembly because he does not belong to the marginalized community in the county. Further, it stated that the ODM party submitted an amended party list which ranked the Appellant first to represent the youth while the 1st Respondent was ranked third to represent ethnicity. It further argued that it published the amended list because it plays no role in the constitution of the party list. That is the role of the political party.

Issues for Determination

The Court determined whether the Applicant/ Appellant was validly and properly nominated as a member of the County Assembly of Kakamega County.

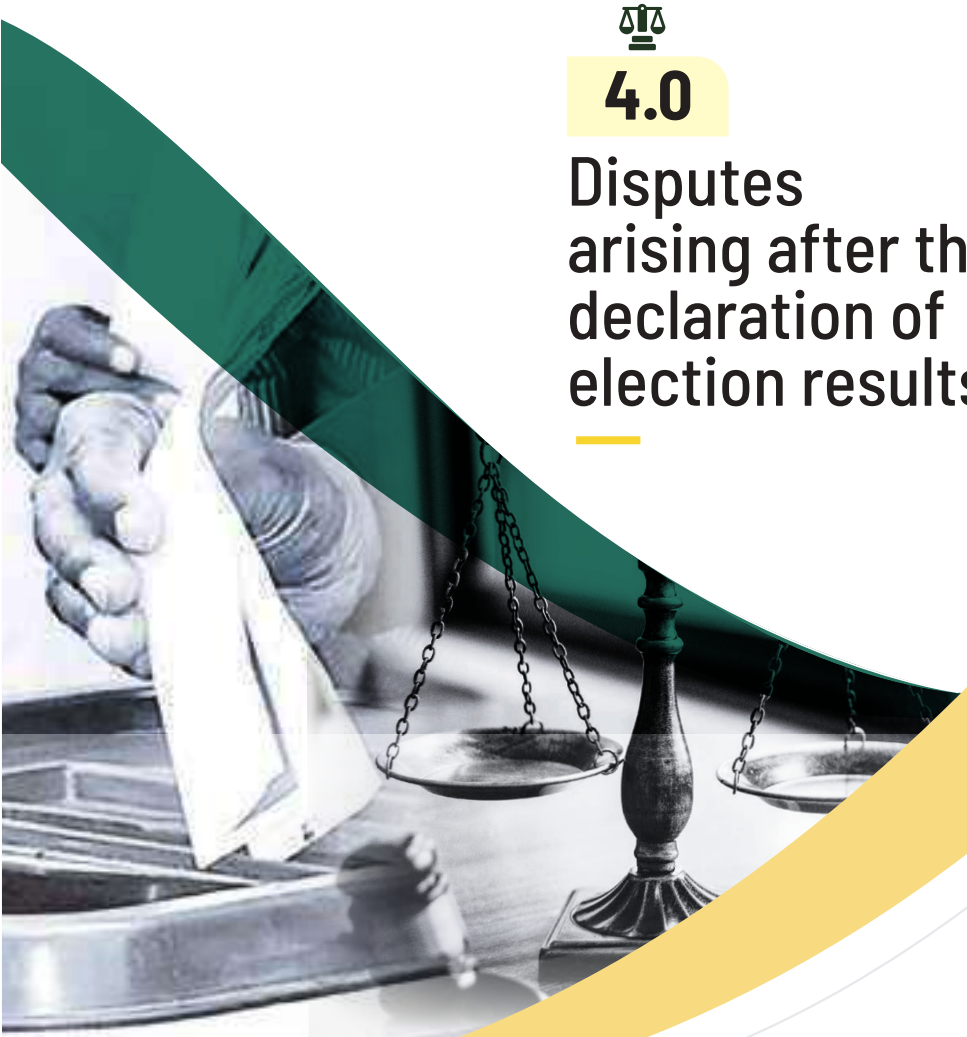
Decision of the court

The Court stated that a political party had the liberty to review the party list until the nominated members were declared elected. The declaration of election for special seats is published in the gazette after the seats have been allocated by IEBC and not the publication done before the general elections is conducted. The publication of the party list in the Kenya Gazette after the general elections cannot be reviewed during the term of the County Assembly unless by an order of the Court.

The Court allowed the appeal and set aside the decision of the lower court. It held that the Applicant/Appellant was validly and properly nominated as a member of the County Assembly of Kakamega County in line with the amended party list that was published in the gazette.

4.0

Disputes arising after the declaration of election results



4.1 Supreme Court Presidential Election Petitions

4.1.1 Principles on scrutiny

Youth Advocacy for Africa & 7 Others v IEBC & 17 Others

Election Petition E002, E003 & E005 of 2022 (Consolidated)

Supreme Court of Kenya at Nairobi

MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

30 August 2022

Summary of the facts

The Petitioners in **Petition E002 of 2022** filed an application seeking orders to compel the Independent Electoral and Boundaries Commission (IEBC) to provide the complete unedited soft copy of the Voters Register. They also sought full and unfettered physical and remote access to the electronic devices used for capturing Forms 34A and 34B via the KIEMS system, and for transmitting these forms to the Constituency Tallying Centre and the National Tallying Centre. The Petitioners further requested access to any servers storing and transmitting voter information and forensic imaging to capture metadata such as data files for all Forms 34A and 34B. Additionally, they sought orders for inspection, scrutiny, and recount in various polling stations.

The Petitioners in **Petition No E003 of 2022** similarly requested the court to compel the IEBC to produce the full KPMG audit report of the Register of Voters dated 16th June 2022. They sought scrutiny and review of the technological infrastructure used by the IEBC and requested logs from all KIEMS Kits, including geolocation data in voter identification and results transmission modes. Furthermore, they sought access to mobile device management logs for Forms 3C, 37B, and 38B in CSV or Excel formats, as well as a list of Forms 32A capturing manually identified voters. The Petitioners also requested scrutiny of the Biometric Voter Register used in the 2022 presidential election.

Issues for Determination

1. What criteria courts should apply when determining applications for scrutiny and recount of election results.

2. Whether the Supreme Court, in resolving the presidential election petition, could direct the production of contracts between third parties who were not parties to the proceedings.

3. Whether the court could allow further affidavits arising from the scrutiny exercise, given the strict timelines governing presidential election petitions.

Decision of the court

In determining the applications for scrutiny, the court relied on the principles established

in **Raila 2017**, which emphasized that requests for scrutiny or recount must be specific and based on sufficient reasons. The court noted that general requests or those intended as "fishing expeditions" for new evidence would be rejected. Further, any impractical requests considering the constitutional timelines for resolving election petitions would also be declined.

Regarding the Petitioners' request for a soft copy of the Voters Register, the court held that since the register was already publicly available and no justification for its relevance was provided, the request was unnecessary. The court similarly rejected the request for access to all KIEMS Kits and servers, citing the impracticality of such a broad request within the time available for resolving the petitions.

The court refused the request for access to contracts between IEBC and third-party service providers, such as Smartmatic International, because these parties were not involved in the proceedings. Additionally, the court dismissed the Petitioners' request for permission to file further affidavits based on information from the scrutiny exercise, stating that such an order would cause delays and prejudice the Respondents.

Finally, the court directed the IEBC to provide copies of its technology system security policy, supervised access to servers at the National Tallying Centre, and certified copies of penetration test reports. The court also ordered the opening of ballot boxes for inspection, scrutiny, and recount in several polling stations. These actions were to be completed within 48 hours, with the Registrar of the Court overseeing the process.

4.1.2 Admission as amicus curiae/ interested party in presidential election petitions

Odinga & another v Independent Electoral and Boundaries Commission & 9 Others

Presidential Election Petition E005 of 2022

Supreme Court of Kenya at Nairobi

MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

29 August 2022

Summary of the Facts

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) applied to be joined as amicus curiae in Presidential Election Petition No 5 of 2022. They submitted that their expertise in the rule of law, democracy, and electoral technology would assist the court, particularly regarding the role of the Independent Electoral and Boundaries Commission (IEBC) and its chairperson. Their focus was on addressing issues surrounding the use of technology in elections, the requisite standard of proof in election petitions, and the management of election results under the relevant constitutional provisions.

Issues for Determination

The court had to determine two main issues:

1. What principles should guide a court in considering an application to be joined as amicus curiae.

2. Whether ICJ Kenya could be admitted as amicus curiae to address the court on the role of the IEBC and its chairperson.

Decision of the Court

In considering the application, the court reviewed the applicant's submission, their intended amicus brief, and relevant case law, including ***Trusted Society of Human Rights Alliance v Mumo Matemu*** and ***Francis Karioki Muruatetu v Republic.*** The court referred to Rule 17A of the Supreme Court (Presidential Election Petition) Rules 2017, which allows for the admission of amici in such cases.

The court reaffirmed the principles laid out in the ***Mumo Matemu*** case, which required that an amicus brief be limited to legal arguments, remain neutral, and be submitted on time. It further noted that the brief should introduce new legal arguments to aid in the development of the law, without duplicating points already raised by the parties. The court emphasised the need to regulate the role of amici to prevent partisanship.

Ultimately, the court allowed the application, permitting ICJ Kenya to address the court on constitutional principles concerning election technology, the court's jurisdiction over criminal matters in the petition, and the respective roles of the IEBC and its chairperson in the management of presidential election results.

Odinga & another v Independent Electoral and Boundaries Commission & 9 Others

Presidential Election Petition E005 of 2022

Supreme Court of Kenya at Nairobi

MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

29 August 2022

Summary of the facts

The applicant, Milton Nyakundi Oriku, sought to be joined as an interested party in the presidential election petition. In support of his application, he submitted that he had an inherent interest in the outcome of the petition as it raised fundamental issues which were integral to the protection of his rights as enshrined in Articles 10, 38, 73, 81, 86 and 140 of the Constitution. Further, he had substantial issues to raise about the legitimacy of Forms 34A and Forms 34B which were central to the petition. No response was filed to the application.

Issue for determination

Whether a natural person could be admitted as an interested party in a presidential election petition.

Determination of the court

The court reviewed Rule 17A (4) of the Supreme Court (Presidential Election Petition) Rules 2017, which provides that an application by an interested party shall not be allowed in a presidential election petition.

The court therefore found no merit in the application and accordingly dismissed it.

4.1.3 Striking out affidavits

Odinga & another v Independent Electoral and Boundaries Commission

Presidential Election Petition E005 of 2022

Supreme Court of Kenya at Nairobi

MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

29 August 2022

Summary of the facts

The 9th Respondent, William Samoei Ruto, applied to strike out affidavits sworn by John Mark Githongo, Benson Wesongo, and Martin E. Papa, which had been submitted in support of the petition. He also sought to have paragraphs 64, 69, 115, and 127 of the Petition removed. In his argument, he claimed that the affidavits contained hearsay and that the contested paragraphs attempted to expand the scope of the petition beyond the provisions of Article 140 of the Constitution, which outlines the content of a presidential election petition.

Issues for Determination

The court needed to determine whether it could expunge supporting affidavits at the preliminary stage of a presidential election petition on the grounds of inadmissibility due to hearsay.

Determination of the Court

The court considered the argument that the affidavits contained hearsay, and the contested paragraphs broadened the scope of the petition contrary to Article 140 of the Constitution. It also reviewed the affidavit of Josphat Koli Nanok, who alleged that the Petitioner intended to introduce extraneous matters beyond the scope of the petition by requesting the summoning of the DCI, a known proxy of the Petitioner.

The court noted that no responses to the application were filed by the Petitioners or the 1st to 8th Respondents within the stipulated timelines. It acknowledged its exclusive jurisdiction under Article 163(3)(a) of the Constitution in presidential election disputes. The court observed that the affidavits involved factual disputes, which had already

been addressed by the 1st Respondent and the applicant through affidavits, including those of Martin Wachira Nyaga, Dennis Itumbi, and Davis Kimutai Chirchir. It concluded that striking out the affidavits at this preliminary stage would be premature without considering the totality of the evidence.

Regarding the request to expunge certain paragraphs of the petition, the court ruled that this issue should be dealt with on its merits in each instance. It also noted that its jurisdiction under Article 140 and its role as an election court in relation to electoral and other offences could be carefully considered. Since the applicant had not sufficiently persuaded the court, the application was dismissed without any order as to costs.

4.1.4 Filing of further affidavit evidence

Odinga & Another v Independent Electoral and Boundaries Commission

Presidential Election Petition E005 of 2022

Supreme Court of Kenya at Nairobi

MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

29 August 2022

The 5th Respondent, Juliana Cherera, filed the present application seeking to have the replying affidavits of Juliana Cherera, Justus Nyang'aya, Francis Wanderi and Irene Masit (the 5th to 8th Respondents), being members of the 1st Respondent, admitted on record. In support of their application, the applicants argued that the 2nd, 3rd, and 4th Respondents, in their Replying Affidavits, had alleged that all the members of the 1st Respondent attended a meeting with a delegation from the National Security Advisory Committee (NSAC) to subvert the will of the people. It was further contended that the 5th to 8th Respondents agreed with the proposal from the NSAC delegation to alter the results of the presidential election in favour of one candidate against another. It was urged that unless the 5th to 8th Respondents were allowed to file responses to the allegations, they would suffer great prejudice as the court would make adverse findings without hearing the affected Respondents.

Issue for determination

Circumstances under which the filing of further or other affidavits could be allowed in a presidential election petition.

Decision of the court

The Court considered the grounds on the face of the application and the supporting affidavit sworn by Juliana Cherera on 28 August 2022 and filed on even date.

The applicants argued that the 2nd, 3rd and 4th Respondents, in the Replying Affidavit, alleged that all the members of the IEBC attended a meeting with a delegation of the National Security Advisory Committee (NSAC)

comprising Dr Kennedy Kihara, the Principal Administrative Secretary in the Office of the President, Mr Kennedy Ogeto, the Solicitor General, Mr Hillary Mutyambai, the Inspector General of Police and Lieutenant General Fredrick Ogolla, Vice Chair of the Kenya Defence Forces, to subvert the will of the people. They urged that unless the 5th, 6th, 7th and 8th Respondents were allowed to file responses to the said allegations, they would suffer great prejudice as the court would make adverse findings without hearing them.

The court also perused the further affidavit of the 5th Respondent sworn on 28 August 2022 and filed on an even date and upon reviewing Rule 17 of the Supreme Court (Presidential Election Petition) Rules 2017, found that there was no provision allowing any further affidavits of this nature. However, the Court considered the special circumstances where the facts/allegations made by the 2nd, 3rd and 4th Respondents were contained in their response to the Petition. Since the events took place in the pendency of the matter, it would only be fair and just, considering the serious nature of the allegations and implications of the same, that the 5th, 6th, 7th and 8th Respondents ought to be given the opportunity to be heard regarding the same.

The Court thereby invoked the provisions of the Supreme Court (Presidential Election Petition) Rules 2017, rule 4 (2) as read together with section 3A of the Supreme Court (Act No 7 of 2011) on the inherent powers of the court and allow the further affidavits to be admitted as applied for.

The application was therefore allowed with no order as to costs.

4.1.5 Participation in presidential election petition as a pauper

Wafula v Odinga, Flag Bearer for Azimio La Umoja One Kenya Alliance & 5 Others; Royal Media (Media Television) & 4 others (Subsequent Party)

Presidential Election Petition 1 of 2022

Supreme Court of Kenya at Nairobi

MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

30 August 2022

Summary of the Facts

The applicant sought to prosecute a draft preliminary objection and counterclaim as a pauper due to an inability to afford court fees amounting to Kshs 1,004,000. The applicant claimed that the IEBC tallying server had been manipulated by the commanders of the Azimio la Umoja One Kenya Kwanza Alliance.

Issue for Determination

The key issue was whether a party who was neither a Petitioner nor a Respondent could prosecute a preliminary objection and counterclaim in a presidential election petition as a pauper.

Determination of the Court

The court observed that the applicant was not a Petitioner and had not been named as a Respondent in any of the presidential election petitions before the court. Furthermore, the applicant had not sought to participate as a friend of the court. The applicant argued that he had been employed by Pan African Paper Mills (EA) Company Ltd from 3 January 1983 to 23 September 2003, and that his financial situation deteriorated following his dismissal after advocating for a salary increase for underpaid employees.

The court considered the preliminary objection and counterclaim, which alleged manipulation of the IEBC tallying server by prominent members of the Azimio la Umoja One Kenya Alliance. However, in applying the Supreme Court (Presidential Election Petition) Rules, 2017, it found that the applicant was neither entitled to pursue the matter as a pauper nor to prosecute a counterclaim in the current proceedings. As a result, the application was dismissed.

4.1.6 Whether Attorney-General should be struck out of a presidential petition

Khalifa & 3 others v Independent Electoral and Boundaries Commission & 3 Others

Presidential Election Petition E003 of 2022

Supreme Court of Kenya at Nairobi

MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

30 August 2022

Summary of the facts

The 3rd Respondent sought leave to strike out the name of the Attorney General in Petition No E003 of 2022 on the grounds of misjoinder.

Issues for determination

Whether the Office of the Attorney General was wrongfully enjoined as a party in the presidential election petition.

Determination of the court

The Court, having considered the application, affidavit in support, as well as the Petitioners' Replying Affidavit and submissions in opposition to the application, found that the application, which was filed on 29 August 2022 at 4:45 pm, was filed out of time and was therefore incompetent and an abuse of the court process.

In any event, the Court had determined the issue in the application in its ruling delivered on 29 August 2022 in Petition E002 of 2022. The application was therefore dismissed with no orders as to costs.

4.1.7 Jurisdiction of the Supreme Court over pre-election issues

Reuben Lichete Kigame v Independent Electoral Boundaries & Another

Supreme Court Presidential Election Petition 9 of 2022

Supreme Court of Kenya at Nairobi

MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

29 August 2022

Summary of the facts

The Supreme Court considered applications from the 1st Respondent and the 2nd Interested Party, William Samoei Ruto, to strike out Petition E009 of 2022. William Samoei Ruto's application, dated 26 August 2022, was brought under Rule 17 of the Supreme Court (Presidential Election Petition) Rules 2017. He argued that the Petitioner had an ongoing appeal before the Court of Appeal in ***Independent Electoral and Boundaries Commission & Wafula Wanyonyi Chebukati v Reuben Kigame Lichete & Attorney General Civil Appeal* No. E2456 of 2022**, where a stay had been granted on the High Court's decision in ***Reuben Kigame Lichete v IEBC & Wafula Chebukati Constitutional Petition* No. E275 of 2022**. The 2nd Interested Party contended that the pending appeal rendered the petition outside the scope of Article 140 of the Constitution, and therefore the Supreme Court lacked jurisdiction.

The 2nd Interested Party also maintained in an affidavit and written submissions that the petition concerned a pre-election dispute still under consideration by the Court of Appeal, asserting that the Supreme Court's jurisdiction under Article 140 was confined to challenges against the election of the President-elect. ***Sammy Ndung'u Waiti v IEBC & 3 others* [2019] eKLR** was cited to support this view.

The 1st Respondent, in a Notice of Motion dated 27 August 2022, also argued that the petition focused on pre-election matters regarding the clearance and registration of independent presidential candidates, and thus did not meet the threshold for the Supreme Court's original jurisdiction. The 1st Respondent's case relied on Articles 88(4), 140(1), and 163(3)(a) of the Constitution, along with relevant sections of the Elections Act and the Supreme Court Act. It was argued that the petition was already under consideration at the Court of Appeal, rendering it sub judice.

In their written submissions, the 1st Respondent emphasised that the issues were jurisdictional, citing ***The Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd* (1989) KLR 1**. The court noted that the Petitioner did not respond to the applications.

Ultimately, the court struck out the petition and ordered that the Kshs. 1,000,000 deposited as security for costs be refunded to the Petitioner, with each party bearing its own costs.

Odinga & 16 Others v Ruto & 10 Others; Law Society of Kenya & 4 Others (Amicus Curiae)

Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)

Supreme Court of Kenya at Nairobi

MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

26 September 2022

Summary of the facts

The 2022 presidential election was highly competitive between the two leading candidates. On 15 August 2022, the Chairperson of the Independent Electoral and Boundaries Commission (IEBC) announced that William Samoei Ruto, the 1st Respondent, had met the requirements under Article 138(4) of the Constitution, thereby being declared President-elect, with Rigathi Gachagua, the 2nd Respondent, named Deputy President-elect. This declaration was formalised in Gazette Notice No 9773 issued on 16 August 2022.

Following this announcement, nine election petitions were lodged. A total of 23 interlocutory applications were filed in relation to these petitions. After hearing these applications and objections raised, Petitions E006 and E009 of 2022 were dismissed for failing to comply with Article 140(1) of the Constitution. The remaining seven petitions were consolidated on the court's own motion, with Petition E005 of 2022 designated as the lead file. Raila Odinga and Martha Karua were named as the 1st Petitioners, additionally, the Law Society of Kenya (LSK), the Kenyan Section of the International Commission of Jurists (ICJ-Kenya), John Walubengo, Dr John Sevilla, and Martin Mirero were admitted as amici curiae.

On 30 August 2022, the court partially allowed applications from the 1st, 3rd, and 4th Petitioners for an ICT scrutiny, inspection, and a recount of ballots in specific polling stations, under the supervision of the Court Registrar.

Issues for determination

The court delineated the following nine (9) issues as arising for its examination and final determination:

1. Whether the technology deployed by IEBC for the conduct of the 2022 General Election met the standards of integrity, verifiability, security, and transparency to guarantee accurate and verifiable results.

2. Whether there was interference with the uploading and transmission of Forms 34A from the polling stations to IEBC's Public Portal.

3. Whether there was a difference between Forms 34A uploaded on IEBC's Public Portal and Forms 34A

received at the National Tallying Centre, and Forms 34A issued to agents at the polling stations.

4. Whether the postponement of Gubernatorial Elections in Kakamega and Mombasa Counties, Parliamentary elections in Kitui Rural, Kacheliba, Rongai and Pokot South Constituencies and electoral Wards in Nyaki West in North Imenti Constituency and Kwa Njenga in Embakasi South Constituency resulted in voter suppression to the detriment of the Petitioners in Petition No E005 of 2022.

5. Whether there were unexplainable discrepancies between the votes cast for presidential candidates and other elective positions.

6. Whether IEBC carried out the verification, tallying, and declaration of results in accordance with article 138(3)(c) and 138(10) of the Constitution.

7. Whether the declared President-elect attained 50%+1 of all the votes cast in accordance with article 138(4) of the Constitution.

8. Whether there were irregularities and illegalities of such magnitude as to affect the final result of the Presidential election.

9. What reliefs and orders can the Court grant/issue.

Decision of the court

The issue of whether the technology used by the Independent Electoral and Boundaries Commission (IEBC) in the 2022 General Election met the required standards of integrity, verifiability, security, and transparency to ensure accurate and verifiable results was challenged by several Petitioners. The Petitioners argued that the technology did not meet the standards prescribed by Article 86 of the Constitution and Section 44 of the Elections Act. They contended that IEBC's technology was neither simple nor transparent and that there were issues regarding the audit of the Register of Voters, late publication of the audit report, and potential manipulation by foreign technology providers.

In response, the IEBC defended its use of a hybrid system that combined biometric voter registration and identification with manual processes for counting and tallying votes. It stated that the electoral process was reinforced through audits and continuous improvements. The IEBC further explained that KPMG had conducted an audit of the Register of Voters, and the necessary remedial measures were implemented. The Commission also asserted that the technology was subjected to public testing and simulation exercises to ensure efficiency and transparency.

The court found that the Petitioners had provided sufficient evidence to shift the

evidentiary burden to the IEBC, which responded with detailed explanations of the steps it had taken to address any shortcomings. The court was satisfied that the Register of Voters had been used effectively in the election, and that any issues identified in the audit had been successfully addressed. Additionally, the IEBC's use of the KIEMS system was deemed efficient, despite localised failures, and the court concluded that there was no credible evidence of unauthorised access or manipulation of the system.

The court upheld the integrity, verifiability, security, and transparency of the technology deployed by the IEBC, finding that it met the necessary constitutional and legal standards.

The issue of whether there was interference with the uploading and transmission of Forms 34A from polling stations to the Independent Electoral and Boundaries Commission (IEBC) Public Portal was raised by the 1st Petitioner. They claimed that the IEBC's technology did not meet constitutional and statutory requirements, specifically those outlined in Article 86 of the Constitution and section 44 of the Elections Act. The Petitioner argued that the Kenya Integrated Election Management System (KIEMS) had failed to ensure confidentiality, integrity, availability, non-repudiation, and authenticity, leading to unverifiable and inaccurate Presidential Election results. They alleged that Forms 34A, transmitted via the Results Transmission System (RTS), were manipulated due to security vulnerabilities, such as discrepancies in image formats and a lack of proper security layers.

The 1st Petitioner further contended that there were instances where over 11,000 Forms 34A were dumped onto the online portal, and specific polling stations were identified where manipulation was believed to have occurred. Discrepancies between physical copies and online versions of Forms 34A were also highlighted, supported by expert testimony and forensic analysis. The 3rd Petitioner echoed these concerns, particularly noting discrepancies in Forms 34B that suggested vote inflation for the 1st Respondent, alongside statistical anomalies.

The IEBC, in response, rejected the allegations and defended its technology as secure, emphasising that Forms 34A were protected by various security features, such as digital signatures and firewalls, and that the RTS system was not compromised. They denied that any manipulation of the forms had occurred and claimed that the documents presented by the Petitioners were falsified.

During the court's scrutiny exercise, it was found that KIEMS kits scanned forms directly into PDFs without converting them to editable formats, and no evidence was uncovered to support the Petitioners' claims of image manipulation or hacking. Additionally, the exercise revealed no suspicious activity or unauthorised access to the RTS server. Ultimately, the court found that the Petitioners failed to provide sufficient evidence to prove

their claims, and the integrity of the electoral process, including the transmission and publication of Forms 34A, was upheld. The Petitioners' assertions of data tampering and large-scale manipulation were debunked by the evidence presented during the scrutiny and expert testimony.

On the third issue, the 1st Petitioner argued that the Independent Electoral and Boundaries Commission (IEBC) engaged in fraudulent activities concerning the printing and handling of Forms 34A and 34B. They claimed that IEBC instructed the printing firm to produce two sets of Forms 34A and neglected to print Forms 34B, which are crucial for result tallying. They also alleged that post-polling alterations to Form 34A were made to favour the 1st Respondent, with discrepancies observed between physical copies and online versions across 41 polling stations.

The 1st and 2nd Respondents denied these claims, asserting that Forms 34A were consistent across all versions and that the process adhered to legal standards. They challenged the reliability of the Petitioner's evidence, which included affidavits and forensic reports, arguing these did not prove tampering.

The court, acknowledging the severity of the allegations, ordered a detailed scrutiny of the election materials. This revealed minor discrepancies in four polling stations, but overall, the Registrar's Report confirmed the authenticity of the Forms. The court dismissed the Petitioner's claims of tampering, finding their evidence insufficient and the allegations unsubstantiated. Ultimately, the court upheld the integrity of the electoral process as declared by the IEBC.

On postponement of elections and whether it led to voter suppression, The Independent Electoral and Boundaries Commission (IEBC) postponed gubernatorial elections in Kakamega and Mombasa Counties, parliamentary elections in Kitui Rural, Kacheliba, Rongai, and Pokot South Constituencies, and ward elections in Nyaki West and Kwa Njenga due to errors in ballot papers. Initially scheduled for 8 August 2022, these elections were rescheduled to 23 August and finally to 29 August 2022. The postponements did not impact the Presidential election or other scheduled elections.

Petitioners alleged that the delays were a tactic to suppress voter turnout in areas supporting certain candidates, claiming significant drops in voter turnout. The IEBC attributed the issues to logistical challenges and printer errors, denying any deliberate suppression. The court found that while the postponements were inconvenient, there was insufficient evidence of intentional voter suppression. The court upheld the IEBC's decision, noting the absence of proof that the delays were aimed at disadvantaging specific candidates or suppressing voter turnout.

On the issue of discrepancies between presidential votes and other elective positions,

the Petitioners argued that discrepancies between votes for the presidential election and other positions in various counties indicated potential fraud or ballot stuffing. They cited discrepancies in Othaya and North Imenti constituencies as evidence. The 1st Respondent contended that these discrepancies were due to factors such as votes from special categories (prisoners and diaspora) and stray ballots.

The court scrutinised the Petitioners' claims and the explanations provided by the IEBC. It found that the discrepancies were attributable to legitimate factors like rejected votes and special voter categories. The court ruled that there was no substantial evidence to prove systematic fraud or irregularities affecting the election outcome. Consequently, it concluded that the results of the presidential election were not undermined by the discrepancies.

On verification, tallying and declaration of results by IEBC, disputes arose over whether the IEBC, specifically its Chairperson, adhered to Article 138(3)(c) and Article 138(10) of the Constitution during the verification and tallying of votes. The Petitioners argued that the entire Commission should be involved in these processes, while the Respondents maintained that the Chairperson held the exclusive authority to verify and declare results.

The court affirmed that the IEBC's role is collective in verification and tallying, but the Chairperson alone is responsible for declaring the results. The court found that despite internal disagreements, the IEBC met its constitutional obligations. The Chairperson's role in the result declaration was confirmed as per the constitutional framework, and the Commission's collective responsibility was acknowledged, notwithstanding internal disputes.

On whether the President-elect had attained the 50%+1 threshold, the Petitioners challenged the 1st Respondent's victory, arguing that they did not achieve the required 50%+1 of the total votes, excluding rejected votes. They claimed that the actual valid votes were less than the required threshold. The IEBC countered with a total valid vote count that showed the 1st Respondent surpassed the threshold.

The court upheld the principle that rejected votes should not be included in the 50%+1 calculation. It confirmed that the 1st Respondent had achieved the required threshold based on valid votes, as per Article 138(4) of the Constitution. The court rejected claims suggesting otherwise and affirmed the President-elect's victory.

Penultimately, the court assessed whether irregularities and illegalities impacted the presidential election result, the Petitioners alleged numerous irregularities and illegalities, including issues with KIEMS kits, late polling station openings, and fraudulent forms. They argued these irregularities affected the election result. The IEBC denied these claims, asserting that any issues were promptly

addressed and did not impact the outcome significantly.

The court found that the Petitioners did not provide adequate evidence to substantiate claims of significant irregularities or illegalities affecting the election result. The court concluded that while some irregularities occurred, they were not proven to be of a magnitude that would alter the final election result. The legitimacy of the election was upheld.

The Supreme Court addressed a range of reliefs sought by Petitioners in relation to the 2022 Presidential Election, operating within the constitutional framework that defines its jurisdiction. According to Article 163(3)(a) of the Constitution, the Supreme Court holds exclusive original jurisdiction to resolve disputes concerning the presidential election, as detailed in Article 140. This article establishes a clear procedure and timeline for challenging the validity of the presidential election results, allowing individuals seven days from the results declaration to file a petition. The Supreme Court is required to resolve the petition within fourteen days, and if the election is deemed invalid, a new election must occur within sixty days.

The Supreme Court Rules complement these constitutional provisions, specifying the orders the court may issue upon concluding an election petition. These orders include dismissing the petition, invalidating the election declaration, confirming the election's validity, and deciding on costs or other relevant measures.

The court's jurisdiction is strictly limited to the validity of the presidential election and does not extend to issues beyond this scope, such as the removal of the IEBC Chairperson. Although the court can issue recommendations and advisory opinions under Article 163(6) of the Constitution, it cannot make determinations on matters outside the scope of the presidential election petition.

The Supreme Court issued several recommendations aimed at improving the electoral process and addressing institutional shortcomings within the IEBC. Recommendations included enhancing corporate governance by advising Parliament to strengthen the statutory and regulatory framework for the IEBC's policy and administrative roles. It was suggested that the IEBC should establish formal internal guidelines to define the roles of its Chairperson, Commissioners, and Chief Executive Officer, and clearly outline responsibilities for officials and third parties in legislative and administrative documents.

On election technology, the court recommended restricting server access to IEBC staff during elections and separating servers for election data from internal administrative functions to support forensic analysis. Reforms for statutory forms included simplifying Form 34A and adding a column for stray ballots, as well as thorough training for

Returning Officers on valid votes. The court also proposed mechanisms for special voting and reconsideration of the constitutional timeline for handling presidential election petitions.

Additionally, the court emphasized the importance of maintaining professionalism in courtroom proceedings and cautioned against inappropriate remarks by advocates, stressing the need for respect for the judiciary and adherence to professional conduct standards.

In conclusion, the Supreme Court reaffirmed its commitment to the Constitution and impartial justice. The court dismissed Presidential Election Petition No E005 of 2022 and other related petitions, validating the 1st Respondent's election as President-elect. It declared Regulation 87(3) of the Elections (General) Regulations, 2012 unconstitutional to the extent that it conferred sole power of verifying and tallying results to the Chairperson of the Commission. In recognition of the public interest involved, the court ordered each party to bear their own costs and released security deposits to the Petitioners.

4.2 Principles emerging from parliamentary and county election petitions

4.2.1 Whether a pre-election dispute can be lodged as an election petition

Nancy Nyanchoka Ongeri and Another v Manson Nyamweya and Others

Election Appeal Petition No. E004 of 2023

High Court of Kenya at Kisii

F Mugambi, J

31st August 2023

Summary of the Facts

This case arose from the nomination for the position of additional seats for the Member of County Assembly by the National Congress Party. The Appellants were aggrieved about the process and manner of the nomination. They alleged that the 5th, 6th, 7th and 8th Respondents were not members of the Party; there was a family relationship between the 5th and 7th Respondents, Furthermore, the 5th, 6th, and 8th Respondents were not validly nominated as per Article 177 of the Constitution. 1st Appellant was dissatisfied with being listed in the marginalized category. The 2nd Appellant was dissatisfied with the ranking in the gender top-up list. It was further alleged that the 8th Respondent was not eligible for not being a registered voter within Kisii County and was not a person with a disability, even though he was listed in that category. The 2nd Appellant filed PPDT E037 of 2022 which was struck out for failure to explore the IDRM. The 1st Appellant also filed PPDT Complaint No. E037 of 2022 which was struck out for failure to explore the IDRM.

The 1st and 2nd Appellants did not appeal the PPDT decisions. Instead, they brought the petition before the Magistrate's Court

in Election Petition No. E007 of 2023. The Appellants were dissatisfied with the Magistrate's Court finding that no law bars family members from taking up political seats. The appellants further emphasized on appeal that they qualify to be listed at the top of the 5th to 8th Respondents because of their time investment in the party and the fact that the Appellants joined the party earlier than the 5th to 8th Respondents. The Appellants reiterated their claims before the Trial Court regarding the eligibility for nomination of the 5th to 8th Respondents. The Respondents noted that they were validly nominated and that any issues ought to have been addressed with the IDRM (under the Party nomination rules) and then IEBC first. On its part, the IEBC took the position that its role in nomination is supervisory only and is therefore very limited.

Issues for Determination

1. Whether the Trial Magistrate had jurisdiction to entertain the matter before it.

2. Whether the nomination process was conducted in accordance with the Constitution and the law.

3. Whether the Appellants proved the 5th to 8th Respondents are not members of the National Congress Party.

4. Whether the 8th Respondent qualified to be nominated to the Kisii County Assembly.

5. Whether the 4th Respondent effected its oversight role in the nomination exercise.

6. Who bears the costs of the appeal.

Decision of the Court

The High Court observed that the jurisdiction to deal with disputes falls on the IEBC and the Political Parties under the Elections Act, IEBC Act and the Constitution of Kenya. The jurisdiction of PPDT is also provided for under section 40 of the Political Parties Act. Political parties are at the centre of resolving disputes and there is a need to exhaust the IDRM. Where the issue had transitioned into an election petition, the matter should have been heard by the IEBC before the same was gazetted (after party nomination and before gazettement). The Appellants had not produced any evidence to show they pursued the IDRM as directed by the PPDT. In the circumstances, the High Court concluded that the Magistrates Court should have found that it did not have jurisdiction to entertain the matter before it as the matters had not crystallized.

Based on the determination on the preliminary issue of jurisdiction, the High Court could not address the issues which parties identified for determination which were: Whether the nomination process was conducted in accordance with the Constitution and the law; Whether the Appellants proved the 5th to 8th Respondents are not members of the National Congress Party; Whether 8th Respondent qualified to be nominated to Kisii county Assembly; Whether the 4th Respondent effected its oversight role in the nomination exercise; and Who bears the costs of the

appeal. In the end, the Court observed that the appeal lacked merit and the proceedings before the Trial Court were null and void for lack of jurisdiction.

Anne Kakhasa Situma and 2 Others v Lydia Chelimo Kiboi

Election Petition Appeal No. E002 OF 2023

(Consolidated with Election Appeal No. E001 and E003 of 2023)

High Court of Kenya at Kitale

AC Mrima, J

1 August 2023

Summary of the Facts

The Respondent applied to the FORD-K party to be in the Trans-Nzoia County Assembly Gender Top-Up category for purposes of nomination. The IEBC gazette nomination list included the Respondent on the Bungoma County Gender Top-Up List. The Respondent complained to the Party to rectify the same. The Party refused to rectify it citing several reasons including the fact that the list of nominees had already been submitted to the IEBC. The Respondent then complained to PPDT seeking an order of amendment of the Bungoma Gender Top-Up List and transferring the same to the Trans-Nzoia Gender Top-Up List and prioritized as being number 1 for being most qualified. The Tribunal assumed jurisdiction and ruled that the Respondent's application to be included in the Gender Top Up List was proper even though she did not attach Chapter Six clearances. PPDT ordered the party to amend the Bungoma Gender Top-Up List and transfer the name of the Respondent to the Trans-Nzoia Gender Top-Up List and forward the same to IEBC for publication. However, PPDT did not address the issue of priority in the list.

The Respondent filed a petition in Kitale CMC Election Petition No. E001 of 2022. The Petition challenged the party list which the FORD Kenya party amended. She claimed that the inclusion of Ann Khakasa Situma in the party's Gender Top-Up List was null, and void given the PPDT judgment. FORD Kenya challenged the jurisdiction noting the non-exhaustion of laid down IDRM procedure and further, that the matter was a pre-election category matter. Ann Khakasa Situma challenged the Petition noting she successfully applied to be included in the Gender Top Up category in Trans-Nzoia County. The Election Court ruled that it had jurisdiction. It faulted the party for failing to comply with the Elections Act. It also found that it failed to adhere to party rules when dealing with the matter as the nomination was done by the Ad hoc Committee and not the Ward Executive Committee and not in a transparent manner. Having found that the nomination process did not comply with the law, the Court quashed the FORD-K gender top-up list and directed a fresh process to be undertaken.

Three appeals were lodged against the decision of the Election Court. Ann Khakasa Situma filed an appeal citing the election court's lack of jurisdiction, Respondent's failure to appeal against the PPDT decision which did not direct that her name be prioritized, allegation that the issues were statute barred and errors in the analysis of the facts and law. FORD-Kenya appealed stating that the court did not have jurisdiction since the well-laid procedure of appealing before the Board was not followed, the matter before the election court was res judicata, the matter was a pre-election dispute and should not be dealt with by the election court, ranking and prioritization is a preserve of political parties, and the election court failed to consider the evidence on the nomination process. IEBC lodged the third appeal stating the election court lacked jurisdiction to inquire into pre-election matters, disregarding evidence and the law; the amended party list did not have patent non-compliance; IEBC did not receive any complaint on the party list and the issue of nomination is a preserve of the political parties.

Lydia Cheboi submitted that the nomination process did not bear the hallmarks of a transparent process. She submitted further that the election court jurisdiction kicks in once IEBC has gazetted the names. She urged that the issues before the trial Court were not barred by the doctrine of res judicata; and the appeal challenging the outcome of PPDT in Nairobi Civil Appeal No. E634 of 2022 was dismissed. Finally, she submitted that the full IDRM process was not achievable since she was left in the dark. The appellants sought that the judgment and decree of the election court be set aside.

Issues for Determination

1. Whether the trial court had jurisdiction over the dispute.

2. If the answer in (i) is in the affirmative, whether the 2nd Appellant's nomination process complied with the Constitution and the law.

Decision of the Court

The Court considered that jurisdiction is a question of law to which the appeal was restricted. From the nature of the dispute, it was a pre-election dispute between a member and a political party. As such, it was rightfully submitted to the jurisdiction of the PPDT pursuant to section 40 of the Political Parties Act. When the Respondent had reservations about the Party List, she could have appealed against the PPDT decision challenging its failure to order that she be prioritized. She could also have filed a complaint before the IEBC or filed a constitutional petition challenging the constitutionality of the Party List. Since the Respondent did not take these legal routes, the election Court lacked jurisdiction to entertain the dispute before it. However, the Court observed that the opportunity to challenge was not extinguished as the Respondent could still lodge a judicial review application.

The court did not make an affirmative finding in issue (i). The first issue having been found in the negative, the Court concluded that the second issue was not for determination.

In the end, the Court determined that the appeals by IEBC, FORD-K party and Anne Kakhasa Situma be allowed. The election petition before the trial court was dismissed. The Court directed that Anne Kakhasa Situma stood duly nominated and further, that each party would bear their costs given the nature of the dispute and the possibility of future challenges.

Dorcas Monyangi Mogaka v. Orange Democratic Movement (ODM) & 4 Others

Election Petition Appeal No. E003 of 2023

High Court of Kenya at Kisii

F Mugambi, J

31 August 2023

Summary of the Facts

The Appellant (Dorcas Mogaka) challenged the nomination of the 5th Respondent (Miriam Egge) to the Kisii County Assembly under the gender top-up category. She argued that she had applied and was successfully nominated by the ODM party where her name appeared second on the list, while the 5th Respondent's name was listed tenth. However, her name was replaced by the 5th Respondent's name in the final list published by the IEBC (2nd Respondent).

The Appellant contended that the replacement of her name was unjustified, as the 5th Respondent was neither a registered voter in any ward in Kisii County nor a member of the ODM party. She claimed there was no legal basis for her removal from the list. The Trial Court upheld the nomination of the 5th Respondent. She appealed against the decision at the High Court.

The 1st Respondent (ODM party) and the 2nd Respondent (IEBC) defended the nomination process. They submitted that the final list complied with legal requirements. The 2nd Respondent argued that they published the list based on instructions from the ODM party and had no authority to alter the party's list. The 5th Respondent also maintained that the Appellant did not follow the proper dispute resolution mechanisms before filing the petition, rendering the appeal inadmissible. The Respondents defended their actions by asserting that the revised list was lawful and that the changes were made following a directive by the Political Parties Dispute Tribunal.

Issues for Determination

1. Whether the Appellant exhausted the internal dispute resolution mechanisms (IDRM) and the Political Parties Disputes Tribunal (PPDT) processes before approaching the Court.

2. Whether the nomination of the 5th Respondent was in accordance with the law and party rules.

3. Whether the Appellant's legitimate expectations were violated by replacing her name on the nomination list.

4. Whether the IEBC had the authority to alter the priority order in the ODM-submitted party list.

Decision of the Court

The Court found that the Appellant did not exhaust the IDRM and the PPDT mechanisms before approaching the Court. The Appellant was aware of the revised party list but did not pursue the dispute through the appropriate channels within the party or the PPDT. The Court held that the revised party list submitted by the ODM party and subsequently gazetted by the IEBC complied with the directive from the PPDT. The IEBC acted within its mandate by gazetting the list provided by the party. The Court stated that the appellant's legitimate expectation was unfounded as she did not follow the proper dispute resolution procedures. The change in the party list was directed by the PPDT and was legally binding.

The Court affirmed that the IEBC's role was limited to receiving and gazetting the party lists as submitted by the political parties. The IEBC did not have the authority to alter the order of priority in the party list.

In conclusion, the Court upheld the gazettement of the 5th Respondent as a member of the Kisii County Assembly under the gender top-up category. It dismissed the appeal for lack of merit.

Josephat Shambu v. Doreen Rodgers & 2 Others

Election Petition Appeal No. 1 of 2023

High Court of Kenya at Mombasa

DK Magare, J

13 February 2023

Summary of the Facts

The case involved an interlocutory appeal challenging the jurisdiction of the trial court to hear and determine an election petition concerning the nomination of a member to the county assembly. The Appellant (Josephat Shambu) contested the jurisdiction of the court based on provisions in the Constitution and the Elections Act. He argued that the matter was a nomination dispute that should have been handled by IEBC under its dispute resolution mechanism. The trial court ruled that the dispute was an election matter, and it had jurisdiction to hear and determine the dispute. The Appellant appealed against the decision at the High Court.

The Appellant argued that the IEBC being responsible for determining the candidates

through its qualifying list, should resolve disputes arising from the nomination process. Conversely, the trial court found that once the nomination results were gazetted, any challenge to those results became an election dispute, thus falling within its jurisdiction.

Issues for Determination

1. Whether the classification of members elected through proportional representation as "special seat members" rather than "nominated members" was constitutional.

2. Whether the dispute concerning members elected through proportional representation should be addressed by the IEBC Dispute Resolution Mechanism or by the Magistrates' Court as an election dispute.

3. The role of the IEBC in resolving disputes arising out of nomination.

4. Whether the High Court had jurisdiction to entertain interlocutory appeals arising from time-bound election disputes.

Decision of the Court

The Court found that the classification of members as "special seat members" was constitutional and aligned with the relevant electoral laws and the Constitution. The Court stated that once the IEBC had gazetted the nomination results, any challenges to those results were to be treated as election disputes, appropriately addressed through election petitions in the courts. It stated that IEBC's role was to manage the pre-election nomination process, but post-election disputes fell under the purview of the courts.

In conclusion, the Court upheld its jurisdiction to hear the interlocutory appeal but emphasized the importance of adhering to strict timelines set out in the Constitution for resolving election disputes, thus restricting the scope of such appeals to avoid delays in the electoral process.

Cross-reference: See similar decisions in the decision in ***Major Suleiman Kanyanya Simba v KANU, IEBC & 2 Others, Kakamega High Court Election Petition No* E004 of 2023.**

4.2.2 Principles guiding extension of time on appeal

Dennis Omwenga Ayiera v Amos Nyaribo Kimwomi

Election Petition No. E002 of 2022

High Court of Kenya at Nyamira

K Kimondo, J

16 February 2023

Summary of the Facts

The 3rd and 4th Respondents filed a Notice of Motion application. The application was

for an extension of time to file and serve their response to the election petition. The application also sought to have the witness affidavits deemed to be properly filed and served as well as leave to serve witness affidavits.

Issue for Determination

The Court determined whether the Court could extend the timelines.

Decision of the Court

The Court considered that the timeline of 7 days provided for responding to the petition under Rule 11(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 can be extended at the court's discretion. The Court then noted that the discretion is exercised under rule 19(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 and the overriding objective is to facilitate a just, expeditions, proportionate and affordable resolution of election petitions as under Rule 4(1). The Court noted, however, that its discretion in extending the timelines in electoral disputes is not an open cheque because of the strict timelines. In the instant case, the IEBC was properly served with the amended petition. However, it displayed a pattern of delays that was ill-explained. Though the hard copies of the amended petition were only served on 21 September 2022, the delay until 11 October 2022 remained unexplained. As the delay was not well explained, the Court found that it was not excusable. Notwithstanding, the Court stated that the IEBC was a key party to the petition, having conducted the impugned election and with orders sought against it and the County Returning Officer. The Court was therefore prepared to extend timelines to respond but declined to entertain a further delay which would be occasioned by granting a further 3 days' leave to file witness affidavits.

In the end, the Court extended the timelines within which the 3rd and 4th Respondents had to file their response to the petition, replying to the Affidavit and witness affidavits attached to the application. However, the Court disallowed the payer for three days' leave to formally file other witness affidavits.

Rose Nyamoita Oyugi v Elizabeth Kwamboka Orango and 4 Others

Election Petition Appeal No. E008 of 2023

High Court of Kenya at Nyamira

WA Okwany, J

31 May 2023

Summary of the Facts

The Applicant (Rose Nyamoita Oyugi) filed the record of appeal 14 days after the lapse of the 21-day window period allowed under rule 34(6) of the Elections (Parliamentary and County Elections) Petition Rules. She filed an application to request the Court to admit the record of appeal and supplementary record

of appeal filed out of time. She argued that filing the record of appeal out of time was not fatal to the appeal. The reasons for filing the appeal out of time were beyond her control. She delayed obtaining Court proceedings and a certified copy of the decree in good time from the Lower Court. She relied on rule 19(1) of the Election (Parliamentary and County) Petition Rules 2017 which permits the Court to exercise its discretion in allowing such applications in the interest of justice.

Respondents argued that the Applicant had not given sufficient reasons for the delay in filing the record of appeal late to convince the Court to exercise its discretion and extend time. They submitted that section 34(6) of the Election Petition Rules provides timelines for filing election petition appeals in mandatory terms.

Issue for Determination

1. The Court determined whether the applicant has made a case for granting orders to extend the time for filing the record of appeal.

Decision of the Court

The Court declined to grant an extension of time to the Applicant to file the record of appeal after the lapse of the statutory timeline because she did not provide convincing reasons. The reason given for the delay was false because trial court records revealed that the copies of the proceedings and judgement were ready and certified on time to allow the Applicant to file the record of appeal within the 21-day statutory timelines. Thus, the Court dismissed the application for lack of merit with costs to the Respondents.

Mokaya Martha Kerubo v United Democratic Alliance and 2 Others

Election Petition Appeal No. E009 of 2023

High Court of Kenya at Nyamira

WA Okwany, J

15 June 2023

Summary of the Facts

This appeal was filed through a memorandum of appeal dated 16 March 2023. It arises from the proceedings of the Nyamira Chief Magistrate's Election Petition No. E 002 of 2022. The Appellant requested 15 days to file a Record of Appeal and was granted. However, the same was done and the further request for 3 days was rejected. At the time, it was clear that the Appellant did not file the Record of Appeal within the 21 days granted by Rule 34(6) of the Elections (Parliamentary and County Elections) Petition Rules, 2017.

This necessitated and formal application for the Appellant to file a Record of Appeal out of time. Nyamanga Doris Magoma raised a preliminary objection in respect of the application. The court made a ruling on the preliminary objection. At the heart of the

objection was that the record of appeal was not filed within the 21 days of filing the appeal which are the timelines required by the Elections Act and Elections (Parliamentary and County Elections) Petition Rules 2017. The Appellant insisted that there was a plausible explanation for the delay as the advocates on record received certified copies of the typed proceedings only on 18 May 2023 which was late.

Issues for Determination

1. Whether the Appellant discharged the burden of extension of time.

2. Whether the court could determine the suit.

Decision of the Court

The Court noted that the timelines are key in electoral disputes. It was not contested that there was a delay. There was no plausible explanation for the delay. The truth was that the typed proceedings were ready earlier. Moreover, the certificate of delay was not provided in court. The Court found that the preliminary objection was merited, and it was upheld. The Court found that it lacked jurisdiction to entertain this appeal. The appeal is incompetent, and it was struck out. There was no order as to costs as the matter did not proceed to a full hearing.

Jemnyango Moses Kamalik v Masla Titus Matheke & 2 Others

Election Petition Appeal No. E001 of 2023

High Court of Kenya at Kajiado

F Rayola, J

5 July 2023

Summary of the Facts

The Petitioner (Jemnyango Moses Kamalik) filed an election petition appeal challenging the ruling of the Trial Magistrate in Ngong Law Courts. The Trial Magistrate dismissed the petition because the appellant failed to properly serve the Respondents within the stipulated time and did not file support affidavits or witness statements with the petition. Dissatisfied with this decision, Jemnyango appealed at the High Court. He argued that the Magistrate erred in law and fact regarding the service of the petition and the procedural requirements.

The Respondents filed an application to strike out the appeal. They argued that it was filed out of time, beyond the 30-day limit set by Section 75(4) of the Elections Act. They also contended that the appeal improperly raised issues of fact rather than law, which the High Court is not permitted to review.

Issues for Determination

1. Whether the appeal was filed out of time.

2. Whether the appeal raised issues of law or fact.

3. Whether the court has jurisdiction to hear the appeal as it raised issues of fact rather than law.

Decision of the Court

The Court held that the appeal was filed outside the statutory period of 30 days and without the necessary leave of the court. The delay in filing was substantial and unexplained, and therefore, the appeal could not be entertained. It stated that it is bound by law to only consider matters of law in election appeals. Since the appellant's grounds of appeal predominantly raised factual issues, the court found that it lacked the jurisdiction to adjudicate on those matters.

In conclusion, the Court considered that given the procedural defects and jurisdictional limitations, the Respondent's application to strike out the appeal was allowed. The Court also ordered the Appellant to pay the costs of the application and half the costs of the appeal.

Michael v Orange Democratic Movement Party & 3 Others

Election Petition Appeal No. E001 of 2023

Court of Appeal at Nairobi

J Mativo, PM Gachoka and A Ali-Roni, JJA

12 May 2023

Summary of the Facts

Election petition arising from PPDT Complaint Number E130 of 202 and the Nairobi High Court Election Petition No. E002 of 2022. The Appellant made an application for an enlargement of time to file her notice of appeal and record of appeal. The Appellant also applied that the filed documents be deemed as properly filed. The Respondent alleged that the appeal was filed in contravention of Rule 6 of the Court of Appeal Rules.

The Appeal was based on the ground that there was a delay by the High Court registry to furnish the appellant with certified documents.

Issue for Determination

The Court determined what was the effect of non-compliance on the fate of the appeal before the court.

Decision of the Court

The Court stated that it had the discretion to extend the timelines on such terms as may be just. The Court noted that the delay by the High Court registry to furnish the Appellant with certified documents was inconsequential to the case. The Appellant did not take advantage of Rule 8(5) of the Court of Appeal Rules which allows for the filing of uncertified documents. As the Court's discretion under Rule 5 was limited, the court cannot enlarge the time. The Court struck out the appeal.

Bardad Mohamed Farah v Abdullahi Bashir Sheikh, & 2 Others

Election Petition Appeal E007 of 2023

In the Court of Appeal at Nairobi

H. A. Omondi, Dr. K. I. Laibuta G.W Ngenye-Macharia

14 July 2023

Summary of facts

In the general elections held in August 2022, the Appellant and the 3rd Respondent contested the National Assembly seat for the Mandera North Constituency where the IEBC and the Returning Officer Mandera North Constituency declared the 3rd Respondent as the winner garnering a total vote count of 9,214 votes whilst the Appellant garnered 6,999 votes.

Aggrieved with the outcome of the election the Appellant filed a petition challenging the overall conduct of the election stating that the elections were not free and fair as they were conducted in a manner contrary to the principles outlined under Article 81 of the Constitution and section 39 of the Election Act and Regulations.

The specific violations included inter alia, deliberate manipulation of KIEMS Kits by various presiding officers; deployment of the complementary identification system to facilitate irregular ballot marking, stuffing and exaggerated voter turnout in favour of the 3rd Respondent; unilateral alteration of certain polling stations and removal of election materials to other polling stations by the 1st and 2nd Respondents; voter bribery and undue influence instigated by the 3rd Respondent and aided by various presiding officers and the 2nd Respondent; ferrying of voters to various polling stations; and that the 1st and 2nd Respondents, alongside the Mandera County security apparatus, meting out violence on agents and candidates whenever objections were raised regarding the election process.

With respect to election material, the Appellant requested the trial court to order a re-tallying, recount and verification of polling stations in the Mandera North Constituency and in the alternative, order that the declared results be null and void and fresh orders of the conduct of a fresh election be issued to the 1st Respondent (the IEBC).

In opposing the claim, the 1st and 2nd Respondent alluded to the fact that the Appellant did not present a different of results but rather relied on the results declared and that he was not specific to the violations in the petition and also the polling stations that the violations had been meted out.

The trial court subsequently proceeded to find a basis in the request of partial scrutiny and recount of the listed polling stations, but no basis was for scrutiny and recount of all polling stations. In making its findings the court determined that the allegation of manipulation of the KIEMS kit was rebutted by the scrutiny report and that there was no evidence

presented to prove voter bribery, ferrying of voters and eruption of violence. In view of the determination, the trial court dismissed the petition with costs to the Respondents.

The appellant preffered an appeal challenging the trial judgment on 17 grounds, the main issues being scrutiny and/or recount; and that the costs awarded were manifestly disproportionate, unreasonable and excessively high.

In opposing the Appeal the Respondents raised separate preliminary objections but shared the same issues: that the court strikes out the memorandum of appeal because the appeal was incompetent, having been filed out of time.

They also submitted that section 85A of the Elections Act and rule 9(1) of the Court of Appeal [Election Petition] Rules, 2017 required that an appeal from the High Court in such an election petition be filed within 30 days of the decision of the High Court.

The 3rd Respondent reiterated that the Appeal ought to have been filed on 10 April 2023 from the date of delivery of judgment on 3 March 2023, the Appellant filed seven days late, failure to comply with timelines extinguished the right to appeal, as the language and tenor of Section 85 of the Elections Act is couched in mandatory terms.

The court was urged not to consider an extension of time as the ***Munuve Mati Case*** made a distinction between timelines within the Court of Appeal rules and the Court of Appeal (Election) Rules.

On the other hand, the Appellant acknowledged that the Judgment was delivered on 3 March 2023 and that the appeal ought to be filed within 30 days within which the acknowledged 10 April 2023 fell within the 30-day timeline.

Issues for determination

1. Whether the court should extend the time to hear the Appeal.

Decision of the court

The Appellant urged the court to proceed to find reprieve was offered under section 57 of the Interpretation and General Provisions Act, (Cap 2), which excludes Sundays and public holidays in the computation of time.

The Appellant conceded that the Court of Appeal (Elections Petition) Rules, 2017 (2017 Rules) did not make provision in regard to the computation of time, but urged the court to adopt the approach stipulated under rule 4 of the 2017 Rules, which allowed the Court to apply the Court of Appeal Rules, (2022 Rules), where there was no applicable provision in relation to election petition appeals.

The Appellant urged the Court to find recourse in rule 3 of the 2022 Court of Appeal Rules, which mirrored provision to section 57 of the Interpretation and General Provisions Act in the computation of time to exclude all Sundays between 3 March and 4 April 2023 as well as

the period between 7 -10 April 2023, and find that the instant appeal was filed in time.

The court in making its findings stated that the timelines were clearly set out and what constituted a complete record of appeal was also well laid out under rule 9 (1) of the Court of Appeal (Elections Petition) Rules, 2017.

And in taking note that the above rules did not make provision for the computation of time the court therefore asserted that election petitions were sui generis and therefore, where the rules did not make provision for the computation of time, the fall-back statute in the court's opinion was not section 57 of the Interpretation and General Provisions Act, but was rather Section 85 of the Elections Act.

The court proceeded to reproduce section 85 of the Elections Act verbatim, stating that election petitions concerning membership of the National Assembly, Senate or the office of county governor lie to the Court of Appeal on matters of law only and, ought to be filed within thirty days of the decisions of the High Court.

The court echoed the decision made in ***Munuve Mati Case*** and the ***Wavinya Ndeti case*** that stated that the language and tenor of Section 85 of the Elections Act were couched in mandatory terms and therefore the court would not need to reinvent the wheel as pertains filing of notices of appeal and record of appeal within 30days from the date of delivery of judgment.

Adam v Jiir & 3 others

(Election Petition Appeal E008 of 2023)

In the Court of Appeal at Nairobi

D. K. Musinga, (P), H. A. Omondi, G.W Ngenye-Macharia

24 July 2023

Summary of the Facts

The Appellant herein Hassan Mohammed Adam was contesting the Wajir gubernatorial seat against the 1st Respondent Ahmed Abdullahi Jiir and Ahmed Mohammed Abdi as the 2nd Respondent was contesting the deputy governor seat. The Appellant was aggrieved by the outcome of the announcement by the returning officer the 4th Respondent and therefore filed a petition on 9 September 2022 to the trial court.

The Appellant alleged several irregularities and illegalities including intimidation and misinformation of voters, gross discrepancies in the statutory forms, improper tallying and tabulation of results, failure to deploy KIEMS kits and inflation of vote numbers through the use of supervisor method of voter identification.

He sought an order of scrutiny and recount seeking that the results declared by the returning officer be annulled and a fresh election be conducted. In response the 3rd and 4th Respondents denied the allegations stating that elections were backed up by an elaborate

electoral management system in compliance with the election laws, ensuring that all system safeguards were in place. The trial court proceeded to dismiss the petition and upheld the election of the 1st and 2nd Respondent.

Aggrieved with the determination of the trial court, the Appellant filed the appeal through its advocates Sallah and Company advocates on grounds that the gubernatorial elections were not conducted in accordance with the Constitution, or the requisite election laws and regulations, as there were several breaches of the law, which fatally affected the integrity of the election, and the trial court was in error in its findings.

Before the appeal could be heard, preliminary objections were raised on points of law raising preliminary issues on the Jurisdiction based on the notice of appeal that was fatally flawed and incompetent therefore triggering the jurisdiction of the court.

It was pointed out that the notice of appeal filed did not comply with the provisions of rule 6(1) of the Court of Appeal (Election Petition) Rules, 2017, which requires that all appeals be initiated by way of a notice of appeal, and rule 6(2) which requires that an appeal be lodged within seven (7) days of the contested decision.

The position was supported by the 3rd and 4th Respondents who stated that a notice of appeal is a jurisdiction prerequisite which should contain all supportive information of the appeal. All Respondents held the same opinion that the notice of appeal was wanting in form and content and could therefore never be redeemed in exercising any manner of excuse.

The Respondents urged the appellate court to find that the notice of appeal offended the provisions of rule 6 of the Election Petitions Rules, and was thus null, void and incapable of initiating any appeal. They further contended that a notice of appeal was fundamental, and where it was defective, no appeal could be founded on it.

In rebuttal, the Appellant stated that the preliminary issues were not well founded as they were presented very late in the day. Secondly, the applications were not made formally as contemplated under rule 19 of the Court of Appeal Election Rules 2017, since any objection raised on the appeal must be done within seven days. Thus, a party is precluded from raising the issue late in the day.

In support of the points raised earlier, the Appellant's counsel argued that while a notice of appeal was attached to the replying affidavit on pages 1532–1533, it had not been included in the record of appeal as required. Despite the lack of precision in drafting, counsel maintained that a valid notice of appeal was before the court, with the only shortcoming being its failure to be formally presented.

It was also argued that the contents of the notice of appeal did not need to be more detailed than what was contained in the impugned notice of appeal, as in this instance, the appeal was against the whole decision,

and not part of it. Thus, there was no need to set out what aspects of the judgment was challenged. Further, any election court when dealing with election petitions, need not read the rules in isolation, and could easily fall back to the Civil Procedure Rules when it is necessary to do so.

Issues for Determination

1. Whether the Appellate Court had jurisdiction to determine the preliminary objection in light of the argument by the appellant's counsel that it had not been brought through a formal application, and is being raised too late in the day, thereby offending the provisions of the rule 17,

2. Whether the notice of appeal as filed at pages 1532 -1532 of the record of appeal was competent and whether the Court had the jurisdiction to extend the time for filing a notice of appeal in this matter.

Decision of the Court

On the first issue as to whether the court had jurisdiction to determine the preliminary objection in light of the arguments by the Appellant's Counsel, the court relied on the renowned case of Mukisa Biscuit that spelt out that a preliminary objection raised must be on a pure point of law and it goes to the root of the matter which was dispensed with first.

Therefore, the court, in answering whether it had jurisdiction to entertain the preliminary objection, affirmed its jurisdiction proceeding to the next issue of determination.

On whether the notice of appeal as filed at pages 1532 -1532 of the record of appeal was competent and whether the Court had the jurisdiction to extend the time for filing a notice of appeal, the court restated the provision in rule 6 that every appeal to the court of appeal was to be initiated by way of a notice of appeal.

Underscored in the case of ***Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others [2014] eKLR,*** the court stated that a notice of appeal is a primary document that ought to be filed outright, whether the subject matter requires leave or not and that it was a jurisdictional prerequisite.

The issue on filing of notice of appeal was stamped with authority that dictates that notices of appeal act as conduits of information to the other litigants supplying them with details of where the successful litigant is informed that the enjoyment of the judgement may be delayed or cut short. The Supreme Court also in the case of ***IEBC vs. Jane Cheperenger & 2 Others*** **[2015] eKLR** emphasized that without filing a notice of appeal there can be no expressed intention to appeal.

Further Rule 8 sets out what constitutes a record of appeal, among them being the notice of appeal, see rule 8(1) (i); whilst sub-rule (5) provides that the record of appeal must be filed within 30 days, This means that since the impugned judgment was delivered on 3 March 2023, in this instance the record of appeal should have been filed by 3 April 2023.

The court further augmented that it was

apparent that the notice of appeal presented by the Appellant subsumed what would ordinarily be a memorandum of appeal, thus, the requirements in form and content of what is required in a notice of appeal are provided under the rule 6(3) of the rules and could not be cushioned either by the general interpretation rules of the court of appeal rules election petition rules 4(2).

That in defining what is part and parcel of a record of appeal, rule 8 provides that a notice of appeal should be set out in the record of appeal, which was the case herein although there were two sets of notice of appeals. One was filed at the Garissa High Court and the other was filed on 10 March 2023 at the Court of Appeal and paid for at the registry. The same was only annexed to the petition as annexure Ex HMI but never formed part of the record of appeal.

In interpreting the non-compliance under rule 6 and the reliefs under rule 5 to balance the act of the court's discretion vis-à-vis the provision in the Constitution in article 159(2), the court proceeded to state that it would need to incorporate the need of timelines as well as applying oxygen principles on a case by case basis merited to the unique circumstances.

In an attempt to apply the balancing act approach, the court remarked that even in the event leave was granted for a supplementary record of appeal to incorporate the requirements of rule 6(3) in the amended notice of appeal, the same would not portray a balance of the interests of the parties as they would be allowing undue advantage to one party to fill in the gaps pointed out by the adversary.

Therefore, in making a finding, the court determined that the Appellant used Article 159 (2) to cure an already defective notice, and it would therefore in no way reinvent the wheel where the directions were so clear under rule 6. The upshot was that the preliminary objection was upheld.

Ochele v Ojuki & 2 others; IEBC (Interested Party)

Civil Appeal No. E037 of 2022

High Court of Kenya at Kisumu

J Kamau, J

13 July 2022

Summary of the Facts

This matter is related to ODM nomination for the position of Member of County Assembly for East Kano/Wawidhi Ward. This matter was coming up for ruling on an application. 1st Respondent's Notice of Motion application that was dated June 15, 2022, and filed on June 16 2022 was for contempt of court. It was alleged that the ODM and its Elections Board were in contempt for not complying with the judgment of the court on May 27, 2022. The Court had, through this judgment, directed ODM and its Elections Board to conduct fresh nominations

by way of universal suffrage within seventy-two (72) hours from the date of the Judgment. In the alternative, they were directed to adopt any of the nomination methods set out in Rule 8 of the Orange Democratic Movement Party Primaries Election Rules as approved by the National Executive Committee held on February 12, 2021, with the consent of all the candidates who would be participating in the fresh nominations for East Kano/Wawidhi Ward.

Issue for determination

The court determined whether the 2nd and 3rd Respondents were guilty of contempt.

Decision of the Court

The Court noted that the court order of 27th May 2022 was self-regulating. The Court found that the 2nd and 3rd Respondents did not comply with the self-regulating court order. Instead, the Court observed that ODM and its Elections Board deliberately and intentionally disobeyed its court order and/or circumvented the court's orders to issue the Appellant a direct ticket to lock out the 1st Respondent, an action that infringed on the 1st Respondent's fundamental and constitutional rights. However, the Court did not take further action since the Court observed that the 1st Respondent's Notice of Motion was defective, and incompetent having been filed by a counsel who was not properly on record.

Failure to file a response on time and to deposit security for costs within 10 days

James Babira Ndeda v. IEBC & 2 Others

Election Petition No. E001 of 2022

High Court of Kenya at Vihiga

JR Karanjah, J

2nd November 2022

Summary of the Facts

The Petitioner (James Ndeda) contested the senatorial election results for Vihiga County, where the 3rd Respondent (Godfrey Osotsi) was declared the winner with 62,798 votes against the Petitioner's 25,406 votes. He filed the election petition alleging irregularities and illegalities in the election process and requested the court to declare the election invalid.

The Respondents opposed the petition and filed an application to strike out the petition. They argued that the petition was served outside the 15 days mandated by Section 76(1)(a) of the Elections Act and that the Petitioner had failed to deposit the required security for costs within the 10 days as stipulated by Section 78(1) of the Elections Act.

Issues for Determination

1. Whether the petition was served within the prescribed 15-day period after filing, as required by Section 76(1)(a) of the Elections Act.

2. Whether the Petitioner deposited the

requisite security for costs within the prescribed 10-day period after filing the petition, as mandated by Section 78(1) of the Elections Act.

3. Whether the non-compliance with these statutory requirements rendered the petition invalid and beyond the jurisdiction of the court to hear and determine.

Decision of the Court

The Court found that the Petitioner served the petition on the 3rd Respondent 25 days after filing, which was beyond the 15-day limit prescribed by law. This non-compliance was not a mere procedural technicality but a substantial infraction that affected the validity of the petition.

The Court stated that the Petitioner failed to deposit the required security for costs within the stipulated 10-day period and did not seek an extension of time to do so formally. This failure further compounded the procedural deficiencies of the petition.

The Court emphasized the importance of strict adherence to the timelines set out in the Elections Act, considering them fundamental to the electoral process. Given the Petitioner's failure to comply with these mandatory requirements, the court held that it lacked the jurisdiction to hear the petition.

In Conclusion, the Court struck out the petition for non-compliance with the mandatory statutory requirements regarding the service of the petition and the deposit of security for costs. The court also awarded costs to the Respondents, capping them at KShs. 500,000/- for the 3rd Respondent and KShs. 300,000/- for both the 1st and 2nd Respondents.

Cross-reference: For similar jurisprudence on the issue of service of the Petition, see also the decision in the case of *Moturi v Geni & another.*

Ondiek v Omar & Another

Civil Appeal 73 of 2022

High Court of Kenya at Mombasa

OA Sewe, J

6th June 2022

Summary of the Facts

The Appellant was declared an ODM candidate for the Kongowea during the nomination of a ward member of the County Assembly. He was issued with an interim certificate of nomination. 1st Respondent challenged the nomination at the ODM Appeals Tribunal and PPDT. He claimed that PPDT revoked his certificate of nomination without giving him a chance to be heard. He also claimed that he was not served with the pleadings before the ODM Tribunal and PPDT which is why he did not file a response or appear for the hearing of the matter.

The 1st Respondent submitted that he served

the Appellant the pleading before PPDT and ODM Appeals Tribunal, but he ignored them and neither filed responses nor appeared for the hearing of the matter.

Issues for Determination

1. Whether the appellant (Kelvin Ondiek) was condemned unheard
2. Whether PPDT erred in invalidating the nomination of the Appellant.

Decision of the Court

The Court found that the Appellant was given a fair hearing. He had an opportunity under the rules of procedure to present and argue his case at the ODM Appeals Tribunal and PPDT. The Appellant had the opportunity to take advantage of and fully exhaust the dispute resolution mechanisms provided for under the internal party structures of the ODM party as well as under the Political Parties Act before approaching the Court for relief. In both instances, the Appellant was served but he neither filed a response nor appeared for the hearing of the matter. He ignored service from ODM Appeals Tribunals and PPDT to appear and prosecute/defend his case.

The Court stated that the decision of PPDT to invalidate the Appellant's nomination was proper because it was enforcing the decision of the ODM Appeals Tribunal which had not been set aside or reviewed. Therefore, the Court found no merit in the appeal and dismissed it with an order that each party shall bear its own costs of the appeal.

4.2.3 Law on witness evidence and admissibility

Kelly Barasa Walubengo v IEBC and 2 Others

Election Petition No. E002 of 2022

High Court of Kenya at Bungoma

W Musyoka, J

24th November 2022

Summary of the Facts

This matter is related to the election to the office of the member of the National Assembly for Webuye Constituency. The Petitioners' Witness statements were not served together with the petition and were only served on the night before the hearing of the Petition when the witnesses were to take the stand. The Respondent's Counsel informed the court that the Petitioner had not served him with the witness statements until the day of the hearing. The Petitioner Counsel asserted that the Respondent's Counsel was aware of the witness statements and that he had not only cross-examined his witnesses on them but also cross-referenced them in their response.

Issues for Determination

1. What is the law on witness evidence through affidavits?

2. Whether and how the court should allow for witness accounts instead of affidavits.

Decision of the Court

The Court observed that the law on witness evidence is Rule 12 of the Elections (Parliamentary and County Elections) Petitions. The Court noted that the law requires that any person intended to be called as a witness by the Petitioner, ought to swear an affidavit, which is then filed together with the petition and served thereafter together with the petition.

The Court also observed that it has discretion to allow for the taking of witness statements instead of an affidavit. However, the Court noted that for the discretion to be exercised, leave of court is required, and sufficient cause ought to be shown.

In the end, the Court noted that time is of the essence and the constitutional provisions cannot be used to cure the procedural defect. As such, there was no sufficient cause to allow the two witnesses to testify.

Kelly Barasa Walubengo v IEBC and 2 Others

Election Petition No. E002 of 2022

High Court of Kenya at Bungoma

W Musyoka, J

31st October 2022

Summary of the Facts

After the pre-trial conference in the election petition, there were two applications filed before the Court. One was dated September 12, 2022. The other was dated October 8, 2022. The application dated 12 September 2022 was in respect of scrutiny and recount of votes. The Petitioner sought to access biometric devices used for election and information on the elections. The ground for the application was that the Respondents colluded leading to the conduct of an election which was marred by irregularities (in the sealing of ballot boxes), anomalies (per the polling station diaries) and discrepancies (between forms 35A and 35B IN 18 polling stations), and that there were instances of illegality, criminal negligence, electoral fraud, bribery, threats of violence and intimidation such that it was impossible to tell who won the election.

The application dated 8 October 2022 application sought to compel some 18 witnesses to attend. The Petitioner sought that the attendance and witness accounts of those who included police commanders, poll officials, and the managing director of a hotel

within Webuye were critical to address the issues raised in the petition.

The Respondents defended the applications for recount stating there was no evidence that illegible voters voted or voters who were eligible to vote were denied the right to vote. They further noted that the recount was not a good relief as it was not sought before the results were declared. It has not been demonstrated that the anomalies cannot be explained by other means than by recounting. The Respondents also defended the applications for summoning of witnesses noting that the application was brought under non-existent provisions of the law. Further, they noted the application was commissioned by an Advocate who did not hold a practising certificate as of the date of the commissioning.

Issues for Determination

1. Whether the matter should be disposed of on the technicalities of being based on non-existent law.

2. Whether the matter should be disposed of on the technicalities of being commissioned by an Advocate who has not taken out a practising certificate.

3. Whether the application dated 12th September 2022 application met the threshold for scrutiny of the election technology.

4. Whether the Court could issue summons for the 18 witnesses.

5. What is the propriety of Mr. Nyaribo Advocate appearing in this matter for the Petitioner?

6. Whether there was proof of payment of security for costs and what was the implication for failure to pay the security within the timelines.

Decision of the Court

The Court noted that the defence that the application for summons is brought under non-existent provisions of the law was cured by Article 159 of the Constitution. The Court took the view that the technicality that the oaths as commissioned by an Advocate who has not taken out a practicing certificate were again cured by Article 159. The Court went on to explain that the failure to obtain a current practicing certificate does not mean that the Advocate is in the same position as an Advocate who has been deregistered or removed from the Roll of Advocates. The Court reasoned that such an Advocate remains an Advocate. The Court explained further that the taking out of a certificate to practice is seen as having more to do with taxation than anything else. Similarly, going by the same principle, it ought not to affect the commission to administer oaths.

The Court considered the substance of the application dated 12 September 2022 application. The Court considered the prevailing case law and noted that the Election courts have the discretion to grant scrutiny upon application provided there is evidence (at

the close of oral hearings) that is restricted to certain polling stations with numerous errors. The Court noted that the application should not be used to aid a fishing expedition. As the matter was still at the interlocutory stage, the Court entertained the matter and directed that the issue of scrutiny of the electoral materials be revisited and considered after the close of the oral hearings.

The Court noted that an applicant who seeks a witness to be summoned must lay a factual basis. In this case, there was no basis laid for the summoning of the Managing Director of Downhill Springs Hotel, Webuye. For the rest of the police officers and presiding officers, the Court observed that the Petitioner ought to lay the primary case first through oral hearings. Afterwards, the Court reserves the power to summon witnesses at any point of the proceedings should that become necessary.

The Court observed that Rule 8 of the Advocates (Practice) Rules requires that an Advocate who has reason to believe that he may be required to give evidence should not appear before the court or tribunal. In this case, Nyaribo Advocate commissioned the Affidavits long before he was instructed to lead Counsel in the matter where he would lead evidence on the affidavits which he commissioned. The Court affirmed that being in the double situation could be potentially embarrassing and cause a conflict of interest. The Court noted that in such cases, the right to legal representation by an Advocate of one's choice would be subject to professional rules and ethics and other considerations, developed for the maintenance of good order and discipline within the legal profession, and with respect to practice and conduct in court. Such considerations include where there is a conflict of interest and others. As such, the Court decided that Mr. Nyaribo should not, and shall not, continue to represent the Petitioner in this matter.

The Court noted that though the judicial schools of thought are divided on the impact of failure to pay security for costs, the predominant and correct interpretation is that such is a matter of procedure, and, therefore, there should be discretion for the court to extend the time for compliance. The Court directed the Petitioner to make the deposit or provide proof of having made the deposit, by the date assigned for the oral hearings, scheduled to commence on November 15, 2022, otherwise, they said oral hearings shall not happen.

In the end, the Court dismissed the technical weakness in the filing of the applications. The Court reserved the application for scrutiny until after the oral hearings. The Court found that the application in respect of the Managing Director is not warranted. The remaining ones are subject to the Court's power after the Petitioner's primary case has been laid out in the oral hearings. Furthermore, the Court ordered that Mr. Nyaribo Advocate shall cease to act for the Petitioner. The Court ordered that costs shall be in the cause.

4.2.4 Admissibility of evidence in election petitions

Ong'era Rogers Moturi v IEBC and 2 Others

Election Petition No. E001 of 2022

High Court of Kenya at Nyamira

KW Kiarie, J

18th November 2022

Summary of the Facts

The 3rd Respondent (Mogaka Stephen) applied to strike out the election petition because it did not comply with the mandatory provision of Rules 8(1) (c), 12(2) (e), 12(3) and 12(4) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 thereby rendering it both fatal and incurably defective.

The Petitioner (Ong'era Rogers Moturi) opposed the application and argued that the petition complied with Rules 8(1) (c), 12(2) (e), 12(3) and 12(4) of the Elections (Parliamentary and County Elections) Petition Rules, 2017.

Issues for Determination

1. Whether the admissibility of evidence can be addressed at this stage.

2. Whether the Petitioner complied with Rules 8(1) (c), 12(2) (e), 12(3) and 12(4) of the Elections (Parliamentary and County Elections) Petition Rules, 2017.

3. What is the effect of non-compliance?

Decision of the Court

The Court dismissed an application to strike out the petition because failure to state the results of the election is not enough reason to strike out a petition. It stated that procedural infractions that do not cause injustice should not be used to strike out a petition.

Amin Deddy Mohamed Ali v IEBC & 2 Others

Election Petition No. E001 of 2022

High Court of Kenya at Nanyuki

A Mshila, J

1st November 2022

Summary of the Facts

The Petitioner (Amin Deddy Mohamed Ali) applied to the Court seeking leave to file a supplementary affidavit supporting the petition in line with rules 12(9) and 15(1)(h) of the Elections (Parliamentary and County Elections) Petition Rules 2017. He also sought the permission of the court to use any electoral materials as evidence for his case including CCT forage from Sportsman Arms Hotel and the call log data.

The 1st Respondent (IEBC) rejected the application because the evidence was based on hearsay. It also stated that the Petitioner had 28 days to collect evidence and receive testimonies from his agents to enable him to

prepare and file a petition in Court. It further stated that the Petitioner requested polling station diaries and KEIMS kit logs. Therefore, asking for supplementary affidavits was an abuse of the Court process that should not be entertained. Further, IEBC submitted that the call log data was private and sensitive and was illegally obtained in violation of a court order and should not form records of the court.

The 3rd Respondent (Kiunjuri Festus Mwangi) rejected the application arguing that allowing the application would amount to granting the Petitioner a blanket leave to introduce further evidence using an affidavit which may be abused.

Issues for Determination

1. Whether the supplementary affidavit in support of the petition should be allowed.

2. Whether the Petitioner should be allowed to use any electoral materials as his evidence.

3. Whether the Petitioner's summary of call log data attached to the affidavit should be expunged.

Decision of the Court

The Court stated that both applications were premature and could not be determined at this stage because they were based on procurement, admissibility and production of new evidence which required the Petitioner to provide a clear basis for them.

4.2.5 Withdrawal of Applications

Tsuma v Katana & Another

Election Petition E002 of 2022

High Court of Kenya at Malindi

J Ngaah, J

16th December 2022

Summary of the Facts

The matter involved two applications. The Petitioner applied for the withdrawal of the election petition because he was unable to raise the security amount to be tendered in court and could not secure the attendance of his witnesses because of threats to their lives and property.

The 1st Respondent applied for the striking out of the petition for filing outside the 28-day limitation period and it was not served to the Respondent.

Issue for Determination

The Court determined whether the applications for withdrawal of the election petition should be granted.

Decision of the Court

The Court stated that Rule 21 of the Elections (Parliamentary of County Election) Petition Rules, 2017 provides for the withdrawal of petitions. Under Rule 21(1), a petition may only be withdrawn with leave of the court.

Amongst the conditions an applicant for withdrawal of a petition must satisfy is that the application for withdrawal must be served to each Respondent and the Petitioner must demonstrate he has published in a newspaper of national circulation a notice of the motion to withdraw.

The Court allowed the application to withdraw the petition because the Petitioner complied with both requirements. He served the application on the Respondents and published the notice of motion to withdraw the petition in a newspaper of national circulation.

4.2.6 Joinder of Deputy Governors as Parties to Petitions Challenging Election of County Governors

Hussein Tuneya v Dhadho Godhana & 2 Others

Election Petition No. E001 of 2022

High Court of Kenya at Garsen

N Mwangi, J

3rd March 2023

Summary of the Facts

The Petitioner (Hussein Tuneya) challenged the gubernatorial election results for Tana River County held on August 9, 2022, and the election of the 1st Respondent (Dhadho Gaddae Godhana) as the governor for Tana River County. He alleged serious irregularities and malpractices that rendered the election unfair and sought a declaration that the election was invalid. He argued that the voting, counting, tallying, and transmission processes were biased and flawed, and requested that the Court nullify the election results and declare him the duly elected Governor.

The 2nd Respondent (IEBC) and 3rd Respondent (County Returning Officer) submitted that the election was conducted in accordance with the Constitution and relevant electoral laws and regulations and denied the allegations in the petition. They prayed that the court would dismiss the petition with costs.

The 1st Respondent denied the allegations in the petition and stated that the election was conducted in a free, fair, peaceful, accurate and transparent manner and free from violence, corruption and intimidation. It was conducted in accordance with the Constitution and relevant election laws. There was no interference with the integrity, credibility and security of the election. Therefore, he was validly elected and declared a winner after proper counting and tallying of votes.

The 1st Respondent further filed an application seeking to strike out the petition on grounds of non-joinder of the Deputy Governor, arguing that the election of the Governor and Deputy Governor are inseparable, and both must be included in the petition. He argued that the absence of the Deputy Governor as a party

violated the principles of natural justice and the right to a fair hearing.

Issues for Determination

1. Whether the failure to include the Deputy Governor as a Respondent in the election petition rendered the petition incurably defective.

2. Whether the 2nd Respondent's employees conducted the election process in compliance with the law.

3. Whether the alleged irregularities and malpractices affected the results of the gubernatorial election.

4. Who should bear the costs of the petition?

Decision of the court

The Court found that the non-joinder of the Deputy Governor was not fatal to the petition. The election of the Governor and Deputy Governor, while intertwined, did not mandate the Deputy Governor's inclusion in the petition unless specific allegations were made against him. It, therefore, dismissed the application to strike out the petition.

The Court held that the Respondents demonstrated compliance with electoral laws and procedures, and any minor errors did not significantly impact the election results. It stated that the Petitioner failed to provide sufficient evidence that the alleged irregularities and malpractices were of such magnitude to affect the overall outcome of the election. Thus, the Court dismissed the petition.

The Court observed that since the costs follow the event, the Petitioner and IEBC shall pay the 1st Respondent KShs. 2,000,000 and KShs. 3,000,000 respectively as costs for the petition.

Note: 1. A similar finding was made by the High Court in Mombasa in ***Dziwe Pala Zuma & Another v The Election Boundaries Commission & 2 Others*** **[2023] eKLR.**

2. However, the Court of Appeal has now ruled in ***Mutula Kilonzo Jr v IEBC & 2 Others*** **Election Petition Appeal No. E002 of 2022** that failure to join a deputy governor is fatal to petition.

4.2.7 Scrutiny

4.2.7.1 Principles guiding application for scrutiny of votes and recount of votes tally

Seth Ambusini Panyako v IEBC and 2 Others

Election Petition No. E001 of 2022

High Court of Kenya at Kakamega

R Ngetich, J

24th February 2023

Summary of the Facts

The Petitioner (Seth Ambusini Panyako) filed a petition to challenge the election of Moses Malulu Injendi (3rd Respondent) as a member of the National Assembly for Malava Constituency. He submitted that the supporters of the 3rd Respondent transported the ballot boxes from polling stations to tallying centres giving them room for ballot stuffing. He also claimed that the 3rd Respondent bribed the poll officials to compromise them. KIEMS kits failed to identify voters in half of the polling stations. There was the forceful ejection of his agents at several polling stations. There was voter bribery and election violence on the voting day. He stated that the names of dead voters were still in the voter register and were allowed to be voted for. He prayed for the nullification of the election results because it was not conducted substantially in accordance with the Constitution and relevant electoral laws.

The 1st Respondent (IEBC) and 2nd Respondent (Constituency Returning Officer) submitted that the election was conducted in accordance with the Constitution and relevant electoral laws and regulations and denied the allegations in the petition. They prayed that the court would dismiss the petition with costs.

The 3rd Respondent denied the allegations in the petition and stated that the election was conducted in a free, fair, peaceful, accurate and transparent manner and free from violence, corruption and intimidation. It was conducted in accordance with the Constitution and relevant election laws. There was no interference with the integrity, credibility and security of the election. Therefore, he was validly elected and declared a winner after proper counting and tallying of votes.

Issues for Determination

1. Whether technological challenge or failure of the KIEMS Kits substantially affected the results of the election.

2. Whether the 2nd and 3rd Respondents engaged in electoral malpractices which interfered with the election process and results.

3. Whether the 3rd Respondent and his agents engaged in violence during and before elections interfered with the results of the election.

4. Whether IEBC complied with the Constitution in delivering a simple, accurate, verifiable accountable and transparent election.

5. Whether the 3rd Respondent was validly elected as a member of the Parliament for Malava Constituency.

6. Whether the Petitioner is entitled to the reliefs sought.

7. Who bears the costs of the petition?

Decision of the Court

The Court stated that the technological challenge or failure of the KIEMS Kits did not affect the results of the election. It also stated that there was no proof of the allegations of electoral irregularities and illegalities that affected the electoral process and results. There was no proof that the 3rd Respondent and his agents were engaged in violence during and before elections which interfered with the results of the election. There was no evidence of any criminal case relating to alleged violence registered in courts dealing with election offences before voting day.

In conclusion, the Court dismissed the petition for lack of merit because the election was conducted and managed substantially in accordance with the Constitution and relevant laws and regulations. There was no evidence to prove the allegation made in the petition of electoral malpractice, fraud and manipulation. The burden of proof is on the Petitioner to show that the election was not conducted in accordance with the Constitution and relevant election laws and regulations. Therefore the 3rd Respondent was validly elected, and the results reflected the will of the people of Malava Constituency.

The Court observed that since the costs follow the event, the Petitioner shall bear the costs of the petition, but the total costs payable should not exceed KShs. 4,000,000.

Bardad Mohamed Farah v IEBC & 2 Others

Election Petition No. E001 of 2022

High Court of Kenya at Garissa

LW Gitari, J

5th January 2023

Summary of the Facts

The Petitioner (Bardad Mohamed Fara) contested the results of the Mandera North Constituency Parliamentary Election held on August 9, 2022. Farah alleged significant electoral malpractices, including manipulation of the KIEMS kits, voter bribery, unauthorized access to election materials, and violence, all of which he claimed affected the integrity of the election. He prayed for the nullification of the election results because it was not conducted substantially in accordance with the Constitution and relevant electoral laws. He also prayed for the scrutiny and recount of votes in specific polling stations.

The 1st Respondent (IEBC) and 2nd Respondent (Constituency Returning Officer) submitted that the election was conducted in accordance with the Constitution and relevant electoral laws and regulations and denied the allegations in the petition. They prayed that the court would dismiss the petition with costs.

The 3rd Respondent denied the allegations in the petition and stated that the election was conducted in a free, fair, peaceful, accurate and transparent manner and free from

violence, corruption and intimidation. It was conducted in accordance with the Constitution and relevant election laws. There was no interference with the integrity, credibility and security of the election. Therefore, he was validly elected and declared a winner after proper counting and tallying of votes.

Issues for Determination

The Court determined whether the Petitioner has laid a basis for this Court to order scrutiny and recount of votes cast in respect to the Mandera North Constituency Parliamentary Election on 9th August 2022.

Decision of the Court

The Court found that the Petitioner had laid a sufficient basis for the scrutiny and recount in specific polling stations due to the detailed allegations and supporting evidence provided. It noted that the irregularities, including KIEMS kit failures and unauthorized manual voting, warranted further investigation through scrutiny to ascertain their impact on the election results. It, therefore, ordered the scrutiny of Forms 32A, 35A, and 35B, polling station diaries, KIEMS kits, and manual registers in the specified polling stations, supervised by the Deputy Registrar.

4.2.7.2 Impact of unpleaded issues revealed during scrutiny

Katatha v IEBC & 2 Others

Election Petition E001 of 2022

High Court at Machakos

RK Limo, J

22nd November 2022

Summary of Facts

Maweu Katatha filed an election Petition seeking to invalidate the IEBC's declaration made on 11th August 2022 that the 2nd Respondent, Lango Guyo, was the duly elected Member of the National Assembly for Kangundo Constituency. The petition cited numerous electoral irregularities and requested scrutiny and recount of votes in specific polling stations, alleging issues such as lack of electricity, ballot stuffing, bribery, harassment, and denial of access to agents. The Petitioner submitted that these irregularities significantly impacted the election results and warranted a recount and scrutiny.

The Respondents opposed the application, arguing that the Petitioner had not established a sufficient basis for such orders. The Respondents also submitted that the Petitioner had failed to plead or provide evidence of the specific election results being contested. They maintained that the election was conducted in compliance with the law and that any allegations of irregularities were unsubstantiated.

Issues for Determination

The Court identified the following issues for determination:

1. Whether the Petitioner established a sufficient basis for the scrutiny and recount of votes in the specified polling stations.

2. Whether the cited irregularities affected the electoral process and the results significantly enough to warrant a recount.

3. Whether the Petitioner's application introduced new grounds not initially pleaded in the petition.

4. Whether the procedural requirements for obtaining a recount and scrutiny were met.

Decision of the Court

The Court found that the Petitioner did not provide sufficient evidence or a clear basis for the requested scrutiny and recount. The Court noted that the Petitioner's allegations were generalized and lacked specific proof of irregularities that would justify the scrutiny or recount.

The court stated that the alleged irregularities, even if true, were not shown to have significantly affected the election results. The Court further noted that the evidence presented by the Petitioner did not demonstrate that the irregularities compromised the integrity of the election to the extent that the results should be invalidated.

The court noted that the Petitioner introduced new allegations in the application. These new grounds were not included in the original petition. The Court deemed such an approach to be procedurally improper and weakened the Petitioner's case.

The Court emphasized that an application for scrutiny or recount must meet the procedural requirements outlined in the Elections Act and relevant case law. After analyzing the law, the Court found that the Petitioner failed to meet these requirements, particularly in establishing the two criteria which require the establishment of prima facie case as well as providing detailed material facts. In the end, the court dismissed the application for scrutiny and recount, finding that the Petitioner had not established a sufficient basis for such orders.

Note: Where an application for scrutiny is granted, the applicant cannot rely on unpleaded irregularities revealed during scrutiny to bolster the petition. For this position, see the Court of Appeal decisions in ***Garama v Karisa & 3 others*** **Malindi Election Petition Appeal 1 of 2023; and** ***Abdikadir Hussein Mohammed v Abass Ibrahim Kafow & 3 Others*** **Nairobi Election Petition Appeal No E004 of 2023.**

4.2.7.3 Guidance on grant of declaration of winners upon recount exercise

Mochumbe Jackson Mogusu v Nyaribo Dennis Kebaso and 4 Others

Election Petition Appeal No. E 006 of 2023 (as Consolidated with Petition Appeal No. E 007 of 2023)

High Court of Kenya at Nyamira

HK Chemitei, J

16th July 2023

Summary of the Facts

This appeal case hinges on the recount and scrutiny of the Nyansiongo DOK primary school stream 1 vote and the impacts it had on the election of the Member of County Assembly for Nyansiongo Ward.

This Appeal was consolidated with a cross-appeal in *Nyaribo Dennis Kebaso versus Mochumbe Jackson Mogusu and 4 Others*, Election Petition Appeal E 007 of 2023. The cross-appeals arose from the Lower court decision in Election Petition No. E001 of 2022 (Mochumbe Jackson Mogusu versus Nyaribo Dennis Kebaso and Others) at Keroka Principal Magistrates Court. This lower court matter primarily sought to invalidate the election of Nyaribo Dennis Kebaso as the Ward representative of Nyansiongo ward. The Lower Court ordered scrutiny of the votes cast in the Nyansiongo DOK primary school stream 1, allowed the Petition, ordered a fresh election for Nyansiongo Ward and capped the costs of the petition at KShs 400,000.

Appeal No. E006 by Mochumbe Jackson Mogusu challenged the proceedings in the Lower Court. The Appellant alleged that he attained the highest number of votes during the recount and ought to have been declared the winner. He mentioned that the only challenge was with Nyansiongo DOK primary school polling station otherwise the voting was free and fair in other areas. IEBC filed a cross-appeal in this appeal pleading that the entire Lower Court judgement be set aside, and the appeal be dismissed with costs. In Appeal No. 007 Nyaribo Dennis Kebaso, challenged the nullification of the election results based on the insufficiency of evidence and the analysis of facts and issues as well as interpretation of law by the Lower court. Consequently, the Petitioner asked that the judgment be set aside.

Issues for Determination

1. Whether the appellant having obtained the highest number of votes in the recount exercise was entitled to be declared the winner of the impugned elections.

2. Who is to bear the costs of the matter?

Decision of the Court

The Court stated that the results in form 36A were altered to 2792 instead of 2497. The said alteration affected the election results. This means the results were not conclusive. The

Court further noted that based on sections 75(3) and 80(4) of the Elections Act, it was appropriate for the trial court not to grant the 1st Respondent the orders declaring him the outright winner after the scrutiny. On this matter, the Court observed that invoking the sections should be used very sparingly where the issues are clear and no traces of illegality. In this case, there was an alteration of a statutory form for which nobody claimed responsibility. Other fringe candidates may be innocent of the matter and the best way to address it is to order a fresh election as directed by the trial court.

The Court observed that it had discretion to decide on the issue of costs. The purpose of costs is retributive. In this case, there was no certainty as to who caused the alteration of the form 36A, neither of the parties has been found culpable. It is, therefore, fair to order each party to pay costs.

In the end, the Court dismissed the consolidated appeals with no order as to costs. The Court also allowed the trial judgment save that it substituted the decision on costs with an order that each party bear its own costs.

Abdikadir Hussein Mohammed v Abass Ibrahim Kafow & 3 Others

Election Petition Appeal No 004 of 2023

Court of Appeal at Nairobi

M'Inoti, Omondi & Ngenye, JJ.A.

25th August 2023

Summary of Facts

On August 11, 2022, Farah Ibrahim, the Returning Officer, declared Abdikadir Hussein Mohammed the winner of the Lagdera Constituency seat, having garnered 5,929 votes against his closest rival's 4,880 votes. Abbas Ibrahim Kafow and Mohammed Ibrahim Sugow, registered voters in the constituency, filed a petition challenging the election results. They sought to invalidate Mohammed's election, calling for fresh elections and a scrutiny of votes. Their petition alleged various irregularities including violence, voter intimidation, vote stuffing, and improper assisted voting.

The Petitioners claimed that UDA party agents were assaulted and ejected from polling stations, particularly at Afweyn Primary School Polling Centre. They also alleged that illiterate voters who needed assistance had their votes marked for Mohammed against their will. The Independent Electoral and Boundaries Commission (IEBC) and Farah Ibrahim, the Returning Officer, denied these allegations. They explained that two individuals were ejected from a polling station due to constant interruption and a fistfight, which led to a brief suspension of voting. They maintained that the election was free and fair.

The High Court judge found some merit in the Petitioners' claims, particularly regarding the failure to properly store election materials at Benane Polling Station. The court ordered the disregarding of results from this station and found discrepancies in voter numbers revealed

by scrutiny and recount. Consequently, the court voided the election results. The IEBC and Farah Ibrahim appealed this decision, arguing that the High Court had expanded the scope of the original petition and considered issues that were not originally pleaded, particularly regarding discrepancies revealed by the scrutiny of KIEMS kits.

The Respondents, on the other hand, contend that the trial judge properly addressed all the issues raised in their petition. They argue that the judge carefully evaluated and analysed the evidence presented, and identified and applied relevant laws and precedents from other election petitions before reaching her decision.

The Respondents assert that they presented sufficient evidence to warrant the scrutiny ordered by the court. They reject the appellants' suggestion that the trial judge went beyond the pleadings and evidence presented. Instead, they argue that an election court should be flexible in its approach to conducting inquiries, in line with Article 259(1) of the Constitution and Section 80(1) of the Elections Act, which requires courts to administer substantive justice.

To support their position, the Respondents cite the case of ***Evans Odhiambo Kidero v Ferdinand Ndungu Waititu & 4 Others* [2014] eKLR**. In this case, the Supreme Court held that parties can be allowed to pose questions on a scrutiny report where new irregularities emerge, and that the IEBC would have the opportunity to explain the cause and effect of those irregularities.

The Respondents argue that the scrutiny was not an ambush, as each party had an opportunity to submit to it. They maintain that the detection of variance between the number of voters identified by the KIEMS Kit, and the number of votes cast was sufficiently cogent and factual to warrant nullifying the election.

Regarding the scrutiny report, the Respondents assert that it was shared with all parties, who then had the opportunity to respond to its contents. They highlight that the scrutiny revealed missing counterfoils at Benane 1 and 2 polling stations and discrepancies between identified voters and votes cast, which they argue were not challenged by the appellants.

Issues for Determination

1. Whether there were any illegalities or irregularities and if so, whether they affected the results and/or validity of said election.

2. Whether the election of the member of the National Assembly for Lagdera was conducted in accordance with the Constitution and electoral laws.

3. Costs.

Decision of the Court

The Court of Appeal noted that the arguments, submissions, and case law referenced in this appeal (E010 of 2023) mirror those in Election Petition Appeal No. E004 of 2023.

The Court decided it would be inefficient to repeat the same issues and arguments they had already addressed in E004 of 2023. They concluded by saying: *"Suffice it to say that the decision in Election Petition Appeal No. E004 of 2023 applies in this matter mutatis mutandis."*

This means that the Court applied the same decision from Appeal No. E004 of 2023 to this case (E010 of 2023), with necessary changes. The Court appeared to have found the issues in both appeals so similar that they felt it unnecessary to provide a separate detailed ruling for this case, instead referring to their decision in the related appeal.

In the case referred to, the trial court stated that the issues for determination were closely meted and therefore the court looked into, the scope of pleadings, all essential facts must be presented to support their case. Pleadings are critical for enabling each side to prepare for potential questions and to submit relevant evidence for the court's evaluation.

Consequently, it is inappropriate for a court to frame issues that do not arise from the pleadings, as this would compromise the fairness and integrity of the judicial process. The court therefore set out that, a court shouldn't frame an issue not arising on the pleadings.

Garama v Karisa & 3 Others Election Petition Appeal 1 of 2023

Court of Appeal at Malindi

SG Kairu, GV Odunga & JW Lesiit, JJA

28th July 2023

In the 2022 Magarini Constituency election, the Appellant, after winning with 11,946 votes, was declared a Member of the National Assembly. However, the 1st Respondent, who lost by 21 votes, contested the results citing irregularities. The High Court, after hearing 35 witnesses, found significant errors and nullified the election on 3 March 2023. A by-election was ordered.

The Appellant appealed, arguing that the High Court lowered the standard of proof, misinterpreted laws, and allowed petition amendments outside the legal timeframe. They also contended that the judge improperly ordered a vote recount and scrutiny. The Appellant claimed these irregularities did not significantly affect the election, citing prior cases as precedents.

Simultaneously, the 2nd and 3rd Respondents filed a cross-appeal, challenging the shifting of the burden of proof, the handling of election materials, and the High Court's directive to bear petition costs. They argued that minor errors, like fatigue-induced mistakes, should not invalidate the election, as the overall process was free and fair.

The 1st Respondent maintained that the election process was flawed, providing evidence of vote tampering and procedural violations, and argued that the narrow margin and non-compliance with election laws had substantially affected the results. The court revisited these grounds to assess the validity of the appeal.

Issues for determination

1. Whether the election of the MNA for Magarini Constituency was conducted in accordance with the Constitution and the law.

2. Whether there was non-compliance with the Constitution and the law in the conduct of the elections of Magarini Constituency

3. Whether there were election offences committed as alleged.

4. Whether the alleged irregularities affected the results of the election of the MNA for Magarini Constituency

5. What order as to costs?

Decision of the court

The court began by clarifying its jurisdiction in appeals from the High Court sitting as an election court, focusing on Section 85A of the Elections Act, which allows appeals only on matters of law. The Supreme Court's decision in ***Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others*** **[2014] eKLR** identified three elements of law: technical interpretation of Constitutional or statutory provisions, evaluation of evidence on record, and conclusions reached based on the evidence.

The court determined that irregularities occurred at the Mapimo Youth Polytechnic stream 1, where the recount of votes contradicted the legal principle established in the ***Maina Kiai Case***, which affirms that vote counting at the polling station is final. Additionally, the Presiding Officer's failure to comment on alterations and the limited presence of polling agents further compromised the recount. The 2nd Respondent's reliance on internal manuals to justify these actions was dismissed, and it was confirmed that this issue had been pleaded in the petition.

Regarding vote transfers, irregularities were noted at Kinyaule polling station, where the discrepancies between Form 35A and Form 35B were factually established, though the Appellant argued these did not affect the election outcome. The court emphasized the cumulative effect of these irregularities. On the issue of declaring results for Majenjeni instead of Mjanaheri due to human error, the court held that this was not pleaded and could not serve as a ground for nullifying the election.

The court scrutinized Section 83 of the Election Act, considering the conjunctive interpretation of irregularities and non-compliance with the law, as previously discussed in ***Raila Amolo Odinga & another***

***v IEBC & 2 others* [2017] eKLR**. The court concluded that significant non-compliance with Constitutional and electoral laws rendered the election neither free nor fair. The only offence identified was the failure to stamp ballot papers and counterfoils, a finding the court ruled erroneous since the regulation requiring stamping had been repealed by Legal Notice 72 of 2017.

Despite the narrow margin of 21 votes, the court found that the irregularities, including vote-stuffing allegations, significantly influenced the election outcome. The Supreme Court's guidance in ***Raila 2017*** reinforced that elections must adhere to Constitutional principles, and even minor irregularities could justify nullification if they compromised the electorate's perception of fairness. Ultimately, the court upheld the nullification of the election in Magarini Constituency, concluding that it failed to meet Constitutional and legal standards.

The award of costs by the High Court capped at Kshs 1,500,000.00, was upheld, with both the appeal and cross-appeal dismissed, following the precedent in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR**.

4.2.8 Election irregularities, illegalities or malpractices that vitiate election results

Josiah Obegi Mang'era v Joseph Nyarang'o Ondari & 2 Others

Election Petition Appeal No. E002 as consolidated with No. 005 of 2023)

High Court of Kenya at Nyamira

HK Chemitei, J

6th July 2023

Summary of the Facts

The Appellant (Josiah Mang'era) alleged that the election process for the Member of County Assembly for Esise Ward in Nyamira County was marred by irregularities and malpractices that significantly affected the outcome. The Election Court dismissed the initial election petition, prompting Mang'era to file an appeal with the High Court. The Appellant contended that the election was not conducted in accordance with the principles laid down in the Constitution and the electoral laws of Kenya. He argued that there were discrepancies in the voter register, instances of voter bribery and improper tallying of votes. The Respondents, on the other hand, maintained that the election was free, fair, and transparent and that any irregularities were not substantial enough to alter the results of the election

Issues for Determination

1. Whether the election was conducted in accordance with the Constitution and the electoral laws of Kenya.

2. Whether some significant irregularities and malpractices affected the outcome of the election.

3. Whether the election court erred in its procedures and findings when dismissing the initial petition.

4. Whether the appellant provided sufficient evidence to warrant the nullification of the election results.

Decision of the Court

The Court found that there were substantial irregularities, including discrepancies in the voter register and instances of voter bribery, which affected the integrity of the election process. It stated that the irregularities were significant enough to potentially alter the election results, thereby justifying the nullification of the election. The Court noted procedural errors in the way the Election Court handled the initial petition, particularly in its evaluation of evidence and application of the law.

In conclusion, the Court allowed the appeals, set aside the trial court's judgment and declared that Josiah Obegi Mange'ra was validly elected as the Member of the County Assembly for Esise Ward.

Cross-reference: See similar court analysis on the claims of alleged various electoral malpractices and irregularities, including voter bribery, violence, and intimidation, which they claimed affected the integrity and outcome of the election in the Petition challenging the election results for the position of Member of National Assembly for Kitutu Chache South Constituency held on August 9, 2022 in *Job Nyabuto Ongige & Another v IEBC & 2 Others,* Kisii High Court Election petition No. E003 of 2022.

Amos Chege Mugo v IEBC and 2 Others

Election Petition No. 1 of 2022

High Court of Kenya at Nyahururu

J Wakiaga, J

27th January 2023

Summary of the Facts

This is the Petition challenging the results of the election of the Member of National Assembly for Kinangop Constituency in which IEBC declared the 3rd Respondent as a duly elected member of Parliament.

The Petitioner alleged that the election was marred by unlawfulness, corruption, fraudulent activities involving two polling clerks stationed at Bamboo Nursery Polling station who were campaigners of the 3rd Respondents, electoral misconduct of lessening his votes by 100 votes

at a polling station and criminal activities of voter bribery in majority of polling stations by the 3rd Respondent, condoned by the 1st and 2nd Respondent who did not properly verify the poll results in Form 35A, thereby denying the people of Kinangop Constituency their democratic right and will. The Petitioner submitted that though the acts of bribery were not reported, the witness accounts had the evidential weight of proof that they negatively impacted the elections. Consequently, the Petitioner sought the scrutiny and retallying of the votes, a declaration that the elections was null and void and an order for fresh elections.

The 1st and 2nd Respondent opposed the Petition. They noted that the poll error which caused the lessening of votes was inadvertent and did not affect the polling result. They submitted that the Petitioner did not raise cogent evidence to strictly prove the allegations of voter bribery at funerals and on the night before the election day. Furthermore, the IEBC noted that they did not have control over places where the voter bribery allegedly took place. The 3rd Respondent noted that the election was free and fair and there was no evidence of voter bribery which could establish proof beyond reasonable doubt since the witnesses admitted they did not know they were being bribed, and the bribery claims were not reported to authorities.

Issues for Determination

1. Whether the election of a member of National Assembly for Kinangop Constituency was marred by numerous widespread and massive electoral malpractices, irregularities, criminal conduct, voter bribery and corruption.

2. Whether there were irregularities which substantially affected the elections.

3. What is the impact of unpleaded issues.

4. Whether the 3rd Respondent was validly elected.

5. If the court found that there were irregularities of a criminal; nature on the part of the 3rd Respondent, whether the court should make a recommendation to DPP for further investigation and prosecution.

Decision of the Court

The Court considered the witness accounts of what transpired on the 6th, the night of the 8th of August being the eve of the elections and the 9th being the election day. The court considered that the burden of proof in an election petition is upon the Petitioner and the standard of proof is somewhere above the balance of probability but below beyond reasonable doubt, save for where there is an allegation of election offence or criminal conduct where the said burden is then required to be beyond reasonable doubt. The Court noted that the Petitioner pleaded irregularities of a criminal nature and was under the obligation to prove them beyond a reasonable doubt. The Court further noted that with respect to the claims of voter

bribery, section 9 of the Election Offences Act criminalizes voter bribery. Giving and receiving a bribe are both offences under the Bribery Act. The Court noted that the allegations of voter bribery were not proved for reasons that since the allegations were not reported, the accounts of bribery were contradictory, and the agents never bothered to record them in this day and age of smartphones. This was more so because the Petitioner did not witness the bribery and the bribes, if at all, and therefore could not prove that they influenced the voters' choice. The agents also signed the declaration forms without complaining. In the end, the Courts agreed with the Respondents that the allegations of voter bribery were uncorroborated and based on mere suspicion. On the allegation involving two polling clerks stationed at Bamboo Nursery Polling station who were alleged to be campaigners of the 3rd Respondents, the Court noted this was supported by screenshots of the Facebook pages of the clerks. The Court noted, however, that the expert witness who produced the screenshots did not produce a certificate to demonstrate he was an expert envisaged under section 48 of the Evidence Act. Therefore, the Court noted that the electronic evidence was inadmissible considering the polling clerks denied ownership of the accounts.

The Court also considered whether the alleged irregularities substantially affected the elections. The Court observed that the Petitioner only pleaded irregularities on two polling stations, Bara-Inya 2 and Kiambariki 1 where there were errors in transposition of the results from Form 35 A to 35 B. From the evidence on record, there was no allegation that the said errors were deliberate and in favour of any particular candidate. The Court also noted that even if the court were to consider the alleged errors or irregularities in recording the results in Form 35B, the same could not change or affect the declared election results. On the impact of unpleaded issues, the Court only considered that the Petition only raised issues in respect of Bara-Inya 2 and Kiambariki 1 polling stations. More irregularities were raised in the submissions. Though the legal principle is that parties should not travel beyond their pleadings, the court was of the considered opinion that the election petition being inquisitorial in nature, the court may consider the un-pleaded issues if they are relevant to the determination of whether the disputed election was conducted in accordance with the Constitution and the relevant law. That is so because the Constitution places a duty upon the IEBC to conduct an election which is free and fair, simple and verifiable, without shielding the same based on un-pleaded matters.

Consequently, the Court found that the 3rd Respondent was validly elected, in an election which was conducted in conformity to the law and the election reflected the will of the people.

The Court considered that the option of recommending the ODPP for further investigation and prosecution did not apply given the negative finding on the pleading

on electoral offences. The Court further considered section 84 of the Elections Act, timelines and the distance of travel by witnesses and awarded the Respondent's cost to be taxed but capped to a maximum sum of KShs. 2,500, 000). The 1st Respondent, being the constitutional body mandated to conduct the elections and which is funded by the taxpayers was entitled to a cost not exceeding KShs. 500,000. The 3rd Respondent was entitled to costs not exceeding KShs. 2,000,000.

Peter Kung'u Kibathi v IEBC & 2 Others

Election Petition No. E002 of 2022

High Court of Kenya at Kiambu

JN Njagi, J

6 March 2023

Summary of the Facts

The Petitioner (Peter Kung'u Kibathi) filed a petition to challenge the election of Babriel Gathuka Kagombe (3rd Respondent) as a member of the National Assembly for Gatundu South Constituency. He claimed that there was voter bribery inside and outside the polling stations. He stated that the 3rd Respondent campaigned outside the official gazette campaign period. He also intimidated and misled voters. Further, he submitted that the 3rd Respondent influenced, harassed and insulted poll officials at the polling stations and tallying centres. He claimed that his agents were excluded from polling stations and the election forms and materials were mishandled by allowing third parties to access ballot papers, election forms, seals to ballot boxes and other election materials thus affecting the integrity and credibility of the elections. He prayed for the nullification of the election results because it was not conducted substantially in accordance with the Constitution and relevant electoral laws.

The 1st Respondent (IEBC) and 2nd Respondent (Constituency Returning Officer) submitted that the election was conducted in accordance with the Constitution and relevant electoral laws and regulations and denied the allegations in the petition. They prayed that the court would dismiss the petition with costs.

The 3rd Respondent denied the allegations in the petition and stated that the election was conducted in a free, fair, peaceful, accurate and transparent manner and free from violence, corruption and intimidation. They contended that the election was conducted in accordance with the Constitution and relevant election laws, there was no interference with the integrity, credibility and security of the election and that he complied with the Electoral Code of Conduct. Therefore, he was validly elected and declared a winner after proper counting and tallying of votes.

Issues for Determination

1. Whether there were malpractices during the campaign period.

2. Whether there were malpractices during the voting period.

3. Whether there were campaigns in and outside the polling stations on voting day.

4. Whether there were election offences committed.

5. Whether there were irregularities relating to counting, tallying and handling of votes and electoral materials.

6. Whether there was harassment and intimidation of the poll officials.

7. Whether the election was conducted in line with the Constitution and relevant election laws and regulations.

8. Whether the Petitioner was entitled to the reliefs sought.

9. Who should bear the costs of the petition.

Decision of the Court

The Court noted that the printing of photographs of candidates in party colours on the ballot paper did not amount to campaigning at the polling station. The purpose of the photograph was the identification of the candidate. The law has not banned printing of a photo in the party colours on the ballot paper.

The Court found that Regulation 72 of the Election (General) Regulations 2012 was not complied with because the presiding officer did not assist voters in the presence of all agents and no declaration was made in from 32 and the same was not recorded in the polling stations registers.

The Court noted a lack of sufficient evidence to prove voter bribery beyond reasonable doubt as an electoral offence. Further, the Court noted that there was no evidence of harassment of poll officials. No report was made to the police station about this. There was no evidence to prove the mishandling of electoral materials.

In conclusion, the Court held that the election was conducted substantially in accordance with the Constitution and relevant election laws and regulations. The burden of proof is on the Petitioner to show that the election was not conducted in accordance with the Constitution and relevant election laws and regulations. Apart from non-compliance with Regulation 72 of the Election (General) Regulations 2012, there was no evidence of any malpractice during the campaign period and voting day. The counting of ballot papers and tallying was conducted in accordance with the law. There was no harassment of poll officials and agents. The failure to comply with Regulation 72 did not substantially affect the results of the election. It, therefore, dismissed the petition for lack of merit.

The Court observed that since the costs follow the event, the Petitioner could bear the costs of the petition, but the total costs payable should not exceed KShs. 3,000,000.

Paul Kipaa Karembu & Another v IEBC & 4 Others

Election Petition No. E001 of 2022

High Court of Kenya at Kajiado

J Mulwa, J

2 March 2023

Summary of the Facts

The Petitioners (Paul Kipaa Karembu and Hon. Pere Judy Neiyeiyo) filed a petition to challenge the election of Lenku Joseph Jama Ole (3rd Respondent) as governor of Kajiado County. They claimed that their agents were denied entry into the polling stations. They submitted that the 1st Respondent appointed county government staff as poll officials. There was irregular, unprocedural and unlawful assisted voting and manipulation of election results. Further, he claimed there was voter bribery and commission of election offences at polling stations and tallying centres. They prayed for the nullification of the election results because it was not conducted substantially in accordance with the Constitution and relevant electoral laws. They also prayed for scrutiny and recount of ballot papers for 46 polling stations as an interlocutory order.

The 1st Respondent (IEBC) and 2nd Respondent (County Returning Officer for Kajiado County) submitted that the election was conducted in accordance with the Constitution and relevant electoral laws and regulations and denied the allegations in the petition. They stated that the election was free, fair, credible, transparent, accurate and verifiable. They prayed that the court would dismiss the petition with costs.

The 3rd & 4th Respondents denied the allegations in the petition and stated that the election was conducted in accordance with the Constitution and relevant laws. There was no interference with the integrity, credibility and security of the election. Therefore, the 3rd Respondent was validly elected and declared a winner after proper counting and tallying of votes.

Issues for Determination

1. Whether the election was conducted in accordance with the Constitution and election laws.

2. Whether non-compliance with the Constitution and legal requirements substantially affected the validity of the election results.

3. Whether the court should grant the reliefs prayed for by the parties.

4. Who should bear the costs of the petition.

Decision of the Court

The Court noted that no agent was denied access to the polling stations and no sufficient evidence to prove ballot stuffing and unreasonable delay in the transportation of ballot boxes from some polling stations to the tallying centre. There was no evidence to prove irregular, unprocedural and unlawful

assisted voting. It further stated that no law prohibits public officers from being appointed as election officers.

In conclusion, the Court dismissed the petition for lack of merit because the Petitioner failed to discharge their legal and evidential burden of proof that the election was not conducted in accordance with the Constitution and relevant election laws and regulations.

The Court observed that since the costs follow the event, the Petitioner would bear the costs of the petition, but the total costs payable shall be KShs. 3,000,000.

Kenga Stanley Karisa v IEBC & 2 Others

Election Petition No. E001 of 2022

High Court of Kenya at Malindi

A Mabeya, J

3 March 2023

Summary of the Facts

The Appellant (Kenga Stanley Karisa) contested the election results for the Member of National Assembly seat for Magarini Constituency. He filed a petition to challenge the election of the 3rd Respondent (Kombe Harrison Garama) as a member of the National Assembly for Magarini Constituency. The petition was grounded on five main allegations: the denial of the Petitioner's agents accesse to three polling stations, false or inaccurate statutory declaration forms in twelve polling stations, discrepancies in the number of votes cast in six polling stations, vote padding or manipulation in four polling stations, and electoral offences committed by the 1st Respondent's officers during the election. They prayed for the nullification of the election results because it was not conducted substantially in accordance with the Constitution and relevant electoral laws. He also prayed for a recount and scrutiny of ballots in 19 polling stations and the reporting of electoral offences to the Director of Public Prosecutions for action.

The 1st Respondent (IEBC) and 2nd Respondent (Constituency Returning Officer) submitted that the election was conducted in accordance with the Constitution and relevant electoral laws and regulations and denied the allegations in the petition. They stated that the election was free, fair, credible, transparent, accurate and verifiable. They prayed that the court would dismiss the petition with costs.

The 3rd Respondent denied the allegations in the petition and stated that the election was conducted in accordance with the Constitution and relevant laws. He stated that there was no interference with the integrity, credibility and security of the election. He claimed that he was validly elected and declared a winner after proper counting and tallying of votes.

Issues for Determination

1. Whether the election for the Member of National Assembly for Magarini

Constituency was conducted in a free, fair, and credible manner.

2. Whether there were significant irregularities, fraud, or illegalities that affected the election results.

3. Whether the Petitioner's agents were unlawfully denied access to certain polling stations.

4. Whether there were discrepancies and inaccuracies in the statutory declaration forms and vote counts.

5. Whether the Petitioner was entitled to the reliefs sought, including the invalidation of the election, declaration of the Petitioner as the winner, or an order for fresh elections.

Decision of the Court

The Court ordered a recount and scrutiny of the ballots cast in the contested polling stations. It found that there were significant irregularities and errors in the election process, including the denial of access to polling stations for the Petitioner's agents and discrepancies in vote counts. It stated that these irregularities and errors were substantial enough to affect the integrity and outcome of the election. Therefore, the Court invalidated the election of the 3rd Respondent as the Member of the National Assembly for Magarini Constituency.

The Court directed that the findings of electoral offences be reported to the Director of Public Prosecutions for further action.

The Court observed that since the costs follow the event, the Respondents would bear the costs of the petition, but the total costs payable to the Petitioner would be KShs. 1,000,000.

Note: This finding was upheld by the Court of Appeal in ***Garama v Karisa & 3 others*** **Malindi Election Petition Appeal 1 of 2023.**

Getuba & Another v Kibagendi & 2 Others

Election Petition E002 of 2022

High Court of Kenya at Kisii

M Thande, J

28 February 2023

Summary of the Facts

George Getuba and Jared Nyang'ara filed an election Petition contesting the election results of the Member of National Assembly for Bomachoge Borabu Constituency. The Petitioners alleged various electoral malpractices including voter bribery, violence, and undue influence which they argued affected the outcome of the election. They claimed that the election was not conducted in accordance with the Constitution and electoral laws of Kenya and sought a declaration that the election was null and void.

The Respondents denied the allegations and maintained that the election was conducted fairly, transparently, and in accordance with the law. They argued that the Petitioners

had not provided sufficient evidence to substantiate their claims. During the trial, the court examined the evidence presented by both parties, including witness testimonies, affidavits, and documentary evidence. The court considered whether the alleged irregularities and illegalities were substantial enough to have affected the overall outcome of the election.

Issues for Determination

1. Whether the 1st Respondent was validly cleared to contest for the election.

2. Whether the election was conducted in accordance with *the Constitution* and the *Elections Act* 2011 and the Regulations thereunder and whether the 1st Respondent was validly declared as the winner in the election.

3. Who should bear the costs of the Petition?

Decision of the Court

The Court noted that the burden of proof lay with the Petitioners to demonstrate that the alleged malpractices had a significant impact on the election results. The Court held that the claim by the Petitioners that the 1st Respondent was not validly cleared to contest the election in question was hollow and was without merit.

The Court found that the election was generally conducted in accordance with the Constitution and electoral laws of Kenya. The Court observed that while there were some minor irregularities, they were not substantial enough to affect the overall outcome of the election.

The Court ordered that *the* 1st Respondent bear the cost of the Petition while the 2nd and 3rd Respondents shall bear their own costs.

Cross reference: See similar jurisprudence in ***Jude Njomo Kang'ethe v Waithaka & 2 others, Kiambu High Court Election Petition E003 of 2022***

Hassan Mohamed Adam v Ahmed Abdullahi Jiir & 3 Others

Election Petition No. E008 of 2022

High Court of Kenya at Garissa

GA Dulu, J

3 March 2023

Summary of the Facts

This Petition relates to the challenge of the Wajir County Gubernatorial Elections held in August 2022. The Petition alleges that the election was marred with several illegalities and irregularities. These irregularities were: intimidation and misinformation of voters, discrepancies in the statutory forms, improper counting, tallying and tabulation of results; acts of violence, disproportionate turnout of voters, failure to deploy KIEMS Kits in 24 polling stations, alteration of Form 37A, and inflation

of vote numbers through the use of supervisor method of voter identification. The Petitioner sought that the court grant a declaration that the election was not conducted in accordance with electoral laws, setting aside the election of 1st and 2nd Respondents as Governor and Deputy Governor, scrutiny of voting materials, election technology and recount of vote tally in some specified polling stations.

The Respondents (Deputy Governor and Governor) denied all allegations. The IEBC and County Returning Officer also denied allegations insisting the election was done in accordance with the Constitution of Kenya and election laws.

Issues for Determination

1. Whether illegalities and irregularities were committed in the Wajir Gubernatorial elections as alleged and if yes, what the effect was.

2. Whether the Wajir Gubernatorial elections were conducted substantially in accordance with the Constitution and election laws.

3. What orders the court should issue.

Decision of the Court

The Court found that only 1 torn 32A was filled in Arbajahan Primary Sch 2 for supervisor-validated voters. Hence, IEBC did not comply with a requirement of the complementary mechanism that was set out by the binding Court of Appeal ruling in the United Democratic Aliance *case* which outlined the steps about the identification of voters by IEBC. Particularly, the IEBC failed to ensure the supervised election method which required the filling of the form 32A after an alphanumeric search upon failure of KIEMS kits. The Court noted, however, that there was no evidence that there was vote inflation or padding because of the failure to fill form 32A, in the respective polling station. On the failure of KIEMs kits, the Court noted that the failure was alleged in respect of some polling stations that were not mentioned in the Petition. As such, the Court concluded that the Petitioner was travelling outside the pleadings. Consequently, the Court found that the allegation of failure of KIEMs kits in five polling stations qualified for consideration by the court. In respect of these, the totality of the evidence of the Petitioner's witnesses was that some KIEMS Kits had experienced malfunctioning. The Court found, however, that there was no evidence that IEBC failed to use KIEMS Kits in the polling stations. On the alteration of Forms 37A, the Court observed that the forms had alterations which have not been countersigned. The only two forms countersigned were for Lagbogol South Centre and Malka Gufu Primary School 2. The Court noted that the votes count, tally and transmission for the Gubernatorial elections was a manual exercise, unlike the Presidential election. As such, the court agreed that the lack of countersigning was caused by human errors. This was so more because the totality of the evidence was that the total votes from all the

candidates were in agreement with the total number of valid votes cast notwithstanding the lack of countersigning of the forms in the polling stations. Furthermore, the Court noted that no witness said that the tabulation of form 37A in a particular polling station was at variance with what was recorded Form in 37B. On the claim that rejected ballots were not declared in form 37C, the Court noted that the rejected ballots were not counted in favour of the Respondents. Since the rejected ballots counted for nothing, the Court found that the complaint was misplaced and unproven.

Further, on the claim of voter intimidation through acts of violence and misinformation related to the postponement of elections in Eldas Constituency, the Court understood the Petitioner complained that voters in various polling stations in Eldas Constituency was misinformed that a candidate from the Ogaden clan was in the lead and as such, it was important for the Degodia to consolidate their support behind the 1st Respondent. The Court noted that the testimonies on interfaces and improper influence were not credible or adequate and the allegations were not proven beyond reasonable doubt. On the claim of violence from politically motivated attacks and insecurity situations, the Court observed that the security incident that the Petitioner referred to happened about one day before the elections. It also occurred somewhere along the road. The road was a substantial distance from the polling stations, and it did not interfere with the distribution of election materials because the same were airlifted. On the allegation of a disproportionately higher turnout in Wajir West Constituency of 68.6% compared to the national average of 64.5%, the court noted that from the figures, it could not be said that the 1st Respondent got 90% in most polling stations in Wajir West Constituency; otherwise, his overall percentage would not have been 57%. With that, the allegation of ballot stuffing or padding fell by the wayside.

The Court noted that two of the Petitioner's complaints on filling Form 32A and lack of countersigning alternations in Form 37A had been proved. However, the Court had certain reservations. First, the non-compliance caused non-conformity with electoral statutes but not with the Constitution. Second, the people were allowed to vote, and the two illegalities and irregularities committed by the 3rd Respondent did not confer an advantage or a disadvantage on any of the candidates. In those circumstances, the court found that elections were conducted substantially in accordance with the Constitution and election laws, the two illegalities and irregularities notwithstanding.

The court dismissed the petition. The Court then declared that the 1st Respondent and 2nd Respondent were validly elected as the Governor and Deputy Governor of Wajir County. The Court further ordered that the Petitioner should bear the costs of the petition assessed at KShs. 4,000,000 with KShs. 2,000,000 payable to the 1st and 2nd Respondents jointly, and KShs. 2,000,000 payable to the 3rd and 4th Respondents jointly.

Ahmed Boray Arale v IEBC and 4 Others

Election Petition No. E004 of 2022

High Court of Kenya at Garissa

SN Riechi, J

6 March 2023

Summary of the Facts

The Petitioner was nominated to contest for the election of Member of the National Assembly for Eldas Constituency. The Petitioner challenged the recruitment of the presiding and deputy presiding officers as being contrary to the Constitution and Regulation 5 of the Election (General) Regulations and sought the court's intervention to quash it. The Petitioner withdrew the Petition later, prompting IEBC to gazette the names. According to the Petitioner, there was a gentleman's agreement to investigate the issues that were raised in the withdrawn petition. Aggrieved that his input was not considered on the election day, the Petitioner protested, and chaos erupted at the CDF centre. The chaos led to the resignation of the constituency returning officer and the postponement of the constituency elections by a day. In the election, Adan Keynan was elected as the Member of the National Assembly.

The Petitioner challenged the results of the election. The Petitioner alleged that there were scores of violence in some polling stations and at the tallying centre and that an independent tally from all polling stations but two polling stations where violence occurred showed that he was leading. There were also claims of discrepancies in vote tallies for elective positions, variances of votes in polling stations, police intimidation, failure of KIEMs kits, and vote swapping in some two polling stations. The Petitioner sought scrutiny as well as an order invalidating the election of the 5th Respondent as the member of the National Assembly Eldas Constituency as well as an order for recommendation of electoral offences to the ODPP.

The 5th Respondent defended the Petition. The defense submitted that the Petitioner did not challenge the evidence provided in the form of the statistical summary of the KIEMs kit dashboard and the Petitioner's agents did not ask for a recount.

Issues for Determination

1. Whether the election of the member of the National Assembly in Eldas Constituency was substantially in accordance with the principles of the Constitution, and the electoral laws.

2. Whether the Court could grant the order for scrutiny and recount.

3. What order the court should make as to costs.

Decision of the Court

The Court considered the allegation of swapping of results from the Petitioner to the 5th Respondent. It observed that the photocopy of the carbon copy of Form 35A of the two

polling stations that was produced as evidence of vote swapping was produced electronically. However, it was not supported with a certificate under sections 78, 78A, and 106 of the Evidence Act. On the variance of votes between registered voters, authenticated by KIEMs kits, votes cast, the Court found that the errors had been sufficiently explained. In some polling stations, the Court found the claim of variance was misplaced since the votes cast did not exceed the number of registered voters or were explained by the number of rejected voters and the use of multiple KIEMS kits. Further, on the claim that there were no elections in two polling stations, the Court observed that the agents signed the forms and none of them challenged their signatures as fictitious. In some polling stations, it is the registered voters who did not turn up. On police intimidation through brutality to the voters, the Court noted that the police were responding to chaos and were, therefore, executing their constitutional duty. Containing the situation could not be called voter intimidation by any stretch of the imagination. On election offences, the Court noted that the allegation of voter swapping was not proved and as such the claim on the occurrence of electoral offence was not proved. Then on the claim of illegal declaration of results, the Court found there was a reason to change the venue of declaration for reason of the insecurity. In the end, the Court concluded that the election of the member of the National Assembly in Eldas Constituency was substantially in accordance with the principles of the Constitution, and the electoral laws.

The Court further observed that the scrutiny and recount are provided for in Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules. Under Rule 33(4) of the Rules, scrutiny should be done in respect of available voting materials. In this case, the voting materials were burnt at the CDF Hall tallying center and as such the order for scrutiny and recount could not be issued.

The Court capped the costs for the 1st to 4th Respondents at KShs. 1 million and for the 5th Respondent at KShs. 5 million. The Court further ordered the Registrar to tax the Bill of Costs.

Dennis Omwenga Ayiera v Amos Nyaribo Kimwomi

Election Petition No. E002 of 2022

High Court of Kenya at Nyamira

K Kimondo, J

16 February 2023

Summary of the Facts

The Petitioner is the County Elections Manager for the United Democratic Alliance Party for one of the gubernatorial candidates, Walter Osebe Nyambati. The Petitioner challenged the election of Nyaribo Amos Kimwomi and James Gesami as the governor and deputy governor respectively for Nyamira County in the general elections held in August 2022.

The Petitioner challenged the gubernatorial election results based on several grounds. These were: there were differing sets of results declaration forms 37C, results in forms 37C did not tally or correspond with some forms 37A from the polling stations; polling agents were either denied access into the polling stations, were harassed or did not participate in the counting and tallying of results; forms 37A were altered or manipulated by officials of the 4th Respondent, and IEBC employees were biased against other candidates.

The Petitioner sought for the court to intervene by making certain orders. The Petitioner sought an order for scrutiny of all election materials used in the elections; a declaration that the 1st Respondent was not validly elected as governor of Nyamira county; an order for fresh elections; an order that the 3rd Respondent and officers of the 4th Respondents committed electoral malpractices of criminal nature; and costs of the petition.

The Respondents defended the Petition and asserted that the election was free, fair, accurate and verifiable manner and that the malpractices or irregularities alleged by the Petitioner did not substantially affect the results of the election. The IEBC also asserted that they conducted the elections in a manner that was substantially in accordance with the Constitution and the law.

Issues for Determination

1. Whether the gubernatorial election for Nyamira held on 9 August 2022 was conducted in compliance with the Constitution, the Elections Act and Regulations.

2. Whether there were irregularities, illegalities or malpractices in the election.

3. Whether the 1st Respondent was validly elected as the Governor of Nyamira County.

4. Whether the Petitioner was entitled to the reliefs sought in the amended petition; and who would bear the costs of the petition.

Decision of the Court

The Court noted that the 1st and 2nd Respondents failed to lead evidence-in-chief to offer any or sufficient rebuttal to the evidence by the Petitioner. The Court further noted that the Court would have found that the Petitioner had substantially discharged his evidential burden had the matter ended there. The Court noted that IEBC failed to provide ballot boxes of some two polling stations for comparison during the partial scrutiny. However, the claim that there were alterations was not proved to the required standards since the allegation was based on the account of one witness from what he heard from people who were not called as witnesses. It was also based on photographs that were taken at night. The Court considered the unchallenged video evidence of an agent of the UPA party who showed his preferences openly at the county tallying centre. However, the evidence of

publication of the County Assembly was produced at the end of the Petitioner's case and was only marked for identification and was, therefore, of no probative value. As such the issue was not proved. In the same vein, the Petitioner failed to prove beyond reasonable doubt that the 1st and 2nd Respondents used public resources or engaged in corrupt practice in contravention of sections 14 and 15 of the Election Offences Act.

On the alterations, cancellations or overwriting of Forms 37A, the Court observed that the allegation of use of wrong forms was not true. In some cases where the forms were incongruent, the Court noted that it could not be said that the incongruence only affected candidate Walter Nyambati. The Court further observed that the candidates who were present at the counting exercise and had issues had the recourse of requesting for recount of votes. On the grounds of chasing away Nyambati's agents from the polling stations, the Court noted that political party agents can represent non-independent candidates owing to space restrictions at polling stations. In the concerned elections, the UDA party had agents at the polling stations and some of them signed Forms 37A. Furthermore, the Court observed that the claim of harassment of agents was very general and was not proven. On the ground that IEBC stamps on the forms were incongruent and of missing signatures of agents in the forms, the Court was of the view that the lack of an IEBC stamp on Form 37A or the presence of it in an unfamiliar shape was not fatal to the election. The view was supported by the rationale on two bases. One, there was no formal space set out in the form to affix the stamp. Secondly, the IEBC stamp constituted what the Regulations refer to as non-strategic materials.

On signing of agents, the Court noted the matter of missing signatures by agents. The signatures by agents are not mandatory since Regulation 79 (6) and (7) of Election (General) Regulations provide that the absence of an agent or candidate at the time of announcing results does not invalidate it. On transposing results from Form 37A to Form 37C, the Court noted that though there were cases of transpositional errors to Form 37C, the results in the primary Form 37A were unaffected. The arithmetic difference where Nyambati lost a total of 432 votes while the 1st Respondent gained 17 votes. was not so substantial as to affect the results. Though the IEBC County Returning Officer took a casual approach in correcting Form 37C, there was no express Regulation that bared the County Returning Officer from correcting such errors in Form 37C. Furthermore, the Court observed that the results for the candidates in both disputed forms remained the same and the introduced changes related to the total number of voters who turned out to vote, the valid votes cast and the rejected ballots.

In the end, the Court concluded that some of the records of the election in some forms 37A, 37Bs and 37C were inaccurate or tainted by irregularities or malpractices. However, the totality of those anomalies did not substantially

affect the numbers or the outcome of the poll. Considering the errors were arithmetic and the correction of Form 37C was only to correct the figure of total votes cast, the Court found that the claim by the Petitioner that the final form amounted to "reverse engineering" or fraud to reach a pre-determined outcome was not proved to the required standard. The flaws did not substantially affect the results of the elections.

The Court held that on the preponderance of the evidence and the authorities, the 1st and 2nd Respondents were validly elected as the Governor and Deputy Governor for Nyamira County. The Court granted the Respondents the costs of the petition. The Court noted that the amended petition was straightforward and did not raise complex questions of law or evidence. Again, all the evidence was taken within a week and the 1st and 2nd Respondents never took to the stand or called any witness. For these reasons, the Court capped the costs at KShs. 1,000,000 for the 1st and 2nd Respondents. The instruction fees for the 3rd and 4th Respondents are capped at KShs. 2,000,000.

Dr. Evans Odhiambo Kidero & Another v IEBC & 4 Others

Election Petition No. E001 of 2022

High Court of Kenya at Homabay

RE Aburili, J

7 March 2023

Summary of the Facts

The Petitioners (Dr. Evans Odhiambo Kidero and Dr. Elijah Odondi Kodoh) contested for the position of governor and deputy governor for Homabay County respectively in the August 2022 general elections. They filed a petition to challenge the election of Gladys Atieno Nyasuna Wanga (3rd Respondent) and Joseph Oyugi Magwanga (4th Respondent) as the governor and deputy governor of Homabay County respectively. They submitted that the failure of ODM to give them the ticket and instead issue a direct ticket to the 3rd Respondent led to them contesting as independent candidates and losing elections. They claimed that ODM party nominations for gubernatorial candidates were not free and fair. They also claimed that there was violence that led to voter suppression on the voting day. They also claimed that their agents were ejected from polling stations. In addition, they submitted that the 3rd and 4th Respondents violated the Electoral Code of Conduct and committed electoral offences. They further stated that there was an exaggeration of voter turnouts, irregular and unlawful assisted voting, voter padding and ballot stuffing in some polling stations. They prayed for the nullification of the election results because it was not conducted substantially in accordance with the Constitution and relevant electoral laws.

The 1st Respondent (IEBC) and 2nd Respondent (County Returning Officer for Homabay County) submitted that the election was conducted in

accordance with the Constitution and relevant electoral laws and regulations and denied the allegations in the petition. They stated that the election was free, fair, credible, transparent, accurate and verifiable. They also submitted that the court had no jurisdiction to hear and determine pre-election disputes and issues raised in the petition. They prayed that the court would dismiss the petition with costs.

The 3rd and 4th Respondents denied the allegations in the petition and stated that the election was conducted in accordance with the Constitution and relevant laws. They stated that there was no interference with the integrity, credibility and security of the election. They also submitted that the court had no jurisdiction to hear and determine pre-election disputes raised in the petition. They claimed that they were validly elected and declared a winner after proper counting and tallying of votes.

The 5th Respondent (ODM Party) submitted that the Political Parties Act 2011 and the ODM party Constitution allow it to choose the mode of nominating its candidates for various elective positions. The 3rd Respondent was nominated through direct nomination.

Issues for Determination

1. Whether the electronic evidence adduced by the Petitioners was admissible.

2. Whether the 5th Respondent was properly joined to this election petition.

3. Whether the pre-election issues raised by the Petitioners affect the result of the election.

4. Whether there were instances of vote padding and ballot stuffing in the Homabay Gubernatorial elections.

5. Whether there were alterations and cancellations on the statutory electoral forms and whether the same affected the results of the impugned election.

6. Whether there was a failure to sign and stamp the statutory electoral forms and whether the same affected the results of the impugned election.

7. Whether there was unlawful ejection and denial of entry and access of the Petitioners' agents to the polling stations and tallying centres and whether the failure of the Petitioner's agents to sign Forms 37A and the presence of more agents of one candidate than the other affected the results of the impugned election.

8. Whether there was bribery and undue influence in the Homabay gubernatorial election and whether the same affected the results of the election.

9. Whether there was violence, chaos and skirmishes during the Homabay gubernatorial election and whether the same affected the results of the election.

10. Whether the Homabay gubernatorial election was free, fair, credible, transparent and verifiable to meet the principles espoused in the Constitution and legislation.

11. What were the findings of the scrutiny and recount report and whether the findings negated the results of the Homabay gubernatorial election.

12. Whether the 3rd and 4th Respondents were validly elected as governor and deputy governor for Homabay County on the 9th of August 2022 general election.

13. What orders the courts should make.

14. Who should bear the costs of the petition.

Decision of the Court

The Court stated that the electronic evidence adduced by the Petitioners was admissible because it complied with sections 78A and 106B of the Evidence Act which requires such evidence to be produced with a certificate stating the source, process and delivery of the electronic evidence to the Court and parties to enable admission of electronic record as evidence.

The court noted that the 5th Respondent was properly joined to the petition, and it meets the definition of a Respondent in section 2 of the Elections (Parliamentary and County Elections) Petitions Rules 2017. The Petitioners raised issues with the conduct of the party before, during and after the election that were considered in the judgment of the case.

The Court noted that the election court lacked jurisdiction to hear and determine pre-election nomination issues. The Petitioner had not established a link or proved that the pre-election issues which arose during the ODM party primaries nomination process affected the election results. The Court noted that there was not sufficient evidence to prove unlawful assisted voting which led to vote padding and ballot stuffing that affected the results of the election. There was no evidence to prove that the ejection of the party agents affected the results of the election. It also noted that there was no sufficient evidence to prove the offence of vote bribery and undue influence on the required standard beyond reasonable doubt. It further noted that the violence witnessed in a few polling stations did not affect the results of the election.

The Court stated that the alterations and cancellations amounted to administrative irregularities and errors occasioned by human imperfection which were not adequate to vitiate the results of the election. Therefore, insufficient evidence was provided to prove that the alterations and cancellations to statutory forms in some polling stations affected the outcome of the election.

The Court noted that the findings in the scrutiny and recount report did not show irregularities or illegalities of such magnitude that would alter the results of the election. The report was

instrumental in establishing the correctness of the allegations raised by Petitioners on how the election was conducted. It assisted the litigants in disposing of the dispute effectively once the points of contention had been identified and to this extent, it is worth consideration by the Court to the extent that if there was sufficient explanation tendered by the Respondents for the anomalies, the report was enough to lead to the nullification of the elections.

In conclusion, the Court held that the election was conducted in substantial conformity with the Constitution and electoral law. There was not sufficient evidence proving that the irregularities and malpractices alleged met the burden and standard of proof that could lead to the nullification of an election. It, therefore, dismissed the petition for lack of merit. It stated that there were no compelling reasons to issue an order of investigation by the DCI because instances of violence were sporadic and isolated and attributable to none of the Respondents and the cases were reported to the police for investigations and action.

The Court observed that since the costs follow the event, the Petitioners should bear the costs of the petition, but the total costs payable shall be KShs. 3,500,000.

Abdikadir Hussein Mohammed v Abass Ibrahim Kafow & 3 Others

Election Petition Appeal No 004 of 2023

Court of Appeal at Nairobi

M'Inoti, Omondi & Ngenye, JJ.A.

25 August 2023

Summary of the facts

The case revolves around the appellant's declaration as the winner of the Member of National Assembly seat for Lagdera Constituency. Following this declaration, the 1st and 2nd Respondents filed a petition at the High Court of Kenya at Garissa. They sought a scrutiny of votes, the invalidation of the election, and an order for fresh elections. Their petition alleged instances of violence, voter intimidation, vote padding, ballot box stuffing, and the unlawful ejection of polling agents at specific polling stations.

The High Court granted the request for scrutiny and recount, referred to provisions of section 82 (1) of the Elections 9 Act 2011, and regulation 33 of the Elections (Parliamentary and County Elections) Petition Rules 2013, on the right to scrutiny and recount, hence acknowledging that scrutiny did not lie as a matter of course, but the parties applying for scrutiny had specified the information they intended to access from the exercise, and it would assist the court to verify the allegations made by the parties. On the report of scrutiny of votes, it revealed a lot of irregularities particularly the variance between the votes cast as compared to the voters identified by the KIEMS which matters had not been pleaded by the Petitioners, but they were taken into consideration. The judge cited ***Richard Nyagaka Tongi vs. IEBC and 2 Others***

[2013] eKLR that all issues in an election petition which crop up during a hearing, whether pleaded or not, but have a potential of adversely affecting the final result, and the will of the voters in a constituency must come under spotlight, interrogation and scrutiny, hence there was no way the judge could ignore the serious implications of irregularities without appearing to be condoning illegality. The court hence overturned the victory of the appellant.

Aggrieved by the High Court's decision, the appellant filed this appeal, challenging the trial court's findings on several grounds. He argued that the trial court misdirected itself by treating the scrutiny as a fact-finding mission to uncover issues that were neither pleaded nor raised during the trial. The appellant also contended that the trial court selectively allowed scrutiny for particular polling stations while excluding others that had been requested for scrutiny. He further argued that the ballot papers found in the ballot boxes had been verified with the counterfoils during scrutiny, and there was no basis for nullifying the results. Additionally, the appellant maintained that the vote variance of 125 votes was negligible and did not alter the difference between his lead and that of the 1st runner-up. The appellant asserted that the nullification was based on erroneous presumptions, violating the standard of proof and burden of proof. He, therefore, sought the allowance of the appeal and the setting aside of the trial court's judgment.

In response, the 1st and 2nd Respondents opposed the appeal, arguing that the learned judge had properly addressed all the issues raised in the petition. They maintained that the judge had correctly evaluated and analysed the evidence, applying the relevant law and precedents set out in other election petitions. According to the Respondents, the learned judge had properly applied the principles pertaining to burden and standard of proof.

The Respondents further asserted that contrary to the appellant's claims, Articles 38, 81, 82, and 86 of the Constitution, along with various provisions of the Elections Act, had been violated during the conduct of the impugned elections. They argued that these violations had been proven, leading the learned judge to the correct conclusion. The Respondents pointed to the results of the scrutiny exercises, which, in their view, established clear evidence of a serious violation of the principle of free and fair elections under Article 81(e) of the Constitution of Kenya, 2010. They highlighted the missing counterfoils and the voting by persons not identified or verified by the KIEMS Kit as evidence of these violations. The Respondents contended that even a single violation of the Constitution would warrant the automatic nullification of the election.

Issues for Determination

1. Whether the learned trial Judge overstepped the proper scope of the pleadings.

2. Whether the alleged irregularities of such a magnitude as to warrant nullification of election results.

Decision of the court

Whether the learned trial Judge overstepped the proper scope of the pleadings

The court thoroughly examined the role and importance of pleadings in the context of electoral disputes. It emphasized that pleadings are fundamental in setting the parameters of the issues to be determined and ensuring that both parties are fully aware of the matters in contention, allowing them to prepare their responses adequately. This principle is well-supported by the Supreme Court's ruling in ***Lenny Maxwell Kivuti vs. IEBC & 3 Others* [2019] eKLR**, where it was underscored that scrutiny or recount exercises should serve to verify the integrity of the electoral process and not as fishing expeditions to discover new issues or evidence not initially pleaded. The court reiterated that conclusions drawn from such scrutiny must relate directly to the original pleadings to maintain the fairness and integrity of the judicial process.

In the ***Lenny Maxwell Kivuti*** case, the Supreme Court allowed consideration of significant irregularities that surfaced during scrutiny, even though they were not pleaded. However, it also highlighted that such issues should not form the basis of a decision unless they materially impact the election results. This allows for submissions on the content of the scrutiny or recount report, strictly within the scope of the original petition. The court also referred to the case of ***Abdirahman Ibrahim Mohamud vs. Mohamed Ahmed Kolosh & 2 Others***, which supported the view that while a court may consider issues arising from the scrutiny that was not initially pleaded, this had to be done in a manner that did not surprise any party or unfairly disadvantage them, upholding the principles of fairness and transparency.

Moreover, the court referenced ***Jacktone Nyanungo Ranguma vs. IEBC and 2 Others***, which aligned with the Indian Supreme Court's decision in ***Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari and Anor***, emphasizing that no party should exceed their pleadings, and all necessary facts must be presented at the outset. This prevents ambush tactics and ensures a fair trial, where each side can prepare and present evidence relevant to the issues that will be adjudicated. Therefore, the court concluded that it was inappropriate for a trial court to base its decision on issues not specifically pleaded, as this compromised the fairness of the judicial process and violated the principle that parties are bound by their pleadings.

The court further analyzed whether the profile of the pleadings as lodged adequately prepared the 3rd and 4th Respondents to respond to the issues. It was noted that while the 1st and 2nd Respondents in their application did request scrutiny of the KIEMS Kit and the data contained therein, they did not specifically address discrepancies between voter turnout as recorded in Forms 35A and the figures

generated by the KIEMS Kits. This omission left the 3rd and 4th Respondents without a clear invitation to address these discrepancies, effectively limiting their ability to respond adequately.

The court acknowledged that although the irregularities revealed by the scrutiny report were serious, they were not initially pleaded. Given their significant nature, the court reasoned that it would have been more appropriate to notify the adverse parties, allowing them to prepare a response. The court's view was grounded in the understanding that the legal framework governing elections, particularly concerning voter identification, mandates both a primary and a complementary mechanism. Section 44 of the Elections Act establishes an integrated electronic electoral system for biometric voter registration, electronic voter identification, and electronic transmission of results. Specifically, section 44(1) states that the Independent Electoral and Boundaries Commission (IEBC) is required to use technology that is simple, accurate, verifiable, secure, accountable, and transparent. Section 44A further provides for a complementary mechanism for voter identification and transmission of election results, ensuring compliance with Article 38 of the Constitution, which guarantees every citizen the right to free, fair, and regular elections.

In ***United Democratic Alliance Party vs. Kenya Human Rights Commission and 12 Others***, the court affirmed that biometric verification of a voter is the primary method of identifying voters at polling stations. However, it recognized that technology was not infallible and that there are circumstances where the biometric system may fail. The court questioned what should happen when technology failed to identify a voter, inquiring whether the IEBC would be expected to turn them away without recourse. The provision for a complementary mechanism in Section 44A of the Elections Act addresses this concern, ensuring that voters could still be identified and participate in the voting process when the primary method failed.

If these considerations had been explicitly pleaded, they might have clarified why there was a mismatch between the total number of voters and those identified by the KIEMS Kit. This lack of specificity in the pleadings regarding the examination of the KIEMS Kit against the entries in Form 35A led the court to conclude that the trial court erred by allowing the petition based on an issue that was neither pleaded nor raised during the hearing following the scrutiny report. By allowing issues that were not explicitly pleaded to influence the outcome, the trial court failed to provide a fair opportunity for the 3rd and 4th Respondents to address these new matters, resulting in an unjust decision.

Whether the alleged irregularities were of such a magnitude as to warrant nullification of election results

In analyzing whether the alleged irregularities

were significant enough to warrant the nullification of the election results, the court acknowledged that no election could be expected to be completely flawless due to the inherent fallibility and potential for manipulation by human participants. This perspective is underpinned by Section 83 of the Elections Act, which stipulates that an election shall not be declared void due to non-compliance with any written law relating to that election, provided it appears that the election was conducted in accordance with the principles laid down in the Constitution and relevant laws, or that the non-compliance did not affect the election result.

The court referenced various case laws to elucidate this standard. **In *Re Kensington North Parliamentary Elections* [1960] 2 ALL ER 150,** Justice Streatfeild asserted that the election seemed to have been conducted substantially in accordance with the law and that any act or omission did not affect the true result. The court emphasized its role in determining, based on the overall evidence, whether there was substantial compliance with election law or whether any act or omission impacted the election's outcome. Similarly, in ***Mashall vs. Gibson [1995], cited in Fitch vs. Stephenson & Others [2008] ALL E 13 or 008 EWHC, 501 (QB)***, Justice Coleman noted that if a breach of the rule resulted in one or more candidates receiving a different number of votes than recorded in the count, but the same candidate would still have been elected, the results would not have been affected. Consequently, the election could only be declared invalid if it appeared that it had not been conducted substantially in accordance with election law.

The court also noted the importance of the election reflecting the will of the people and emphasized that judicial intervention was warranted only when the electoral process was so flawed that the winner could be clearly determined due to irregularities. If the paper trail enabled the court to discern the voters' intent, the courts should not interfere. The court observed that while the Petitioner's witnesses referred to irregularities, such as violence, changes in polling stations, voter intimidation, and voter assistance, the trial court found no merit in any of the six complaints raised by the 1st and 2nd Respondents. The Respondents also did not raise the issue of the absence of counterfoils at Benane Primary 1 and 2 polling stations or contest the number of votes garnered at those stations. Thus, the court concluded that the electoral process was conducted substantially in accordance with the Constitution and electoral law, and the election could not be invalidated on the grounds that it was conducted so poorly that it could not be recognized as a valid election.

Additionally, the court referred to the Supreme Court decision **in *Gatirau Peter Munya*** , which reiterated that if a recount, re-tally, or scrutiny did not change the final result in terms of the number of votes gained by candidates, the percentage or margin of victory, however narrow, was immaterial in determining the proper outcome of the election.

Regarding the issue of whether the absence of counterfoils for Benane 1 and 2 Primary polling stations was significant enough to void the election results, the court criticized the trial court's approach, which voided all 1,268 votes in six polling stations based on the non-availability of the counterfoil for Benane Primary School stream 1. The appellate court found that the variances revealed by the scrutiny fell within allowable discrepancies and were not significant enough to warrant the nullification of the election. It held that the trial judge erred by discounting the votes that were cast manually and relying solely on the tally as per the KIEMS Kit without allowing the 3rd Respondent to prepare and respond to that issue adequately.

The court also highlighted that the trial court's rationale for disregarding the 48 votes validated by the Presiding Officer, which would have reduced the variance recorded in the KIEMS Kit and the total number of votes cast, was not explained. This was emphasized in light of Regulation 69(1) of the Elections (General) Regulations 2012, which equips the Presiding Officer with the role of overseeing the election process, including counting and tallying the votes cast.

Furthermore, the appellate court noted that the scrutiny process did not consider some polling stations and that the 1st and 2nd Respondents did not raise this issue during the trial, leaving the 3rd Respondent without a chance to address it. The court found no indication in the trial court's judgment that the missing counterfoils were due to any intent by the 3rd and 4th Respondents to manipulate the election. The court highlighted that the trial court had not found proof of deliberate manipulation of election results sufficient to conclude that the election was not free and fair.

Citing the Supreme Court decision in ***Martin Nyaga Wambora vs. Lenny Maxwell Kivuti & 3 Others* [2018] eKLR**, the court reaffirmed that procedural and administrative mistakes are inevitable in any election. The court warned that allowing elections to be easily nullified based on such errors could erode public confidence in the finality and legitimacy of election results. The Supreme Court in ***Raila Amolo Odinga vs. IEBC & 2 Others* (2017) eKLR** also held that the burden of proof lies with the Petitioner to demonstrate that the conduct of the election in question substantially violated constitutional and legal principles or was fraught with irregularities or illegalities that affected its outcome. The appellate court emphasized that since the trial judge had already concluded that the irregularities were not significant enough to alter the election outcome, the burden of proof could not suddenly be introduced at the scrutiny stage on an un-pleaded matter of such significance.

The court held that the trial court had erred by basing its decision on issues uncovered during scrutiny that were not specifically pleaded. The court underscored that pleadings are crucial for defining the scope of the trial and ensuring all parties are fully aware of the issues to be

determined, thereby maintaining fairness and transparency in the judicial process. The court concluded that addressing issues not raised in the pleadings compromised the integrity of the judicial process and deprives the Respondents of the opportunity to fully respond to the allegations against them. The court further noted that if a court must consider unpleaded issues that arise during scrutiny or other proceedings, it is essential to provide the adverse party with a fair chance to respond to these new allegations. This ensures that the principles of fairness and transparency are upheld and that no party is caught off guard or unfairly disadvantaged. By failing to do so, the trial court violated this fundamental principle, thereby justifying the appeal on this ground.

The court found merit in the appeal on this ground, emphasizing the need for strict adherence to the proper scope of pleadings in electoral disputes to ensure just outcomes. It allowed the appeal to the extent that the trial court's findings on unpleaded issues were set aside, reinforcing the centrality of pleadings in guiding the judicial process in electoral matters. The decision affirmed that courts must confine themselves to the issues presented in the pleadings and should not introduce or base their findings on matters that fall outside the scope initially defined by the parties.

The appellate court concluded that the 1st and 2nd Respondents failed to meet the legal burden of proof to the required standard to demonstrate the alleged irregularities. It was evident that all six complaints raised in the petition before the trial court were found to have no substance and were dismissed. Consequently, the appellate court determined that the trial court erred in invalidating the appellant's election based on un-pleaded matters. The appellate court noted that nullifying the election was a drastic measure and reiterated that scrutiny should not serve as a fishing expedition, particularly in matters not pleaded.

The appeal was deemed to have merit, and the appellate court allowed it, setting aside the trial court's decision to invalidate the election. Costs were awarded to the appellant and the 3rd and 4th Respondents, underscoring the necessity of adhering strictly to the established legal standards and principles governing electoral disputes.

Independent Electoral and Boundaries Commission & Another v Abass Ibrahim Kafow & 2 Others

Election Petition Appeal No. E010 of 2023

Court of Appeal of Kenya at Nairobi

M'inoti, Omondi & Ngenye, JJ.A.

25 August 2023

Summary of Facts

On 11 August 2022, Farah Ibrahim, the Returning Officer, declared Abdikadir Hussein

Mohammed the winner of the Lagdera Constituency seat, having garnered 5,929 votes against his closest rival's 4,880 votes. Abbas Ibrahim Kafow and Mohammed Ibrahim Sugow, registered voters in the constituency, filed a petition challenging the election results. They sought to invalidate Mohammed's election, calling for fresh elections and a scrutiny of votes. Their petition alleged various irregularities including violence, voter intimidation, vote stuffing, and improper assisted voting.

The Petitioners claimed that UDA party agents were assaulted and ejected from polling stations, particularly at Afweyn Primary School Polling Centre. They also alleged that illiterate voters who needed assistance had their votes marked for Mohammed against their will. The Independent Electoral and Boundaries Commission (IEBC) and Farah Ibrahim, the Returning Officer, denied these allegations. They explained that two individuals were ejected from a polling station due to constant interruption and a fist fight, which led to a brief suspension of voting. They maintained that the election was free and fair.

The High Court judge found some merit in the Petitioners' claims, particularly regarding the failure to properly store election materials at Benane Polling Station. The court ordered the disregarding of results from this station and found discrepancies in voter numbers revealed by scrutiny and recount. Consequently, the court voided the election results. The IEBC and Farah Ibrahim appealed this decision, arguing that the High Court had expanded the scope of the original petition and considered issues that were not originally pleaded, particularly regarding discrepancies revealed by the scrutiny of KIEMS kits.

The Respondents, on the other hand, contend that the trial judge properly addressed all the issues raised in their petition. They argue that the judge carefully evaluated and analysed the evidence presented, and identified and applied relevant laws and precedents from other election petitions before reaching her decision.

The Respondents assert that they presented sufficient evidence to warrant the scrutiny ordered by the court. They reject the appellants' suggestion that the trial judge went beyond the pleadings and evidence presented. Instead, they argue that an election court should be flexible in its approach to conducting inquiries, in line with Article 259(1) of the Constitution and Section 80(1) of the Elections Act, which requires courts to administer substantive justice.

To support their position, the Respondents cite the case of ***Evans Odhiambo Kidero v Ferdinand Ndungu Waititu & 4 Others* [2014] eKLR**. In this case, the Supreme Court held that parties could be allowed to pose questions on a scrutiny report where new irregularities emerge, and that the IEBC would have the opportunity to explain the cause and effect of those irregularities.

The Respondents argued that the scrutiny

was not an ambush, as each party had an opportunity to submit to it. They maintain that the detection of variance between the number of voters identified by the KIEMS Kit and the number of votes cast was sufficiently cogent and factual to warrant nullifying the election.

Regarding the scrutiny report, the Respondents asserted that it was shared with all parties, who then had the opportunity to respond to its contents. They highlighted that the scrutiny revealed missing counterfoils at Benane 1 and 2 polling stations and discrepancies between identified voters and votes cast, which they argued were not challenged by the appellants.

Issues for Determination

1. Whether there were any illegalities or irregularities and if so, whether they affected the results and/or validity of said election.

2. Whether the election of the member of the National Assembly for Lagdera was conducted in accordance with the Constitution and electoral laws.

3. Costs.

Decision of the Court

The Court of Appeal noted that the arguments, submissions, and case law referenced in this appeal (E010 of 2023) mirror those in Election Petition Appeal No. E004 of 2023.

The Court decided it would be inefficient to repeat the same issues and arguments they had already addressed in E004 of 2023. They concluded by saying: *"Suffice it to say that the decision in Election Petition Appeal No. E004 of 2023 applies in this matter mutatis mutandis."*

This means that the Court applied the same decision from Appeal No. E004 of 2023 to this case (E010 of 2023), with necessary changes. The Court appeared to have found the issues in both appeals so similar that they felt it unnecessary to provide a separate detailed ruling for this case, instead referring to their decision in the related appeal.

In the case referred to, the trial court stated that the issues for determination were closely meted and therefore the court looked into, the scope of pleadings, all essential facts must be presented to support their case. Pleadings are critical for enabling each side to prepare for potential questions and to submit relevant evidence for the court's evaluation.

Consequently, it is inappropriate for a court to frame issues that do not arise from the pleadings, as this would compromise the fairness and integrity of the judicial process. The court therefore set out that, a court shouldn't frame an issue not arising on the pleadings.

Patrick Mweu Musimba v Independent Electoral & Boundaries Commission & 2 others

Election Petition E001 of 2022

High Court of Kenya at Makueni

JN Onyiego, J

28 February 2023

Summary of Facts

The Petitioner argued that the Kenya Integrated Election Management System KIEMS Kits failed in 84 polling stations in Kibwezi West Constituency, leading to voter disenfranchisement. He cited Articles 81 and 86 of the Constitution, which mandate free, fair, and transparent elections. The Petitioner claimed that the use of a manual voting system compromised the election's credibility. He referenced the ***United Democratic Alliance Party v Kenya Human Rights Commission & 12 Others*** case, arguing that the delay in switching to manual voting was inordinately long.

The Petitioner further highlighted unexplained discrepancies in the votes cast for different elective positions, suggesting irregularities in the tallying process. He relied on Regulation 69(2) and (3) of the Elections (General) Regulations. He further argued that he had discharged his burden of proof, shifting it to the Respondents to prove the election was conducted lawfully.

The Petitioner's case challenged the conduct of the Makueni County elections, arguing that they were not free, fair, and credible as required by Kenyan law. Despite assurances from the 1st and 2nd Respondents that all systems were tested and ready, 140 KIEMS Kits were inoperable on election day. This failure allegedly disenfranchised voters, particularly in Kibwezi West Constituency. The Petitioner claimed that proper testing of the KIEMS Kits was not conducted, leading to their malfunction and compromising the election's integrity.

He contended another issue which was the delayed use of manual voting systems. The switch to manual voting registers was delayed by up to 6 hours in some polling stations, causing many voters to leave without casting their ballots. This delay, combined with the technical failures, reportedly led to voter suppression and frustration, with many people leaving polling stations without voting after long waits.

The Petitioner also alleged irregularities in vote counting and tallying. Unexplained discrepancies in the vote count for various elective positions were noted, raising doubts about the credibility and transparency of the process.

In sum, the Petitioner argued that these issues collectively demonstrated that the 1st Respondent failed to meet its constitutional and statutory obligations to conduct a credible, fair, secure, and transparent election in Makueni County. The technical failures, delays, and alleged irregularities are presented as evidence of a flawed electoral process that fell short of the standards required by Kenyan law.

In response the Respondents argued that they complied with all relevant legal provisions, including Article 10, 27, 38, 81, and 86 of the Constitution and section 39 of the Elections

Act. They cited the ***Raila 2022 Presidential Election Petition*** to support their use of a manual register. The Respondents claimed that the KIEMS Kits were tested and found functional before the election. They referenced the ***United Democratic Alliance Party v Kenya Human Rights Commission & 12 Others*** case to justify the use of a complementary manual voting system.

They argued that the voter turnout in the affected polling stations was consistent with other areas, and no voter was disenfranchised. They cited the ***Raila Odinga & Another v IEBC & Others Petition No. E005 of 2022***. The Respondents contended that any discrepancies in the votes were minor and did not affect the election outcome. They referenced the ***Charan Lal Sahu & Others v Singh*** case to argue that general allegations without specific evidence are insufficient.

The 1st and 2nd Respondents strongly denied the allegations that they failed to conduct free, fair, transparent, and credible elections. They assert that they discharged their duties in accordance with the electoral laws and the Constitution. They contend that all Forms 37As and 37Bs were duly received, verified, and collated before the announcement of final results. The Respondents argued that the Petitioner had misinterpreted their press release regarding the use of printed voter registers, stating that they followed the protocol established in previous legal cases.

Regarding the KIEMS kits, the Respondents explained that they had conducted thorough testing and preparation before the election. They clarified that the alpha-numeric search is an alternative system within functioning KIEMS kits, while the manual register was only used when a kit completely fails. They argued that the defects discovered on election day could not have been detected earlier without illegally opening polling stations prematurely. The Respondents maintained that any delays in adopting manual registers were due to necessary procedural requirements and that voting time was extended to compensate for these delays.

The Respondents refuted claims of voter disenfranchisement or suppression, stating that voter turnout in affected areas was comparable to, or higher than, other polling stations. They dismissed the allegation that KIEMS kits were intentionally manipulated as baseless and unsubstantiated. The Respondents also averred that discrepancies in vote counts for different ballots were due to minor, genuine reasons that were communicated to the candidates.

Additionally, the 3rd Respondent, in his response, echoed many of the arguments made by the 1st and 2nd Respondents. He asserted that the election was conducted in a free, fair, and transparent manner, in accordance with the Constitution and electoral laws. He contended that the petition lacks firm and credible evidence of alleged departures from these laws. The 3rd Respondent also argued that the Petitioner has not sufficiently pleaded the issues raised in the petition, rendering it

defective. All Respondents urged the court to dismiss the petition, with the 3rd Respondent specifically requesting that costs be awarded.

Issues for Determination

1. Whether there was an electronic failure in Makueni Gubernatorial election exercise and if so, whether the said failure compromised the voter turnout.

2. Whether the use of a manual voting system compromised the credibility, verifiability, integrity, accountability and transparency of the declared results.

3. Whether the 1st Respondent carried out the verification, tallying and declaration of the results in accordance with the applicable electoral laws.

4. Whether there were unexplainable discrepancies between the votes cast for the County Governor's position and other elective positions.

5. Whether the 3rd Respondent was validly elected.

6. Whether the reliefs sought can be issued.

7. Who bears the costs.

Decision of the Court

The court dismissed the petition challenging the Makueni County gubernatorial election results. It found that there was indeed an electronic failure in the KIEMS kits in some polling stations, particularly in Kibwezi West Constituency. However, the court determined that this failure did not compromise the overall credibility, verifiability, integrity, accountability, and transparency of the declared results.

The court acknowledged that manual voting was implemented as a complementary mechanism where KIEMS kits failed. It found no evidence that this manual process compromised the election's integrity. The court noted that voter turnout in areas using manual voting was comparable to areas using electronic systems and that all voters were given the opportunity to cast their ballots, with voting hours extended to compensate for delays.

Regarding the verification, tallying, and declaration of results, the court found no substantial evidence of irregularities or malpractices that would invalidate the election. The court dismissed claims of result inflation and unauthorized alterations, noting a lack of specific evidence to support these allegations.

The court addressed the issue of discrepancies in vote totals between different elective positions. It found the explanations provided for these discrepancies to be satisfactory and

concluded that the differences were minor and did not significantly impact the election's outcome.

The court upheld the election of the 3rd Respondent, Mutula Kilonzo Junior, as the validly elected Governor of Makueni County. It emphasized that while the election process is important, the significant margin of victory (214,088 votes for the winner versus 63,252 for the Petitioner) was a clear indication of the voters' will.

In its final orders, the court dismissed the petition, declared the election valid, confirmed the 3rd Respondent's election, and ordered the Petitioner to bear the costs of the petition. The court capped the costs at three million Kenyan shillings, to be divided among the Respondents.

Kyalo & 2 others v Wanjohi & 7 others

Election Petition Appeal E006, E005 & E009 OF 2023 (Consolidated)

Court of Appeal at Nairobi

MA Warsame, KI Laibuta & JM Mativo, JJA

28th July, 2023

Summary of facts

The dispute arises out of three consolidated appeals, namely Election Petition Nos. E006 of 2023 filed by Stanley Muli Kyalo, E005 of 2023 filed by Peter Maihenya Macharia and E009 of 2023 filed by Samuel Nduhiu Wanjohi.

The Appellants were registered voters of Starehe Constituency, being aggrieved by the outcome of the Elections held on 9th August 2022 they sought to challenge the announcement of the 2nd Respondent as the winner by citing that the conduct of the election and declaration of results was undertaken in flagrant violation of the Constitution and the election laws. In dismissing the Petition, the trial judge admitted the existence of irregularities and illegalities but stated that they were mere procedural administrative irregularities, which were not of such a magnitude that they could have affected the election results.

Regarding the costs, the learned judge noted that it is the voters who filed the petitions however he remarked that there were several interlocutory applications at the behest of the Appellants and proceeded to tax costs at Kshs. 4,000,000/- . Kshs3,000,000 to the 4th Respondent and Kshs. 1,000,000/- to the 1st and 2nd Respondent.

Aggrieved by the decision of the trial court, the 1st Appellant filed the appeals on 26 grounds of appeal seeking to challenge; whether the admitted errors, irregularities and illegalities were mere procedural administrative infractions of such magnitude to undermine and affect the election results; whether the trial judge erred in admitting the Respondents documents filed out of time; they also challenged the bias of the trial judge

in facilitating fair trial and access to justice; they challenged whether the 4th Respondent was properly in record and the exorbitant costs they were condemned to pay.

The 2nd Appellant challenged the erring of the trial judge in upholding the declared result that the 6th Respondent was lawfully elected as a Member of the National Assembly Starehe Constituency as well as the exorbitant costs condemned to pay.

The 3rd Appellant sought to challenge the fact that the learned judge allowed the 3rd, 4th, 5th and 6th Respondent applications to file out of time but dismissed the Appellant's application to amend the petition and file a further affidavit. In addition, the 3rd appellant challenged the exorbitant costs condemned to pay.

the gravamen of the appellants' case was then that the scrutiny exercise revealed the existence of irregularities, illegalities and blatant noncompliance and violation of the principles laid down in the Constitution and the election laws, and that the results did not reflect the will of the people. To fortify their contestation, the appellants urged that the scrutiny and recount established that the results declared were not verifiable, accountable, or secure.

Furthermore, in 7 polling stations the scrutiny and recount report revealed glaring mistakes, errors, irregularities, illegalities and blatant noncompliance with the law which were confirmed by the Deputy Registrar's report.

The Appellants held the averment that rule 11 of the election rules, stated that once a petition is filed and served the Respondent has 7 days to put in their response and that the Respondents filed their documents after 7 days, therefore the court lacked jurisdiction to extend time in that regard.

The Respondents in response stated that section 83 of the Elections Act barred the court from nullifying elections where there were trivial errors or irregularities and where such errors or irregularities had no bearing on compliance with the applicable constitutional and statutory principles, or on the correctness of results declared by the electoral management body.

In defending the admission of their documents out of time the Respondents stated that the objection had been raised when pre-trials had been concluded and that the court too stated that an objection of that kind ought to have been raised before hearing as provided in the rule 15(2) therefore no bias was occasioned against the appellants.

On the issue of the cost of the petition, the 1st, 2nd and 3rd Respondent stated that costs were awarded at the discretion of the court. That the petition had its fair share of interlocutory applications at the behest of the Respondents and that by the trial judge upholding the election and finding that the election was conducted in a manner compliant to the Constitution, the 1st Respondent would substantially not be condemned to pay costs.

The 4th Respondent submitted that the irregularities and illegalities were not of such magnitude to have seriously undermined and affected the election results. The 4th Respondent further submitted that the returning officer remarked in the 5 polling stations where the elections were never declared, it was only 3, 362 votes were never submitted.

That the same would not have affected the outcome of the results since the margin of gap between the 4th Respondent and the second highest candidate was 15,229 votes. On the issue of bias, the 4th Respondent stated that essentially the Appellants challenged the filing out of time at the hearing stage of the petition way past pre-trial in the full knowledge that the court had convened more than four times before the hearing date.

That there was no application made by the appellants seeking the admission of further affidavits and that if the appellants were to accuse the trial court of bias, they had openly admitted to receiving rulings in their favour, even when they had not complied with the rules.

On the issue of cost, the 4th Respondent submitted that, from the pleadings and evidence tendered by the appellants at the High Court, it was clear that the Petitioners' petition lacked substance, and that the 4th Respondent incurred costs defending it. Consequently, the 4th Respondent was entitled to the sum of Kshs.3, 000,000/= awarded by the trial court, if not more.

Issues for determination

1. Whether the learned Judge erred in allowing the Respondents' application for extension of time, and in dismissing the appellants' application for amendment of the petition, and for leave to file a further affidavit.

2. Whether the admitted errors, irregularities and illegalities were of such magnitude as to seriously undermine and affect the election results.

3. Whether the costs were exorbitant.

Decision of the court

The court submitted that it was a no-brainer that election matters are unique with strict timelines in place. That it is well established in Rule 4 that the objective of Election Petition rules is to facilitate expeditious, affordable and proportionate resolution of election petitions.

The appellant claimed that that the trial judge erred in dismissing their application to amend their petition. In dismissing the said application, the trial Court cited **Timamy Issa Abdalla v Independent Electoral and Boundaries Commission & 3 Others (2018) eKLR** in which, a similar application was declined where the court faulted the Petitioner for failing to seek leave to amend his petition or to do so within the stipulated time frame.

The appellate court reproduced section 76 of the Elections Act which provided that an amendment of a petition may be done through leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented.

Therefore, the decision on whether to allow or refuse an amendment lies in discretion as provided under rule 5 (1) which provides that the effect of failure to comply with the rules shall be determined at the court's discretion in accordance with the provisions of Article 159(2)(d) of the Constitution.

Noted the failure to comply with section 76, the appellate judges determined that they did not find a reason to fault the discretion of the trial court as pertains to the amendment to the petition or the exercise of the trial court's discretion.

Secondly, in addressing the Petitioner's contention that the learned Judge erred in failing to strike out the Respondents' pleadings for having been filed out of time. The court reproduced rule 11(1) which states that responses ought to be filed within seven days from the date of service. Citing rule 19, the court remarked that the court has powers to extend time or reduce time in determining election cases in the bid to cushion any injustices.

However, the court asserted that the discretion should be exercised judiciously, wherever the circumstances of the case so require. That in principle the appellate court ought not to interfere with the discretion of the trial court unless it is manifestly wrong. The appellate court remarked as the record showed, that both the appellants' and Respondents' applications before the trial court stood on different grounds however, if the application to strike out the responses file would render the petition as undefended therefore locking out the Respondents' out of the seat of justice, therefore, the trial court did not exercise its discretion capriciously when deciding whether the appellants' application for amendment and the application to have the affidavits admitted out of time, should be granted.

Turning to the second issue on whether the admitted errors, irregularities and illegalities were of such magnitude as to seriously undermine and affect the election results. The court remarked that section 83 of the elections law set out the test of nullifying an election. In that, an election cannot be declared null and void if it was performed in compliance with the Constitution and if the non-compliance did not substantially affect the outcome of the result.

The standard of proof of irregularities and illegalities is higher than the civil standard of balance of probabilities but lower than the criminal standard of proof of beyond reasonable doubt. The Apex Court in that decision held that mere proof or admission of electoral irregularities, without more, would not automatically vitiate an election.

Therefore, in an election petition, the burden of

proof lies on the person alleging. In the instant case, it was upon the Appellants to prove their allegations of non-compliance with the Constitution and the electoral law, electoral misconduct, irregularities, and illegalities that would result in the election being nullified.

The apex court further stated that in principle, it would refrain from interfering and intervening in the election results unless it was established to the required standard of proof that such non-compliance with the Constitution and the electoral law, as well as the irregularities and electoral malpractices complained of rendered the elections invalid.

The court relied on the second presidential election of 2017 relying in the case of **John Harun Mwau & 2 Others v Independent Electoral and Boundaries Commission & 2 Others (2017) eKLR** to answer the question whether non-compliance, irregularities and improprieties were substantial and significant and affected the result.

The non-legitimacy of an election can be claimed if in the absence of clear evidence that the bulk of it simply failed; that due procedure was not followed in the conduct of the election; that someone other than IEBC conducted the election; that the procedures of vote counting were not followed; that false results were announced, in place of the true outcome; that the voters were turned away from polling stations by IEBC, or by State agencies of power; that the motions of verification and announcement of vote-outcome were not complied with.

In that results from 5 polling stations were not accounted for the Respondents stated that the appellants did not prove how failure to tally the results in issue affected the final results. Further, there was no evidence of the actual number of voters who voted, and their votes were not tallied.

In making a determination, the trail court relied on the case of ***Jackton Nyanungo Ranguma v IEBC & 2 Others*** (supra) and proceeded to hold as follows: "...Applying the provision of Section 83 of the Act, I find that these irregularities would not have affected the ultimate result given the margin of votes and the fact that the irregularity occurred in only 5 Polling Stations out of over 1000 polling stations in the County..."

In the appeal herein the learned judges admitted that indeed results from five polling stations were not accounted for however the record showed that the 4th Respondent explained to the appellants that 3 presiding officers had locked their forms 34As in the ballot boxes, while the other two had misplaced their original forms 34As.

Furthermore, an attempt by the 4th Respondent to have the 3 ballot boxes opened to retrieve the Form 34As came to a cropper because the candidates rejected the proposal. It meant no fault could be attributed to the 4th Respondent for arriving at his decision. In any event, the said decision affected all the parties and there was no evidence that the winner got

undue advantage or benefit from the failure to include or exclude the said results.

Therefore, the learned appeal judges affirmed that the appellants successfully proved the irregularities in the conduct of the election for Member of the National Assembly for Starehe Constituency. However, as observed by the Supreme Court in Mohammed Mahamud Ali v Independent Electoral and Boundaries Commission, elections as a matter of cause cannot be perfect and errors, so long as they are explainable should not affect the will of people. The infractions were not of such magnitude as to justify nullification of the election of the Member of Parliament for Starehe Constituency.

On the issue of stamping of Form 34As, and the allegations of imposters signing Forms 34As and 34B, the court found and held that this Court had severally held that stamping of Form 34As was not mandatory, and they need not reinvent the wheel. In addition, the appellants did not adduce evidence in support of the imposter allegations consequently the appellants failed to demonstrate how the non-stamping of form 34As affected the final tally of elections announced.

Subsequently, on the issue of bribery of voters, the court remarked that it constituted both a criminal and an electoral offence and that the standard of proof required is beyond reasonable doubt. There was no evidence to prove whether the alleged bribe was in the form of money, or whether it was given on behalf of the 4th Respondent.

No attempt was made to identify the administration police officer or the local chief who allegedly engaged in bribery. No photos were adduced in evidence. In this time and age of technology, it is very easy to capture bribery of voters on camera thus persuaded that the allegations of bribery were not substantiated.

Regarding the scrutiny exercise, the learned Judge found that there were illegalities and irregularities in the conduct of the election of the Member of Parliament for Starehe Constituency. However, the said irregularities and illegalities could be termed as procedural or administrative irregularities, illegalities and errors, and they were not of such a magnitude as to seriously undermine and affect the election results.

From the foregoing, the court was persuaded that, indeed, the irregularities and errors complained of by the appellants were of such a nature that they did not affect the outcome of the election.

Finally on costs, considering that the petition, and the interlocutory applications, including an application for scrutiny, the court was not persuaded that the costs awarded were manifestly excessive to warrant our interference. Accordingly, the court found no reason to interfere with the award made by the election court. There was no evidence or material to show that the trial judge injudiciously or arbitrarily exercised his decision such that it occasioned injustice.

In conclusion, the upshot of the appeal was that the appeal had no merit and therefore the consolidated appeals were dismissed with costs to the Respondents.

Ayiera v Kimwomi & 3 others

Election Appeal No. 001 of 2023

Court of Appeal at Kisumu

First appeal from Nyamira High Court in Election Petition No. E002 of 2022

P.O. Kiage, M Ngugi & JM Ngugi JJA

4TH August 2023

Summary of Facts

The case was an appeal from a High Court judgment regarding the Nyamira County gubernatorial election held on August 9, 2022. The appellant challenged the declaration of the 1st and 2nd Respondents as governor and deputy governor of Nyamira County, respectively. He argued that the election was not conducted in accordance with the Constitution, the Elections Act, and the Election (General) Regulations, 2012. Specifically, he alleged that the IEBC failed to conduct a transparent, impartial, and verifiable election.

The appellant's claims included the use of two conflicting sets of forms 37C, discrepancies in the results between forms 37A and 37C, and manipulation of votes to favor the 1st Respondent and another candidate. He also accused the 1st Respondent's agent, Leonard Okari Mogaru, of corrupt practices while serving as a public officer, in violation of the Election Offences Act. Additionally, the appellant contended that his agents were denied access to polling stations and were harassed during the counting and tallying of votes.

The 1st and 2nd Respondents denied these allegations, asserting that the election was conducted according to the law and that any non-compliance was minor and did not affect the results. They argued that the role of the County Elections Manager was not recognized in the election process and that votes for all candidates remained consistent across the two forms 37C. They further claimed that the appointment of Mogaru as an agent was legal and that he was not employed by the County Public Service Board.

The High Court granted the appellant's request for limited scrutiny of election materials in several polling stations but ultimately found that the election process was conducted in substantial compliance with the law. The court dismissed the appellant's petition, concluding that the alleged errors and irregularities were not significant enough to invalidate the election.

Dissatisfied with this decision, the appellant filed an appeal citing nine grounds of appeal. Among these grounds, the appellant argued that the learned judge had erred in disregarding evidence of corrupt practices by the 1st and 2nd Respondents and had failed to hold that these practices, once established, should have invalidated the election results.

The appellant further contended that the judge did not properly account for the responsibility of the candidate for the actions of his agent, Mr. Leonard Mogaru, who allegedly engaged in corrupt practices while serving as a public officer. Additionally, the appellant argued that the elections had not been conducted in substantial compliance with the law and criticized the judge for applying a quantitative rather than a qualitative test in evaluating the disputed election.

The appellant sought to have the appeal allowed, the election court's judgment and decree set aside, the petition granted, and the election of the 1st and 2nd Respondents annulled, with a fresh election ordered within 60 days. The appellant also requested that costs be awarded for both the appeal and the petition.

The Respondents maintained that the court correctly dismissed the petition, arguing that the appellant failed to prove the alleged irregularities to the required standard. They also asserted that the errors cited were minor and did not affect the election's outcome. The Respondents contended that the burden of proof remained with the appellant and that no new issues should have been introduced during the appeal.

Issues for Determination

1. Whether corrupt practice as an electoral offence occurred and was proved against the 1st and 2nd Respondents; and if so, what is the consequence thereof.

2. Whether the gubernatorial election in Nyamira County was conducted in substantial compliance with the law

Decision of the court

In considering whether a corrupt practice occurred and was proven against the 1st and 2nd Respondents, the court underscored the principle that any electoral offense committed by a candidate, once established, is sufficient to nullify an election without needing further evidence of the offense's gravity. This aligns with the view that an election offense, once proven, inherently invalidates the election results, allowing the party challenging the election to secure a nullification without proving additional factors. The appellant alleged that Leonard Okari Mogaru, who was claimed to be both a public officer and a chief agent for the 1st and 2nd Respondents, engaged in corrupt practices contrary to sections 14 and 15 of the Election Offences Act.

To substantiate these claims, the appellant needed to establish three critical elements: first, that Mogaru was indeed a public officer; second, that his actions as an agent in the election constituted an electoral offense or corrupt practice; and third, that his conduct was directly attributable to the 1st and 2nd Respondents. The court noted that proving a direct link between Mogaru's actions and the 1st and 2nd Respondents was crucial for these allegations to affect the election results.

The court examined the appellant's attempt to demonstrate that Mogaru was employed by the County Assembly Service Board rather than the County Public Service Board, as initially pleaded. This attempt was dismissed by the court, which emphasized that parties are bound by their pleadings and cannot deviate from them. The court referenced the decision in ***Odinga & Another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR),*** underscoring the importance of consistency in pleadings to ensure fairness and clarity in legal proceedings.

Additionally, the court analysed whether Mogaru's conduct could be attributed to the 1st and 2nd Respondents. The court referred to the case of ***Alfred Nganga Mutua & 2 Others v Wavinya Ndeti & Another*** **[2018] eKLR**, which differentiated between party agents and candidate agents. The evidence showed that Mogaru was appointed as a party agent by the United Progressive Alliance (UPA) and not directly by the 1st and 2nd Respondents. Under electoral law, political parties are tasked with appointing agents, and candidates can only appoint their own agents if the party fails to do so. Therefore, the court concluded that Mogaru's actions could not be legally attributed to the 1st and 2nd Respondents, as they were not involved in his appointment.

The court undertook a comprehensive examination to determine whether the Nyamira gubernatorial election was conducted in substantial compliance with the law. It anchored its analysis on established principles from notable cases, including ***Gatirau Peter Munya vs. Dickson Mwende Kithinji & 2 Others*** **[2014] eKLR.** The court reiterated that elections should not be invalidated for non-compliance with electoral laws unless such irregularities are of a magnitude that they materially affect the outcome. This principle was also supported by the ruling in ***Raila Amolo Odinga vs. Independent Electoral and Boundaries Commission and 2 others*** **[2017] eKLR**, which posited that an election could be voided if it was proven that the conduct of the election substantially violated constitutional principles or was so fraught with irregularities that it affected the results.

The appellant argued that the Nyamira gubernatorial election was flawed due to the use of two conflicting sets of forms 37C, each reflecting different voter turnout figures, suggesting that the election was not conducted in substantial compliance with the law. However, the court found that these discrepancies did not materially affect the election's outcome. The learned judge in the trial court had ordered partial scrutiny, including a re-tally of the votes, which revealed that the discrepancies between the forms were largely administrative errors. The court concluded that these errors did not compromise the election's integrity.

To further substantiate this conclusion, the court referenced ***IEBC v Maina Kiai & 5 Others***

[2017] eKLR, emphasizing the finality of the results declared at the polling stations. The scrutiny process conducted during the trial revealed that the discrepancies in the forms 37C were mainly arithmetic errors. These errors did not affect the total number of votes each candidate received. The court found that the alterations in the final form 37C, which was used to declare the election results, were corrective measures to address the total number of voters who turned out and the valid votes cast. These corrections did not have any substantive effect on the overall outcome of the election.

The court also addressed the appellant's claims that his agents were denied access to several polling stations. Upon reviewing the evidence, the learned judge dismissed these allegations, concluding that UDA Party agents were indeed present in the polling stations. Additionally, the law only permits candidates to appoint their own agents if the nominating party has not already done so. The appellant failed to provide sufficient evidence to contradict the presence of UDA agents or to prove that his agents were unjustly barred.

The court ultimately held that the appellant failed to prove the allegations of corrupt practices against the 1st and 2nd Respondents to the required legal standard. It concluded that the connection between Mogaru's conduct, and the Respondents was not adequately established, and the appellant did not meet the burden of proof necessary to substantiate his claims. Furthermore, the court found that any evidence presented was insufficient to demonstrate that Mogaru's actions, as alleged, were directly linked to the Respondents or that they amounted to an electoral offense sufficient to nullify the election.

The court reaffirmed that for an election to be annulled based on alleged corrupt practices, there must be clear and convincing evidence directly implicating the candidate in question. In this case, the court determined that such evidence was lacking. Consequently, the appeal was dismissed on this ground, and the election of the 1st and 2nd Respondents was upheld. The decision emphasized the need for strict adherence to legal standards and principles in proving allegations of electoral offenses to ensure the fairness and integrity of the electoral process.

The Court of Appeal ultimately held that the Nyamira gubernatorial election was conducted in substantial compliance with the law. The appellant did not meet the burden of proof required to establish that the election process violated constitutional principles or that the alleged irregularities were significant enough to alter the election results. The court reaffirmed that the errors identified were minor administrative mistakes that did not affect the election's integrity or the final results.

By upholding the judgment of the High Court, the Court of Appeal affirmed that the election genuinely reflected the will of the people of Nyamira County and was

conducted in accordance with constitutional and legal standards. Consequently, the appeal was dismissed with costs awarded to the Respondents. The election of the 1st and 2nd Respondents as Governor and Deputy Governor of Nyamira County was upheld, reinforcing the principle that minor administrative errors, which do not affect the election's outcome, cannot serve as grounds for nullification.

4.2.8.1 Adequacy of Voter Education

Kelly Barasa Walubengo v IEBC & 2 Others

Election Petition E002 of 2022

High Court of Kenya at Bungoma

WM Musyoka, J

28 February 2023

Summary of the Facts

The Petitioner (Kelly Barasa Walubengo) filed a petition to challenge the election of Sitati Daniel Wanyama (3rd Respondent) as an elected member of the National Assembly for Webuye West Constituency in the general elections conducted on 9th August 2022. He submitted that the IEBC conducted inadequate voter education which negatively affected the voter turnout in the constituency. There was voter bribery and coercion before voting day. He further submitted that on the voting day, the 1st and 2nd Respondents conspired to flood polling stations with extra agents and allies of the 3rd Respondent. There was intimidation and harassment of voters in the polling stations and his agents were chased away from the polling stations. He claimed that KIEMS kits were selectively and inconsistently used in the identification of voters resulting in ineligible persons being allowed to vote and some eligible voters being turned away. There was also failure or refusal to enter results at the polling stations in KIEMS kits and forgery and fraudulent erasures and amendments and irregular stamping of ballot papers for 23 polling stations. He also submitted that there was voter bribery at 6 polling stations and inadequate security for voters leading to electoral violence and intimidation in some polling stations He also stated that strange ballot boxes were found in tallying centres and others were not properly sealed. The list of poll officials was not displayed for verification and authentication by the Petitioner and his gents. He prayed for the nullification of the election results because it was not conducted substantially in accordance with the Constitution and relevant electoral laws. He also prayed for scrutiny and audit of systems and technology used to conduct elections.

The 1st Respondent (IEBC) and 2nd Respondent (Constituency Returning Officer) submitted that the election was conducted in accordance with the Constitution and relevant electoral laws and regulations and denied the allegations in the petition. They prayed that the court would dismiss the petition with costs.

The 3rd Respondent denied the allegations in

the petition and stated that the election was conducted in a free, fair, peaceful, accurate and transparent manner and free from violence, corruption and intimidation. It was conducted in accordance with the Constitution and relevant election laws. There was no interference with the integrity, credibility and security of the election. Therefore, he was validly elected and declared a winner after proper counting and tallying of votes.

Issues for Determination

1. Whether there was inadequate voter education that affected the outcome of the election.

2. Whether the election was conducted in accordance with the Constitution and relevant laws and regulations.

3. Whether there were irregularities in voter identification, balloting, counting of the ballots and collation tallying and declaration of election results significant to upset the elections.

4. Whether the elections were marred by blatant denial of voter's rights, voter bribery, voter treatment and voter manipulation.

5. Whether there was insufficient security and electoral violence that affected the final results.

6. Whether election agents of the Petitioner were harassed and intimidated.

7. Whether the court should order an audit and scrutiny of the system and technology deployed in the election.

Decision of the Court

The Court noted that IEBC conducted adequate voter education and if it was inadequate, it did not affect the outcome of the election. There was no denial of voter rights, voter bribery, voter treatment and voter manipulation. It also stated that no irregularities were demonstrated with respect to voter identification, balloting and declaration of results, but there were irregularities or discrepancies or errors with respect to counting of the ballots and collation and tallying of results, but the same was not significant as to upset the outcome of the election.

The Court stated that the election security was sufficient. Although there were incidents of chaos at the polling stations it did not affect the voting process and had no impact on the results of the election. No election agents of the Petitioner were harassed and intimidated. Further, The Court stated that there was no basis to order for audit and scrutiny of the system and technology used in the election.

In conclusion, the Court dismissed the petition for lack of merit because the election was conducted and managed substantially in accordance with the Constitution and relevant laws and regulations. There was no evidence to prove the allegation made in the petition of electoral malpractice, fraud and manipulation. Therefore the 3rd Respondent was validly

elected, and the results reflected the will of the people of Webuye West Constituency.

The Court observed that since the costs follow the event, the Petitioner shall bear the costs of the petition, but the total costs payable should not exceed KShs. 5,000,000.

4.2.8.2 Failure of KIEMS kits and voter suppression

Patrick Mweu Musimba v IEBC & 2 Others

Election Petition E001 of 2022

High Court of Kenya at Makueni

JN Onyiego, J

28 February 2023

Summary of the Facts

The Petition filed on 9th September 2022 related to the challenge on the election of the Governor in Makueni County where Mutula Kilonzo Junior was declared to be victorious after garnering a total of 214, 088 votes. Patrick Mweu Musimba who secured second position with 63,252 votes challenged both the results and the declaration of the Governor of Makueni County. The crux of the petition was on the failure of election technology during the voting exercise occasioned allegedly by dysfunctional KIEMS Kits deployed to about 84 polling stations within Kibwezi West Constituency within Makueni County.

There were several grounds for the Petition. These were failure of KIEMS kits across the county, irregularities in the manual voting, lack of manual register in most polling stations, non-compliance with the requirement for complementary mechanism as well as discrepancies in the votes cast for the elective positions. The Petitioner urged the Court that the irregularities and noncompliance undermined the electoral process. Consequently, it sought interim reliefs for scrutiny and forensic audit of the election material and technology used for the election (Smartphones as well as KIEMS kits and their logs and GPSs). Relatedly, the Petitioner sought an order that the results be retallied. The Petitioner also sought a declaration that the conduct of the election did not substantially comply with the applicable electoral laws law and the Constitution. Consequently, the Petitioner sought for the court to intervene and invalidate the election of the 3rd Respondent as Governor and to quash the certificate issued to him as the Governor-elect.

The Court dismissed the Notice of Motion dated 8th September 2022 seeking supply of all election materials, retallying and scrutiny of all votes cast in the entire county. The Court also dismissed the application to review its decision to dismiss the application. The Court proceeded with hearing the Petition on its merits.

The 1st and 2nd Respondents defended the Petition. They affirmed that they conducted credible, free and fair elections. They faulted

the petition for not stating the grounds of the petition as required by Rule 8 of the Elections (Parliamentary and County) Petitions Rules, 2017. They stated further that the KEIMS kits were functional and that the malfunctioning kits affected all candidates. IEBC also submitted that it followed due procedure in replacing the election technology and the time lost as a result of malfunctioning was compensated for hence no voters were suppressed or disenfranchised and the discrepancies in votes were not caused by voter inflation and were in any event insignificant and could not affect the results of the elections.

The 3rd Respondent also defended the Petition. On top of the grounds of response laid by the 1st and 2nd Respondents, the 3rd Respondent added grounds that the issues were not sufficiently pleaded, and there was a lack of credible evidence of the alleged electoral malpractices. The Respondent further noted there are no perfect elections in the world over and that the failure in technology in 84 polling stations did not affect or compromise the voter turnout, voting and the voting outcome of the Makueni County Gubernatorial elections.

Issues for Determination

1. Whether there was an electronic failure in the Makueni Gubernatorial election exercise and if so, whether the failure compromised the voter turnout.

2. Whether the use of a manual voting system compromised the credibility, verifiability, integrity, accountability and transparency of the declared results.

3. Whether the 1st Respondent carried out the verification, tallying and declaration of the results in accordance with the applicable electoral laws.

4. Whether there were unexplainable discrepancies between the votes cast for the County.

5. Governor's position and other elective positions.

6. Whether the 3rd Respondent was validly elected.

7. Whether the reliefs sought can be issued.

8. Who bears the costs?

Decision of the Court

The Court first noted that IEBC is mandated to ensure electoral technology is simple; accurate; verifiable, secure, accountable and transparent. The Court observed that since the technology can fail, the law provides for a complementary mechanism. The Court further observed that the Court of Appeal decision in *United Democratic Alliance Party v Kenya Human Rights Commission and 12 Others* sanctioned the use of complementary mechanisms (by way of manual voting) in the August 2022 general elections. The complementary mechanism helps to uphold the right of voters to express themselves in a democracy especially since even advanced electoral technology can fail at some point.

The Court further noted that there was

consensus that the KEIMS kits failed in Kibwezi West Constituency. From the narration of the Returning Officer on how the problem escalated and the attempts that were made to address it, the Court was convinced that the Commission did its best to restart the gadgets. The Court observed that end-to-end testing on the preparatory stages that the Petitioner referred to does not involve opening the KIEMS kits. As such, there was there no proof that the malfunctioning was premeditated or occasioned by insufficient training of IEBC staff. Instead, it was a technical hitch. The Court further noted that the Petitioner did not produce cogent evidence to prove the allegation that there was external interference and manipulation of the KIEMS Kits to distort the final results. Instead, the court noted that the allegation was a matter of conjecture.

The Court also observed that the Supreme Court in ***Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)*** had ordered a recount in Kibwezi West constituency and found that the malfunctioning did not affect the voter turnout. Furthermore, the Court noted that the allegations that the statutory polling forms were not filled could not be ascertained since the Court declined to grant the order for scrutiny on the ground that the Petitioner was on a fishing expedition. Thirdly, the Court opined that the Petitioner's complaint on voter suppression was resolved by the fact that the time lost was compensated through extension of time.

The Court also noted that the Petitioner's claim that voter verification was not properly done, and results inflated was not proved as no agents or voters came forward to claim the specific station/s where such anomalies or malpractices occurred. Furthermore, no candidate gained from the polling stations where several votes cast exceeded the registered voters since the same was discarded. Hence the counting complied with Regulation 76 of the Election (General) Regulations 2012.

The Court noted that the discrepancy in the number of votes such as that of the Presidency 290,491; Governor 289,538; Senator 290,550 and Women Representatives 269,465 votes was explained through the discarding of votes of certain positions in certain polling stations. In any event, the discrepancy was negligible and could not affect the outcome of the elections. The Court noted further that whereas an election is not about numbers alone, but the process employed before realizing those numbers, winners are also determined by the highest number of votes obtained in an election. Since there were no glaring malpractices to such a magnitude as to vitiate the elections, the 3rd Respondent was validly elected.

The Court also ruled that the reliefs related to scrutiny could not be granted, neither could the reliefs that sought to invalidate the election of the 3rd Respondent. The Court found that there was not any relevant relief to grant the Petitioner. Considering the time taken in

the preparation of the pleadings, prosecuting the petition, the complexity of the matter and the number of counsels involved, the Court awarded the Respondents costs capped at a maximum of KShs. 3,000,000 out of which the 1st and 2nd Respondents being government agents supported by taxpayer's money to share KShs. 1,000,000 and KShs. 2,000,000 to the 3rd Respondent.

In conclusion, the Court dismissed the petition. The Court concluded that the Gubernatorial elections held on 9 August 2022 in Makueni County were constitutionally and validly held and the 3rd Respondent was validly elected and gazetted as the Governor of Makueni County.

4.2.8.3 Discrepancies between the votes cast for elective positions and their impact on the validity of elections

Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 Others (Amicus Curiae)

Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)

Supreme Court of Kenya at Nairobi

MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

26 September 2022

Summary of the facts

The 2022 presidential election was highly competitive between the two leading candidates. On 15 August 2022, the Chairperson of the Independent Electoral and Boundaries Commission (IEBC) announced that William Samoei Ruto, the 1st Respondent, had met the requirements under Article 138(4) of the Constitution, thereby being declared President-elect, with Rigathi Gachagua, the 2nd Respondent, named Deputy President-elect. This declaration was formalised in Gazette Notice No 9773 issued on 16 August 2022.

Following this announcement, nine election petitions were lodged. A total of 23 interlocutory applications were filed in relation to these petitions. After hearing these applications and objections raised, Petitions E006 and E009 of 2022 were dismissed for failing to comply with Article 140(1) of the Constitution. The remaining seven petitions were consolidated on the court's own motion, with Petition E005 of 2022 designated as the lead file. Raila Odinga and Martha Karua were named as the 1st Petitioners. Additionally, the Law Society of Kenya (LSK), the Kenyan Section of the International Commission of Jurists (ICJ-Kenya), John Walubengo, Dr John Sevilla, and Martin Mirero were admitted as amici curiae.

On 30 August 2022, the court partially allowed applications from the 1st, 3rd, and 4th Petitioners for an ICT scrutiny, inspection, and a recount

of ballots in specific polling stations, under the supervision of the Court Registrar.

Issues for determination

The court delineated the following nine (9) issues as arising for its examination and final determination:

1. Whether the technology deployed by IEBC for the conduct of the 2022 General Election met the standards of integrity, verifiability, security, and transparency to guarantee accurate and verifiable results.

2. Whether there was interference with the uploading and transmission of Forms 34A from the polling stations to IEBC's Public Portal.

3. Whether there was a difference between Forms 34A uploaded on IEBC's Public Portal and Forms 34A received at the National Tallying Centre, and Forms 34A issued to agents at the polling stations.

4. Whether the postponement of Gubernatorial Elections in Kakamega and Mombasa Counties, Parliamentary elections in Kitui Rural, Kacheliba, Rongai and Pokot South Constituencies and electoral Wards in Nyaki West in North Imenti Constituency and Kwa Njenga in Embakasi South Constituency resulted in voter suppression to the detriment of the Petitioners in Petition No E005 of 2022.

5. Whether there were unexplainable discrepancies between the votes cast for presidential candidates and other elective positions.

6. Whether IEBC carried out the verification, tallying, and declaration of results in accordance with article 138(3)(c) and 138(10) of the Constitution.

7. Whether the declared President-elect attained 50%+1 of all the votes cast in accordance with article 138(4) of the Constitution.

8. Whether there were irregularities and illegalities of such magnitude as to affect the final result of the Presidential election.

9. What reliefs and orders could the Court grant/issue.

Decision of the court

The issue of whether the technology used by the Independent Electoral and Boundaries Commission (IEBC) in the 2022 General Election met the required standards of integrity, verifiability, security, and transparency to ensure accurate and verifiable results was challenged by several Petitioners. The Petitioners argued that the technology did not meet the standards prescribed by Article 86 of the Constitution and section 44 of the Elections Act. They contended that IEBC's technology was neither simple nor transparent and that there were issues regarding the audit of the Register of Voters, late publication of the audit report, and potential manipulation by foreign technology providers.

In response, the IEBC defended its use of a hybrid system that combined biometric voter registration and identification with manual processes for counting and tallying votes. It stated that the electoral process was reinforced through audits and continuous improvements. The IEBC further explained that KPMG had conducted an audit of the Register of Voters, and the necessary remedial measures were implemented. The commission also asserted that the technology was subjected to public testing and simulation exercises to ensure efficiency and transparency.

The court found that the Petitioners had provided sufficient evidence to shift the evidentiary burden to the IEBC, which responded with detailed explanations of the steps it had taken to address any shortcomings. The court was satisfied that the Register of Voters had been used effectively in the election and that any issues identified in the audit had been successfully addressed. Additionally, the IEBC's use of the KIEMS system was deemed efficient despite localised failures, and the court concluded that there was no credible evidence of unauthorised access or manipulation of the system.

The court upheld the integrity, verifiability, security, and transparency of the technology deployed by the IEBC, finding that it met the necessary constitutional and legal standards.

The issue of whether there was interference with the uploading and transmission of Forms 34A from polling stations to the Independent Electoral and Boundaries Commission (IEBC) Public Portal was raised by the 1st Petitioner. They claimed that the IEBC's technology did not meet constitutional and statutory requirements, specifically those outlined in Article 86 of the Constitution and section 44 of the Elections Act. The Petitioner argued that the Kenya Integrated Election Management System (KIEMS) had failed to ensure confidentiality, integrity, availability, non-repudiation, and authenticity, leading to unverifiable and inaccurate Presidential Election results. They alleged that Forms 34A, transmitted via the Results Transmission System (RTS), were manipulated due to security vulnerabilities, such as discrepancies in image formats and a lack of proper security layers.

The 1st Petitioner further contended that there were instances where over 11,000 Forms 34A were dumped onto the online portal, and specific polling stations were identified where manipulation was believed to have occurred. Discrepancies between physical copies and online versions of Forms 34A were also highlighted, supported by expert testimony and forensic analysis. The 3rd Petitioner echoed these concerns, particularly noting discrepancies in Forms 34B that suggested vote inflation for the 1st Respondent, alongside statistical anomalies.

The IEBC, in response, rejected the allegations and defended its technology as secure, emphasising that Forms 34A were protected by various security features, such as digital

signatures and firewalls, and that the RTS system was not compromised. They denied that any manipulation of the forms had occurred and claimed that the documents presented by the Petitioners were falsified.

During the court's scrutiny exercise, it was found that KIEMS kits scanned forms directly into PDFs without converting them to editable formats, and no evidence was uncovered to support the Petitioners' claims of image manipulation or hacking. Additionally, the exercise revealed no suspicious activity or unauthorised access to the RTS server. Ultimately, the court found that the Petitioners failed to provide sufficient evidence to prove their claims, and the integrity of the electoral process, including the transmission and publication of Forms 34A, was upheld. The Petitioners' assertions of data tampering and large-scale manipulation were debunked by the evidence presented during the scrutiny and expert testimony.

On the third issue, the 1st Petitioner argued that the Independent Electoral and Boundaries Commission (IEBC) engaged in fraudulent activities concerning the printing and handling of Forms 34A and 34B. They claimed that IEBC instructed the printing firm to produce two sets of Forms 34A and neglected to print Forms 34B, which are crucial for result tallying. They also alleged that post-polling alterations to Form 34A were made to favour the 1st Respondent, with discrepancies observed between physical copies and online versions across 41 polling stations.

The 1st and 2nd Respondents denied these claims, asserting that Forms 34A were consistent across all versions and that the process adhered to legal standards. They challenged the reliability of the Petitioner's evidence, which included affidavits and forensic reports, arguing these did not prove tampering.

The court, acknowledging the severity of the allegations, ordered a detailed scrutiny of the election materials. This revealed minor discrepancies in four polling stations, but overall, the Registrar's Report confirmed the authenticity of the Forms. The court dismissed the Petitioner's claims of tampering, finding their evidence insufficient and the allegations unsubstantiated. Ultimately, the court upheld the integrity of the electoral process as declared by the IEBC.

On postponement of elections and whether it led to voter suppression, The Independent Electoral and Boundaries Commission (IEBC) postponed gubernatorial elections in Kakamega and Mombasa Counties, parliamentary elections in Kitui Rural, Kacheliba, Rongai, and Pokot South Constituencies, and ward elections in Nyaki West and Kwa Njenga due to errors in ballot papers. Initially scheduled for August 8, 2022, these elections were rescheduled to August 23 and finally to August 29, 2022. The postponements did not impact the Presidential election or other scheduled elections.

Petitioners alleged that the delays were a

tactic to suppress voter turnout in areas supporting certain candidates, claiming significant drops in voter turnout. The IEBC attributed the issues to logistical challenges and printer errors, denying any deliberate suppression. The court found that while the postponements were inconvenient, there was insufficient evidence of intentional voter suppression. The court upheld the IEBC's decision, noting the absence of proof that the delays were aimed at disadvantaging specific candidates or suppressing voter turnout.

On the issue of discrepancies between Presidential Votes and Other Elective Positions, the Petitioners argued that discrepancies between votes for the presidential election and other positions in various counties indicated potential fraud or ballot stuffing. They cited discrepancies in Othaya and North Imenti constituencies as evidence. The 1st Respondent contended that these discrepancies were due to factors such as votes from special categories (prisoners and diaspora) and stray ballots.

The court scrutinised the Petitioners' claims and the explanations provided by the IEBC. It found that the discrepancies were attributable to legitimate factors like rejected votes and special voter categories. The court ruled that there was no substantial evidence to prove systematic fraud or irregularities affecting the election outcome. Consequently, it concluded that the results of the presidential election were not undermined by the discrepancies.

On verification, tallying and declaration of results by IEBC, disputes arose over whether the IEBC, specifically its Chairperson, adhered to Article 138(3)(c) and Article 138(10) of the Constitution during the verification and tallying of votes. The Petitioners argued that the entire Commission should be involved in these processes, while the Respondents maintained that the Chairperson held the exclusive authority to verify and declare results.

The court affirmed that the IEBC's role is collective in verification and tallying, but the Chairperson alone is responsible for declaring the results. The court found that despite internal disagreements, the IEBC met its constitutional obligations. The Chairperson's role in the result declaration was confirmed as per the constitutional framework, and the Commission's collective responsibility was acknowledged, notwithstanding internal disputes.

On whether the president-elect had attained the 50%+1 threshold, the Petitioners challenged the 1st Respondent's victory, arguing that they did not achieve the required 50%+1 of the total votes, excluding rejected votes. They claimed that the actual valid votes were less than the required threshold. The IEBC countered with a total valid vote count that showed the 1st Respondent surpassed the threshold.

The court upheld the principle that rejected votes should not be included in the 50%+1 calculation. It confirmed that the 1st

Respondent had achieved the required threshold based on valid votes, as per Article 138(4) of the Constitution. The court rejected claims suggesting otherwise and affirmed the President-elect's victory.

Penultimately, the court assessed whether irregularities and illegalities impacted the presidential election result, the Petitioners alleged numerous irregularities and illegalities, including issues with KIEMS kits, late polling station openings, and fraudulent forms. They argued these irregularities affected the election result. The IEBC denied these claims, asserting that any issues were promptly addressed and did not impact the outcome significantly.

The court found that the Petitioners did not provide adequate evidence to substantiate claims of significant irregularities or illegalities affecting the election result. The court concluded that while some irregularities occurred, they were not proven to be of a magnitude that would alter the final election result. The legitimacy of the election was upheld.

The Supreme Court addressed a range of reliefs sought by Petitioners in relation to the 2022 Presidential Election, operating within the constitutional framework that defines its jurisdiction. According to Article 163(3)(a) of the Constitution, the Supreme Court holds exclusive original jurisdiction to resolve disputes concerning the presidential election, as detailed in Article 140. This article establishes a clear procedure and timeline for challenging the validity of the presidential election results, allowing individuals seven days from the results declaration to file a petition. The Supreme Court is required to resolve the petition within fourteen days, and if the election is deemed invalid, a new election must occur within sixty days.

The Supreme Court Rules complement these constitutional provisions, specifying the orders the court may issue upon concluding an election petition. These orders include dismissing the petition, invalidating the election declaration, confirming the election's validity, and deciding on costs or other relevant measures.

The court's jurisdiction is strictly limited to the validity of the presidential election and does not extend to issues beyond this scope, such as the removal of the IEBC Chairperson. Although the court can issue recommendations and advisory opinions under Article 163(6) of the Constitution, it cannot make determinations on matters outside the scope of the presidential election petition.

The Supreme Court issued several recommendations aimed at improving the electoral process and addressing institutional shortcomings within the IEBC. Recommendations included enhancing corporate governance by advising Parliament to strengthen the statutory and regulatory framework for the IEBC's policy and administrative roles. It was suggested that

the IEBC should establish formal internal guidelines to define the roles of its Chairperson, Commissioners, and Chief Executive Officer, and clearly outline responsibilities for officials and third parties in legislative and administrative documents.

On election technology, the court recommended restricting server access to IEBC staff during elections and separating servers for election data from internal administrative functions to support forensic analysis. Reforms for statutory forms included simplifying Form 34A and adding a column for stray ballots, as well as thorough training for Returning Officers on valid votes. The court also proposed mechanisms for special voting and reconsideration of the constitutional timeline for handling presidential election petitions.

Additionally, the court emphasized the importance of maintaining professionalism in courtroom proceedings and cautioned against inappropriate remarks by advocates, stressing the need for respect for the judiciary and adherence to professional conduct standards.

In conclusion, the Supreme Court reaffirmed its commitment to the Constitution and impartial justice. The court dismissed Presidential Election Petition No E005 of 2022 and other related petitions, validating the 1st Respondent's election as President-elect. It declared Regulation 87(3) of the Elections (General) Regulations, 2012 unconstitutional to the extent that it conferred sole power of verifying and tallying results to the Chairperson of the Commission. In recognition of the public interest involved, the court ordered each party to bear their own costs and released security deposits to the Petitioners.

Matoke Emily Kwamboka v IEBC and 2 Others

Election Petition No. 004 of 2022

High Court of Kenya at Nyamira

K Kimondo, J

2 March 2023

Summary of the facts

This Petition filed on 8th September 2022 was in respect of the election for the seat of County Woman Representative to the National Assembly for Nyamira County in the general elections held on 9 August 2022. The Petitioner who ran on the ODM ticket lost to the 3rd Petitioner who ran on the Jubilee ticket. The Petitioner then filed the case alleging that the election for the County Woman Representative was not conducted in compliance with Articles 81 and 86 of the Constitution, the Elections Act and the Regulations that require fair, transparent, efficient, accurate or verifiable poll. The Court ordered scrutiny and recount of votes cast at Ebaro DOK primary school, recount in 12 polling stations and retally of votes in Forms 39B and 39C.

The Petition was based on several grounds. First, there was an inexplicable variance of 29,976 votes between the election of the County Woman Representative and that of the County Governor as well as variances with other elected seats. The second ground was the allegation that the Petitioner was the most popular candidate. The third ground was the claim of multiple errors, anomalies, alterations and cancellations in Forms 39A in 14 polling stations in Kitutu Masaba Constituency. The fourth ground was the claim of intimidation and ejection of ODM agents from polling stations creating doubt on the validity of 10,844 votes. The fifth ground was the claim of "homogeneous results" particularly in the Kitutu Masaba Constituency which affected 12,234 votes. The sixth ground was the allegation of transposition errors that illegally switched the Petitioner's results and credited them to the 3rd Respondent in some polling stations. The seventh ground was on bribery of voters through CS Fred Matiang'i as well as his unlawful campaigns through marshalling of state resources. The eighth ground was the allegation that the results declaration forms were not signed at all by agents and no reasons proffered by the presiding officers. Consequently, the Petitioner sought that the court order security of election materials, scrutiny and recount of votes in polling stations complained of, nullifying the election of the 3rd Respondent and ordering fresh elections for the position of County Woman Representative to the National Assembly for Nyamira County.

The 1st and 2nd Respondents defended the Petition, asserting that they conducted the elections in accordance with the law. They also argued that any malpractices did not affect the results of the elections; there was no discrepancy between the votes cast for Woman Representative and the Governor and that the Petitioner was relying on an erroneous form 37C; variances were accounted for by the rejected ballots; the alteration of form 39A was made openly and was necessitated by the need to correct certain errors; no agents bearing proper credentials were locked out; no complaints of vote bribery and intimidation of agents was received; Under Regulation 79(6) of Elections General Regulations, failure or refusal by agents to sign the results declaratory forms, would not impeach the validity of the poll or the results.

The 3rd Respondent also denied the Petition noting that the Petitioner was not popular and denying personal involvement in the alleged electoral irregularities.

Issues for Determination

1. Whether the election was tainted by irregularities, illegalities or malpractices and whether they substantially affected the result.

2. Whether the 3rd Respondent was validly elected as the County Woman Member to the National Assembly for Nyamira.

3. Whether the Petitioner was entitled to the reliefs sought in the petition.

4. Who should bear the costs of the petition.

Decision of the Court

The Court observed that ideally, the number of valid votes cast should be largely the same in all six elections. However, the Court observed that the variance complained about is not in the primary forms 39A for elections where results are final. But they are in the consolidation or totals indicated in form 37C for the election of governor.

The Court noted that Regulation 69 (2) provides that a voter shall, in multiple elections, be issued with ballot papers for all the elections therein and shall after receiving the ballot papers-(a) cast his or her votes in accordance with Regulation 70 without undue delay. The Court noted that the Regulation simply means that in a general election, the voter is given six ballot papers which must be dropped into the respective ballot box. So much so that all other factors remain constant, the total votes cast across the county-wide offices of governor, Senator or Woman Representative should not have a significant variance. However, the Court observed that the Petitioner did not provide cogent evidence to support the claim that the variance was caused by ballot stuffing. In the end, the Court was not satisfied that the Petitioner proved above a balance of probabilities that the variance between the two elections amounted to 29,976 votes. Further, the Court observed that the evidence of proof of alleged fraud which led to the discrepancy was not proved beyond reasonable doubt as is required by the standard of proof of such illegalities that are criminal in nature. In the end, the Court was not satisfied that there was a fraudulent scheme to puff up the data to justify the 3rd Respondent's score or to rig the election.

On the ground that the IEBC could not account for the results of stream 1 at Embaro D.O.K Primary School during the scrutiny process, the Court readily found that the allegation had been proved above a balance of probabilities. In arriving at this finding, the Court considered that the procedure under Regulation 73 of the Election (General) Regulations was not followed in declaring the results of stream 1. Therefore, the Court arrived at the inevitable conclusion that malpractices of a criminal nature may have occurred at Embaro D.O.K Primary School stream 1 of 2 in Kitutu Masaba. The Court went further to note that the stream results had a voter count of 700 and the absence of the result affected all candidates. Hence, the absence of the results for School Stream 1 of 2 would not dent the lead of the 3rd Respondent.

On the ground of interference by state officials, the Court noted that the Petitioner provided little evidence to support the fact considering that the video recordings were disallowed. The Court was satisfied that during the height of the campaign season CS Fred Matiang'i had no kind words for the Petitioner and CS's comments were misogynistic and denigrating. The Court also found that CS Fred Matiangi's open support for the 3rd Respondent was highly irregular. However, the court could not objectively measure the number of votes that

the open support cost the Petitioner. On the ground of voter bribery, the Court observed that the allegations from witness accounts were general in nature and were not proven beyond any reasonable doubt. Furthermore, the alleged instances of bribery were not reported.

On the grounds of cancellations or alterations or overwriting in forms 39A, the Court observed that some of those changes were countersigned by presiding officers and some of the affected forms were signed by agents. On homogenous results, the Court noted that from results in Form 39B, the results of Esanige streams 2 and 3 and Ekerenyo EDN Centre streams 1 and 2 were identical. The Court noted, however, that the identical result was based on a consolidation of results and not the final results at the polling stations as indicated in Form 39A. As such, the Court found that the Petitioner's allegation failed on merit. Regarding the close results in other polling stations, the Court agreed with the Petitioner that those results were strikingly close for each candidate and looked extremely suspicious. However, the Court observed there was no clear-cut evidence to show that the Respondents doctored them. On transpositional errors from Form 39A to 39B, the Court observed that IEBC conceded some of the transpositional errors. The Court was of the view that the errors were not significant in changing the main results. Some of the errors were arithmetic or resulting from poor summation. The scrutiny also proved that the delay in signing the releasing of results did not affect the results.

On the other grounds of unlawful ejection and intimidation of agents, the Court considered the law on agents and found that several agents who claimed they were denied entry into polling centres carried general appointment letters. The Court found that the appointment letters were defective as they did not clearly specify the polling station in respect of which the agents were appointed. The Court also observed that the problem of agents was not unique to the Petitioner. Furthermore, considering the high number of agents in the general election and the constraints of space, the court found there was no significant transgression of the law or Regulations merely because the Petitioner did not have her personal agents in some of the polling stations. On tampering with election materials, the Court considered the scrutiny report showed some results of unmatching seals, removal of seals as well as breaking of the ballot boxes. The Court observed, however, that the same could only be considered in light of the evidence that was led at trial so as not to expand the scope of the Petition.

The Court concluded that there were irregularities or anomalies in this election. The striking irregularities and anomalies are the missing results for the whole stream at Embaro D.O.K Primary School 1 of 2 in Kitutu Masaba; campaigning by a former cabinet secretary in favour of the 3rd Respondent; errors in transferring data from some forms 39A into the B and C series; and many cases of cancellations or alterations or overwriting in forms 39A. When all those irregularities and

anomalies are contrasted against the overall findings in the scrutiny report and the wide margin between the two leading candidates, they did not substantially affect the outcome of the election.

The Court held that the results at the polling station were final. Further, the anomalies in the transfer of data from forms 39A into forms 39B and 39C did not materially affect the outcome. Therefore, the Court was unable to say that the election was not conducted in accordance with the principles laid down in the Constitution and written law. Therefore, the Court concluded that the election for County Woman Representative to the National Assembly for Nyamira County held on 9 August 2022 was substantially conducted in accordance with the Constitution, the Elections Act and Regulations.

Further, the Court noted that the Petitioner was not entitled to an order nullifying the results or for fresh elections or to quash the Kenya Gazette Notice dated 22 August 2022 or any such other instrument declaring that the 3rd Respondent was validly elected. The Court dismissed the petition. Furthermore, the Court observed that the petition did not raise any complex questions of law or evidence even though many witnesses testified. Also, the evidence was taken within a week. Therefore, the Court ordered that the costs should not exceed KShs 3,000,000 for all three Respondents and shall be shared between them. The court directed that the matter at Embaro polling station be transmitted to the Director of Public Prosecutions for investigation and action as provided under section 87(3)(a) & (b) of the Elections Act.

Election offences alleged as the only basis for impugning election

Bryan Khaemba v Didmus Barasa & 2 Others High Court Election Petition E001 of 2022

High Court of Kenya at Bungoma

Kasango J

22 November 2022

Summary of the facts:

The court considered an interlocutory application filed by the 1st Respondent, Didmus Wekesa Baraza Mutua, on 30 September 2022. He sought the striking out of the Petitioner's petition dated 31 August 2022 and its supporting affidavits, including specific annexures such as a report labeled "BMK-6." Additionally, the 1st Respondent requested the court to award him the costs of the application and the petition.

The petition was filed by Bryan Mandila Khaemba, challenging the election of the 1st Respondent as Member of the National Assembly for Kimilili Constituency in the general election held on 9 August 2022. The Petitioner claimed that the election was not conducted in accordance with the Constitution and the law, alleging that the 1st

Respondent committed election malpractices, including using public resources during his campaign and being involved in the shooting and killing of his aide, Brian Odinga Olunga. The Petitioner requested the court to refer the alleged malpractice to the Director of Public Prosecutions (DPP) for investigation and to order a fresh election.

The Petitioner clarified that his grievance was with the actions of the 1st Respondent, particularly the shooting incident and the misuse of a Constituency Development Fund (CDF) vehicle for campaigning, rather than the conduct of the election by the Independent Electoral and Boundaries Commission (IEBC). The Petitioner's affidavit referenced a police investigation into the shooting that resulted in the 1st Respondent being charged with murder in the Kakamega High Court under Criminal Case No. E037 of 2022.

In his affidavit, the 1st Respondent argued that the petition was an abuse of the court process, as it sought to address criminal matters already pending in other courts. He contended that allowing the election court to trial facts similar to those in the criminal case would prejudice his defense in the ongoing murder trial and that the election court lacked jurisdiction over pre-election violations of the IEBC Code of Conduct, which fell under the IEBC's purview.

The 1st Respondent asserted that the petition relied on the same evidence used in the criminal case, including postmortem and ballistic reports, potentially undermining his constitutional rights to a fair trial as guaranteed by Article 50 of the Constitution.

In opposition, the Petitioner maintained that the application to strike out the petition did not meet the legal threshold. He cited legal precedents advocating for the court to exercise caution in striking out petitions unless they are hopelessly defective. He referenced section 193A of the Criminal Procedure Code, arguing that parallel criminal and civil proceedings could coexist without prejudice.

The Petitioner further claimed that the election court had jurisdiction to consider alleged election malpractices, stating that the murder charges did not prevent an inquiry into the election's conduct concerning violence. He asserted that the elements of an election offense differed from those of murder, allowing for prosecution on both fronts without concerns of double jeopardy.

The court noted the importance of evaluating the allegations of violence, which were central to the Petitioner's claims. The Petitioner detailed an incident on 9 August 2022, during which the 1st Respondent allegedly initiated violence at Chebukwabi Primary School polling station, leading to the shooting death of Olunga. The Petitioner also claimed that the 1st Respondent misused a government vehicle for campaign purposes, constituting improper influence under Section 14 of the Election Offences Act. He sought several orders, including declarations regarding the election's

validity and requests for a fresh election.

While the 1st Respondent maintained that the election court could not proceed with the petition based on overlapping facts with the criminal trial, the Petitioner argued that the constitutional right to a fair trial applies to both parties involved.

Decision of the Court

Ultimately, the court determined that nothing in the Constitution or statutory law prevents pursuing a party whose actions constitute a criminal offense and infringe upon electoral rights. However, it found the petition lacked specific allegations demonstrating how the alleged violence affected the electorate's rights, as the violence occurred outside the polling station.

In concluding its decision, the court referenced ***Fredrick Otieno Outa v. Jared Odoyo Okello & 4 others* (2014) eKLR**, stressing that the onus is on the election Petitioner to present a compelling case for setting aside an election. It ruled that the allegations of violence pointed to the murder charge against the 1st Respondent, potentially jeopardizing the criminal trial. Consequently, the court struck out the pleadings related to violence and noted that the Petitioner's claim regarding undue influence through the misuse of a government vehicle failed to utilize appropriate constitutional mechanisms for addressing pre-election disputes, citing ***Sammy Ndungu Waity v. Independent Electoral & Boundaries Commission & 3 others* (2019) eKLR** for support on the resolution of pre-election disputes by the IEBC or the Political Parties Disputes Tribunal (PPDT).

4.2.9 Principles Guiding Withdrawal of Petition

Thoya & 2 Others v IEBC & 2 Others; Fondo & Another (Interested Parties)

Election Petition No. E004 of 2022

High Court of Kenya at Malindi

FN Muchemi, J

1 December 2022

Summary of the Facts

This matter relates to the determination of costs for the withdrawal of an election petition.

The Petitioner filed the petition dated 12 October 2022. The Petition successfully applied for the withdrawal of the Petition. The Parties failed to agree on the costs for the petition and filed their submissions on the matter. The Court was to deliver a ruling relating to the Parties' submission on costs.

The Petitioner urged the court to consider that the Petitioner was in financial difficulty and the matter had limited paperwork as it did not proceed to a full hearing. The Respondents urged the Court to consider that they incurred considerable expenses as they traversed the entire county to meet with various witnesses

and polling officials in preparation for defense against the alleged election malpractices particularized in the Petition.

The 3rd Respondent urged the Court to consider that even though the matter did not go to a full hearing, their instructed counsel incurred expenses for perusal, instruction, court attendance, drawing as well as filing. They urged the Court to grant costs that would enable them to repay the expenses. They submitted that pursuant to the Remuneration (Amendment) Order 2014, the reimbursement of the costs requires amounts that comes to KShs. 526,475.

Issues for Determination

1. How should costs be provided for the 1st and 2nd Respondent?

2. How should costs be provided for the 3rd Respondent?

Decision of the Court

The Court observed that the Counsel for the 1st and 2nd Respondents put in quite some work in preparation and filing of the response to the Petition. The Counsel acted jointly for the two parties. The 1st and 2nd Respondents were awarded costs of KShs 350,000. The decision on the costs also factored in the fact that the withdrawal was done at an early stage and only four mention sessions had been scheduled before then.

The Court observed that the Counsel for the 3rd Respondent only filed a 4-paragraph response worded as a ground of objection. Therefore, the Court concluded that less industry went into the preparation and filing. The 3rd Respondent was awarded the costs of KShs. 150,000. The decision on the costs also factored in the fact that the withdrawal was done at an early stage and only four mention sessions had been scheduled before then.

The Court noted that election courts do not consider the financial ability or otherwise of a Petitioner when awarding costs. The Court further noted that costs are granted because they are commensurate to the industry of each party. The decision on the costs also factored in the fact that the withdrawal was done at an early stage and only four mention sessions had been scheduled before then.

4.2.10 Principles guiding payment of costs of the Petition

Kenta & another v IEBC & 3 others

Election Petition E001 of 2022

High Court of Kenya at Narok

T. M Matheka, J

6 February 2023

Summary of Facts

The Petitioners, Richard Moitalel Ole Kenta and William Kenteiyia Oltetia, contested the election results declaring Patrick Keturet Ole Ntutu and Tamalinye Koech as Governor and Deputy Governor of Narok County, respectively, following the general elections held on 9 August 2022. The petition sought the court to order inspection, scrutiny, recount, and re-tallying of votes across six constituencies. The Petitioner also prayed to the Court to nullify the election results and declare that the Petitioner as the duly elected Governor and Deputy Governor of Narok County.

The Petitioners later filed a Notice of Motion on 12 November 2022. The application was seeking to withdraw the petition on grounds of fostering unity, public interest, and development in Narok County. The Petitioners further expounded on these grounds of application stating that the prolonged electoral dispute would be prejudicial to the county's cohesion. They also stated that no agreements or undertakings had been made regarding the withdrawal. They also sought that each party bears its own costs.

The Respondents did not oppose the withdrawal. However, the 1st and 2nd Respondents requested costs due to the extensive preparations and legal work undertaken in respect of the Petition. The Respondents detailed the industry to include filing numerous affidavits, attending court proceedings, and handling multiple interlocutory applications. The Respondents cited various cases to justify their claim for costs, emphasizing the significant resources expended.

Issue for Determination

The Court determined whether the 1st and 2nd Respondents should be awarded the costs of the suit, and how much those costs should be.

Decision of the Court

The Court stated that while election petitions serve the public interest, they also have personal elements and costs are necessary to compensate Respondents fairly. The Court stated that the awarded costs were seen as a reasonable balance between compensating the Respondents and promoting access to justice.

The Court awarded costs to the 1st and 2nd Respondents. The Court capped the costs at KShs. 2,500,000 for both Respondents. The costs were to be taxed by the Deputy Registrar. The Court further ordered that the security deposit by the Petitioners should be used as part payment of the certified costs.

Erick Ntabo Omwenga v IEBC & 2 Others

Election Appeal No. 005 of 2023

High Court at Kisii

LN Mutende J

4 August 2023

Summary of the facts

The appellant lost the election of Member of County Assembly (MCA) for Bogiakumu Ward in Bonchari Constituency, Kisii County held on 9 August 2022 by a margin of 275 votes to the 3rd Respondent, held on 9 August 2022. He filed a petition seeking to nullify the results, a declaration that the 3rd Respondent was not duly and validly elected, declaring the election invalid; a declaration that the Respondents committed illegalities including election offences and malpractices during elections; and an order directing the 1st Respondent (IEBC) to organize and conduct fresh elections for Bogiakimu Ward in strict compliance and adherence with the Constitution of Kenya 2010 and regulatory provisions governing elections.

The trial court considered the evidence tendered before it and dismissed the petition, affirming the 3rd Respondent's election, which led the appellant to file this appeal before the High Court.

The appellant, dissatisfied with the trial court's decision, filed an appeal, arguing that the court erred in its findings. He claimed that the learned magistrate failed to identify that the election was not conducted according to constitutional and legal standards and that the court failed to acknowledge multiple alleged irregularities, including the 3rd Respondent's illegal campaigning, voter intimidation, and denial of access to polling stations for his agents.

The appellant also contended that the court overlooked evidence of breaches in the Electoral Code of Conduct, such as demonstrations and defamatory statements made by the 3rd Respondent which reduced the voter turnout. Additionally, he criticized the court for dismissing evidence of disenfranchised voters and accepting questionable affidavits and documents. He further alleged that the court mishandled the timeline of events, particularly the premature issuance of an election certificate, and argued that these errors compromised his right to a fair hearing, ultimately leading to an unjust ruling.

The Respondents argued that the appeal was incompetent, as it violated Section 75(4) of the Elections Act, claiming the appeal was based on matters of fact rather than law. They maintained that the appellant failed to meet the burden of proof for the alleged irregularities and illegalities, as required by the Evidence Act and the standards set in previous cases, such as the Raila Amolo Odinga 2017 case. They contended that the appellant's accusations were general and unsubstantiated, including claims of voter intimidation, chaos, and manipulation, which did not impact the election's outcome. They further argued that minor issues with the KIEMS Kit were promptly resolved and did not warrant the election's annulment. They urged the court to uphold the fairness and transparency of the Bogiakimu Ward MCA election.

Issues for determination

1. Whether the elections were conducted in accordance with the constitution, Statute (Election laws) and regulations.

2. Whether the conclusion of the trial court was in accordance with the law.

Decision of the court

In addressing whether the elections for the Member of County Assembly (MCA) for Bogiakumu Ward were conducted according to constitutional and statutory requirements, the court first examined the standard of appellate jurisdiction. According to Section 75(4) of the Elections Act, appeals to the High Court from the Magistrate's Court in election matters are limited strictly to matters of law. This implies that the High Court's review does not extend to re-evaluating factual evidence but focuses on interpreting legal principles, and statutory provisions, and applying those laws to the facts.

The court also referenced the ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others*** case, which delineates the three elements that constitute a matter of law: the technical element (interpretation of constitutional or statutory provisions), the practical element (application of the Constitution and law to a set of facts or evidence on record), and the evidentiary element (evaluation of a trial court's conclusions based on evidence on record).

In this context, the appellate court noted that while it could not engage in fact-finding, it must evaluate whether the trial court's decision was legally sound, which may involve examining how the facts were applied to legal standards. The court emphasized that this evaluation could not be conducted in a vacuum and must consider the broader legal framework to determine compliance with electoral laws.

The court then discussed the issue of unpleaded matters, stating that parties are typically bound by their pleadings, as established in ***Waititu vs. IEBC & Others* (2013) eKLR**. It highlighted that courts are not expected to decide on issues not raised in the pleadings unless the parties had implicitly or explicitly left such issues to the court's determination, as seen in the *Odd Jobs* case. In electoral matters, however, the court has some leeway to inquire whether an election was conducted in accordance with constitutional and statutory mandates, even when certain issues were not specifically pleaded, provided that this does not prejudice any party.

The court reviewed several grounds of appeal that were dismissed by the trial court because they were not pleaded or introduced during submissions. For example, the allegations about the appellant being portrayed as a murderer were not explicitly mentioned in the pleadings but rather in supporting affidavits. Similarly, claims about the disenfranchisement of voters who could not be identified biometrically, the issuance

of a defective election certificate, and the submission of incomplete affidavits were all unpleaded issues that emerged only during the appeal process or in submissions. Citing ***Erastus Wade Opande vs. Kenya Revenue Authority & Another***, the court reiterated that submissions are not evidence and cannot introduce new issues for determination.

The court concluded that the trial court acted correctly in disregarding these unpleaded issues, as they were not part of the original petition and addressing them would have been contrary to the principle that parties are bound by their pleadings.

In addressing whether the election for Bogiakumu Ward MCA was conducted according to the Constitution, electoral laws, and regulations, the court began by examining the appropriate standard of proof required in election disputes. The court reiterated that the standard of proof in election cases is higher than the balance of probabilities but lower than beyond a reasonable doubt. However, in cases involving allegations of criminal or quasi-criminal conduct, such as electoral offenses, the standard is proof beyond a reasonable doubt. This principle was supported by the Supreme Court decision in ***Raila Amolo Odinga & Another vs. IEBC* (2017) eKLR**, which emphasized that Petitioners must provide clear and convincing evidence of non-compliance with electoral laws and that such non-compliance affected the validity of the elections.

The court emphasized that allegations of non-conformity with electoral laws must be substantiated with specific evidence showing not only a breach of the law but also that the breach had a direct impact on the election results. This position is supported by the case ***Raila Amolo Odinga* (2013) eKLR**, which clarified that the Petitioner bears the initial burden of proving the non-compliance, after which the Respondent must demonstrate that the election was conducted in accordance with the law or that the non-compliance did not affect the results.

The Constitution, under Article 81, outlines the principles of a fair electoral system, including the requirement that elections be free, fair, and devoid of violence, intimidation, and improper influence. Additionally, Section 83 of the Elections Act, 2011, states that an election should not be declared void due to non-compliance with any written law if it is demonstrated that the election was conducted substantially in accordance with the principles of the Constitution and relevant laws or if the non-compliance did not affect the result of the election.

The court reviewed several precedents, including ***Morgan v Simpson [1974] All ER 722*** and ***Thomas Malinda Musau & 2 Others vs. IEBC & 2 others* (2013) eKLR,** which support the position that minor procedural errors or the absence of signatures by agents on electoral forms do not automatically invalidate election results unless it is proven that such errors affected the election outcome. The

court reiterated that the absence of an agent or their signature, or the failure to sign forms, does not by itself invalidate the results if the election was otherwise conducted in substantial compliance with the law.

On the matter of access to polling and tallying stations, the court noted that Regulation 62 of the Elections (General) Regulations, 2012, empowers the presiding officer to regulate the number of people in a polling station to maintain order. The Regulation allows the exclusion of persons other than accredited agents, candidates, and authorized personnel and specifies that the absence of agents does not invalidate the proceedings. The appellant failed to provide sufficient evidence that any alleged exclusion of agents directly impacted the fairness of the election process.

Regarding irregularities in voter identification, the court examined the use of the Kenya Integrated Electoral Management System (KIEMS) kit, as mandated by Section 44 of the Elections Act. The law requires an integrated electronic electoral system that is simple, accurate, verifiable, and transparent, with Section 44A providing a complementary mechanism for voter identification if the primary biometric system fails. The court found no substantive evidence from the appellant to show that the KIEMS kit failures or alleged disenfranchisement of voters materially affected the election results or violated the principles of free and fair elections.

On the issue of assisted voting, the court referenced Regulation 72 of the Elections (General) Regulations, 2012, which allows voters unable to vote independently to be assisted by a person of their choice, provided this person is not a candidate or agent. The appellant failed to demonstrate any abuse of this provision, such as coercion or undue influence, that would have affected the election results. Concerning allegations of illegal acts, the court cited Section 11 of the Elections Act, which criminalizes actions that inflict harm or threaten voters to influence their choice. The court reiterated that such allegations must be substantiated with a high standard of proof, akin to criminal conduct, and the appellant did not provide adequate evidence of violence, threats, or propaganda that materially influenced voter behaviour or the election outcome.

In assessing the overall impact of the alleged irregularities on election integrity, the court emphasized that procedural or administrative errors, while inevitable, do not necessarily invalidate an election unless they substantially compromise the election's fairness and results. The court would consider whether the errors affected a significant number of votes, undermined free and fair election principles, or resulted in a failure to comply with constitutional and legal requirements.

The court upheld the trial court's dismissal of the election petition, affirming that the election for the MCA of Bogiakumu Ward was conducted in accordance with the Constitution, electoral laws, and regulations. The appellate

court found no error in the trial court's determination that the alleged irregularities and illegalities were either unsubstantiated or insignificant enough to affect the election's overall outcome.

The court emphasised that while it is within its jurisdiction to ensure that elections are conducted in compliance with legal standards, any review must adhere strictly to the legal framework and avoid delving into unpleaded issues that could prejudice any party. The appeal was dismissed, and the election results for the MCA of Bogiakumu Ward were upheld. Costs were awarded to the Respondents, reinforcing the principle that electoral disputes must be grounded in clear and substantive legal arguments rather than speculative claims or unpleaded matters.

The court concluded that the appellant's allegations did not meet the required standard of proof necessary to overturn the election results for Bogiakumu Ward MCA. The court found that the election was conducted in substantial compliance with the Constitution, electoral laws, and regulations, despite the minor errors cited. The appellant failed to provide clear and convincing evidence that the alleged irregularities and illegalities directly impacted the election's outcome.

Therefore, the court upheld the trial court's decision, affirming the election results and dismissing the appeal. The election for Bogiakumu Ward MCA was deemed to have reflected the will of the people, and conducted according to constitutional and legal standards. Costs were awarded to the Respondents in the sum of Ksh. 60,000, capped at Ksh. 20,000 for each Respondent, underscoring the court's position that electoral disputes should be grounded in substantive legal claims rather than speculative or unproven allegations.

4.2.11 Review of orders of a judge with a concurrent jurisdiction

Evans Okacha v Democratic Action Party Kenya (DAP-K) & 3 Others

Election Appeal No. E008 of 2022

High Court of Kenya at Kakamega

S Chirchir, J

16 June 2023

Summary of the Facts

The Applicant (Evans Okacha) filed an election petition against the Respondents in the lower court. Respondents raised a preliminary objection, and the petition was struck out for want of service. He appealed the decision at the High Court which was struck out again after Respondents raised preliminary objections arguing that the petition was filed out of time and in the wrong registry and court and the 4th Respondent (Joel Castine Okwako) was not served with the petition. The Applicant made an application seeking a review of the High Court's decision and prayed for the reinstatement of the petition. The application for review was based on an apparent error on the face of the record and the discovery of new facts.

Respondents opposed the application and stated that the High Court cannot hear, review and set aside a decision of the Court with concurrent jurisdiction. They also argued that there were no grounds to support a review of the decision.

Issues for Determination

1. Whether the Election Act and Regulations provide for a review of a decision.
2. Whether a Court has jurisdiction to review orders of a Judge with concurrent jurisdiction.
3. Whether the High Court was *fuctus officio* on the matters.
4. Whether a review was warranted.

Decision of the Court

The Court stated that although the Elections Act is silent on the aspect of the review, where circumstances called for it, the Court could invoke Article 159(2)(d) of the Constitution and Section 80(1)(d) of the Elections Act to ensure the end of justice are met. Further, nothing bared the Court from borrowing procedures in the Civil Procedure Act where demands for justice call for it. This is more important in cases of election petitions arising from county assembly elections where the route of appeals ends at the High Court level. It also stated that the Court has jurisdiction to review orders of a Judge with concurrent jurisdiction when the grounds for review are proved. The High Court was not *fuctus officio* on the matters because it was seeking to correct an error on the face of the record to consider some evidence that was inadvertently left out by the parties or was not available at the time of the hearing. This complies with section 80 of the Civil Procedure Act.

In conclusion, the Court dismissed the application with costs for lack of merit. The Court held that no explanation was given as to why such evidence could not be obtained before the hearing of the preliminary objection. The applicant did not demonstrate that he exercised due diligence but still failed to get the evidence before the hearing.

Note: There is a contrary position taken by courts of concurrent jurisdiction in ***Clement Kung'u Waibara & Another v Francis Kigo Njenga*** **[2013] eKLR** & ***Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 Others*** **Machakos Election Petition No 8 of 2013** to the effect that an election court has no power to review as it was not expressly granted by statute.

4.2.12 Applicability of Civil Procedure Rules (CPR) in electoral disputes

Geoffrey Omwenga Getuba & Another v Kibagendi & 2 Others

Election Petition E002 of 2022 (Ruling)

High Court of Kenya at Kisii

M Thande, J

9 November 2022

Summary of the Facts

The Petitioners (Geoffrey Omwenga Getuba and Nathan Onkundi Mosioma) filed an application challenging the notice of appointment of advocates submitted by M/s. Ombui Ratemo & Associates Advocates on behalf of the 1st Respondent (Antoney Kibagendi). They argued that the notice of appointment was improperly filed, out of time, and not in compliance with the Elections (Parliamentary and County Elections) Petitions Rules, 2017, specifically Rule 10(4), which mandates the filing of a notice of address for service within 5 days of the petition service. They sought to have the notice, and all related pleadings struck out with costs.

In response, the 1st Respondent acknowledged the filing omission but contended that it was a minor procedural error that did not affect the substance of the petition or prejudice the Petitioners. He argued that the notice of appointment served the same purpose as a notice of address for service by providing the necessary address for correspondence. Furthermore, he stated that the Court has the discretion to extend or limit the time for compliance with procedural requirements to serve the interests of justice.

Issues for Determination

1. Whether the error of filing a notice of appointment instead of a notice of address for service is fatal.

2. Whether the notice of appointment of advocates should be struck out.

3. Whether the pleadings filed on behalf of the 1st Respondent are fatally defective and should be struck out.

Decision of the Court

The Court held that the error of filing a notice of appointment instead of a notice of address for service is not fatal, as both documents serve similar purposes. It stated that the notice of appointment of advocates should not be struck out as it fulfils the requirement of notifying the address for service.

The Court held that the pleadings filed on behalf of the 1st Respondent are not fatally defective and should remain on record as striking them out would be an undue regard for procedural technicalities over substantive justice. The Court dismissed the application for lack of merit.

4.2.13 Abatement of election petitions/ appeals upon the death of a party

Douglas Shitote Okumali v IEBC and 2 Others

Election Petition Appeal No. E005 of 2023

High Court of Kenya at Kakamega

S Chirchir, J

18 April 2023

Summary of the Facts

This was an appeal from the judgment of the

Hon Obutu, SPM in Mumias Election Petition No. E001 of 2022 which was delivered on 16 January 2023. When the appeal came up for hearing, the Court was informed that the 3rd Respondent had died. The Court directed parties to submit what ought to be the way forward.

The Appellant submitted that an election petition did not abate upon the death of a party. The Appellant further submitted that this should be the case for reasons that (a) election petitions / appeals are not actions *in personam* but are *in rem*; (b) election petitions are brought in public interests; (c) Issues raised in the Appeal are constitutional and electoral in nature. The Appellant cited a number of those issues as lifted from the Memorandum of Appeal that the court should proceed and decide on notwithstanding the demise of the 3rd Respondent.

The 1st and 2nd Respondents submitted that the real electoral dispute was between the Appellant and the 3rd Respondent who had died. They argued that in the circumstances the dispute should abate in the absence of the 3rd Respondent in the dispute. They further submitted that the electoral and constitutional issues that are raised in the Petition are not new and have been subject to past consideration and determination.

Issues for Determination

1. The Court determined whether the election petition or an appeal as the case herein, abates upon the death of one party, in the Instant case, against a person whose election is being challenged.

Decision of the Court

The Court noted that Rule 29 (1) of the Election (Parliamentary and County) Petition Rules 2017 requires that if before the hearing of a Petition, the person whose election is being contested dies, the Petition shall abate. The court noted that the same applies to the same Petition that is being litigated at an Appellate stage.

The Court considered the finding in *Party of* ***Independent Candidate & Another v Mutula Kilonzo & 2 Others [2013] eKLR*** that was cited by the Appellant. The Court observed that the determination in Mutula Kilonzo was based on the Election (Parliamentary and County) Petition Rules of 2013, which expressly provided that the suit shall not abate upon the death of the person whose election is being contested. Further, the Court noted that those 2013 rules have since been replaced by the 2017 Election Petition Rules which expressly require that the Petition shall abate. The Court noted that the position in the 2017 Rules applies even if the petition had germane constitutional and electoral issues which require determination.

In conclusion, the Court declared that the Appeal had abated. The Court directed the Registrar of the Court to publish a Notice in terms of Rule 29 (2) (a) of the Election (Parliamentary and County) Petition Rules. In the circumstances, the Court ordered each party to meet their own costs in the Appeal.

4.3 Appeals

4.3.1 Documents to be filed on appeal

Makau v Mohamed; Wiper Democratic Movement & Another (Interested Parties)

Election Appeal No. E001 of 2022

High Court of Kenya at Nairobi

AC Mrima, J

8 July 2022

Summary of the Facts

Mohammed Adan Mohamed (the Respondent) filed a Complaint before the PPDT. He alleged that he had twice emerged as the winner of the nominations that the Wiper Democratic Movement party conducted for the MCA position in respect of Kwa Njenga Ward. Though he had been issued with a nomination certificate, he complained that the Wiper Democratic Movement issued another nomination certificate to Marcos Makau (the Appellant in this case). He further alleged that the party's National Elections Board refused to admit his complaint therefore prompting him to appeal to the PPDT. Marcos Makau and IEBC did not participate in the PPDT proceedings. PPDT delivered its judgment on 25 May 2022. PPDT overruled the objection to its jurisdiction and declared that Mohamed Adan Mohamed was duly nominated as the Wiper Democratic Movement nominee and for removal of the name of Marcos Makau as the party nominee.

The Appellant filed an appeal against the judgment and decree of the PPDT. The Appellant argued that he was victorious after voting by delegates and his name was forwarded to the IEBC. He sought a declaration that his nomination was properly conducted and therefore legal. The High Court considered the matter raised a preliminary issue on the effect of the absence of the decree in the record of appeal and the Tribunal file as well.

Issue for Determination

The Court determined what documents ought to be filed in an appeal from PPDT to the High Court.

Decision of the court

The Court noted that Regulation 34 of the PPDT (Procedure) Regulations 2017 stipulates that the law governing civil appeals before the High Court, specifically the Civil Procedure Act and Civil Procedure Rules, applies to appeals from the PPDT to the High Court.

Thus, the documents submitted to the High Court for appeal must meet the requirements of the Act and its rules. First, from the reading of Section 65(1) of the Civil Procedure Act, it is the decree or part thereof that is appealed from the subordinate court or the Tribunal, as in this case, to the High Court. Second, under Order 42 Rule 13(4) of the Civil Procedure Rules a Court may dispense with the requirement of any document being part of the Record of Appeal except the memorandum of appeal, the pleadings and the judgment, order or decree appealed from and in appropriate

cases the order giving leave to appeal. Third, the saving grace under Article 159(2)(d) of the Constitution is inapplicable in this case because the provision only applies to matters relating to procedure or form and not the substance thereof as in this matter. Fourth, despite clear provisions on the extension of time, the Appellant never sought any extension of time to file the decree, nor did it explain any difficulty in obtaining the decree.

In the end, the Court concluded that the record of appeal was incomplete and incompetent for lack of a decree extracted from the judgment of PPDT. In such circumstances, there was no competent appeal for consideration. The Court struck the appeal with costs.

4.3.2 Failure to file Notice and/ or Record of Appeal on time

Njelekela Ashura Michael v Orange Democratic Party & 3 Others

Election Petition Appeal E001 of 2023

Court of Appeal of Kenya at Nairobi

Ali-Aroni, JM Mativo & PM Gachoka, JJA

12 May 2023

Summary of Facts

The appellant, a member of ODM, was initially included in the party list submitted to the IEBC for nomination to the Senate representing special interests before the 2022 general elections. However, the IEBC returned the party list to ODM for non-compliance with the Constitution, and ODM subsequently re-submitted a fresh list excluding the appellant's name.

Aggrieved by the omission, the appellant filed a complaint at the Political Parties Disputes Tribunal (PPDT), seeking a declaration that the decision to omit his name amounted to an adverse administrative action, and an order compelling ODM to reinstate his name. The PPDT dismissed the appellant's claim for failure to exhaust the party's internal dispute resolution mechanism before approaching the PPDT.

The appellant then filed an election petition at the Nairobi High Court (Election Petition No. E002 of 2022), seeking similar relief as in the PPDT complaint. The 3rd Respondent (Crystal Kagehi Asige) filed a notice of preliminary objection, arguing that the matter was res judicata, the dispute fell within the jurisdiction of the PPDT, and the appellant should have appealed against the decision of the PPDT instead of filing an election petition.

The High Court (Ndungu, J.) upheld the preliminary objection and dismissed the appellant's election petition, holding that the available legal mechanism was an appeal to the High Court sitting as a judicial review court or in the exercise of its supervisory jurisdiction under the Constitution. The High Court awarded costs of Kshs. 100,000/= to the

3rd Respondent. Aggrieved by the High Court's ruling, the appellant filed a notice of appeal and a record of appeal in the Court of Appeal.

On the other hand, the 3rd Respondent contended that the appellant's election petition was res judicata, having already been determined by the PPDT. They argued that the appellant should have pursued an appeal against the PPDT's decision rather than filing a new election petition. This position was supported by the assertion that the dispute fell within the jurisdiction of the PPDT as outlined in the Political Parties Act, which mandates that internal party disputes be resolved through the party's established mechanisms before escalating to the courts.

Additionally, the Respondents highlighted that the appellant failed to file the notice of appeal and the record of appeal within the stipulated time frames, which they argued rendered the appeal defective. The 4th Respondent emphasized that the appellant's notice of appeal was filed out of time and that the necessary security for costs had not been deposited as required by the Election Petition Rules. They maintained that these procedural missteps were significant enough to warrant dismissal of the appeal, asserting that the appeal raised no reasonable grounds of law or fact.

Moreover, the 3rd Respondent pointed out that the appellant had not provided sufficient justification for extending the time for filing the notice and record of appeal. They argued that allowing such an extension would be prejudicial to the 3rd Respondent, as it would undermine the finality of the previous judgment and the orderly conduct of electoral processes.

Issues for Determination

1. Whether the court had jurisdiction.
2. Whether the court could grant Appellant's plea for enlargement of time to file her Notice of Appeal and Record of Appeal and that the filed documents be deemed as properly filed.

Decision of the Court

The Court elaborated on the concept of jurisdiction, emphasising that it refers to a court's authority or power to adjudicate a dispute. For a court to have jurisdiction, it must be properly constituted regarding the bench's composition, the subject matter must be within its jurisdiction, and the case must come before the court initiated by due process and after fulfilling any conditions precedent. If jurisdiction is lacking, proceedings become null and void. This principle was reinforced by the Court's decision in ***National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 Others*** **[2022] eKLR.** The Court further referenced ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others*** **[2013] eKLR,** which underscored the fundamental nature of jurisdiction as a threshold issue that must be addressed before considering the merits of a case.

Notice of Appeal is a critical document for initiating an appeal. If it is defective or incompetent, the Court has the authority to strike it out, as established in ***Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 Others*** **[2014] eKLR**. In ***Silverbrand v County of Los Angeles*** **[2009] 46 Cal. 4th 106 (Cal. Sup. Ct.)**, the California Supreme Court similarly held that a timely Notice of Appeal is a jurisdictional prerequisite. The Court of Appeal in ***Boy Juma Boy & 2 Others v Mwamlole Tchappu Mbwana & Another*** **[2014] eKLR** affirmed that the jurisdiction of the Court of Appeal is contingent upon the filing of a proper Notice of Appeal.

Rule 6 of the Election Petition Rules provides that a Notice of Appeal must be filed within seven days of the decision and ***Munuve Mati v Returning Officer Mwingi North Constituency, Independent Electoral and Boundaries Commission and Paul Musyimi Nzengu*** **[2018] eKLR**, which had allowed applications for extension of time. The Court also considered ***Charles Kamuren v Grace Jelegat Kipchoim & 2 Others*** **[2015] eKLR**, which underscored the importance of strict adherence to timelines in electoral disputes. However, it acknowledged that the 2017 Rules confer discretion to determine the effect of non-compliance, provided that justice is not unduly impeded by procedural technicalities.

The Supreme Court in ***Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others*** **[2014] eKLR** affirmed that non-compliance with service rules does not necessarily warrant striking out an appeal, especially where there is no demonstrated prejudice to the other party. Similarly, in ***John Munuve Mati v Returning Officer of Mwingi North Constituency & Others*** **Nairobi Election Petition Appeal No. 5 of 2018**, the Court exercised discretion to admit a Notice of Appeal which was filed late.

The Court further referenced ***Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*** **[2014] eKLR**, which underscored that strict adherence to statutory timelines is mandatory. The Court also considered the principles outlined in ***Wavinya Ndeti v IEBC & 4 Others*** **[2015] eKLR**, emphasising that statutory timelines for filing appeals are mandatory and cannot be extended. In essence, the Court ruled that the delay in filing the Record of Appeal was not excusable and struck out the appeal.

4.3.3 Failure to deposit security for costs on appeal

Hon. Jude Kang'ethe Njomo v Hon. John Machua Waithaka & 2 Others

Election Petition Appeal (Application) E002 of 2023

Court of Appeal of Kenya at Nairobi

HA Omondi, KI Laibuta & JM Mativo, JJA

22 June 2023

Summary of Facts

The crux of the appeal centres on the appellant's failure to deposit the required security for costs as mandated by the Court of Appeal (Election Petition) Rules, 2017. On April 14, 2023, the court directed the appellant to make this deposit as a pre-condition for hearing the appeal. However, by 2 May 2023, it was established that the appellant had not complied with this order, leading the court to grant the Respondents the liberty to apply for the appeal to be struck out.

On 5 June 2023, the 2nd and 3rd Respondents filed an application to strike out the appeal for non-compliance with the court's rules. They argued that the appellant had been given ample time to deposit the security but failed to do so, which they claimed warranted the dismissal of the appeal. In response, the appellant filed an application on 7 June 2023, seeking an extension of time to deposit the security until he could file a supplementary record of appeal.

The appellant attributed his failure to deposit the security to several factors, including financial hardship stemming from the election campaigns and challenges in obtaining the necessary court documents from the Kiambu High Court. He argued that these issues were beyond his control and contended that his constitutional rights should not be infringed due to procedural delays caused by the court.

Conversely, the Respondents, including the 1st Respondent Hon. John Machua Waithaka, supported the application to strike out the appeal on the grounds of non-compliance with the Court of Appeal (Election Petition) Rules. They argued that the appellant had failed to deposit security for costs within the stipulated timeframe, which is a mandatory requirement under Rule 27 of the rules. The Respondents emphasized that the failure to comply with this requirement is sufficient grounds for the dismissal of the appeal, as it is both substantive and jurisdictional in nature.

The Respondents further asserted that the appellant's claims regarding financial hardship and delays in obtaining court documents did not provide a valid excuse for failing to meet the court's directives. They highlighted that the rules do not allow for an extension of time for depositing security and pointed to previous case law that underscores the importance of adhering to set timelines in election petitions. The Respondents maintained that the appellant's apparent indolence in pursuing the appeal indicated a lack of genuine interest in prosecuting the matter.

Issues for Determination

1. Whether the court had jurisdiction to extend the time for depositing security for costs in election petition appeals.

2. Whether the court should exercise discretion to extend time.

Decision of the Court

In its determination, the court analysed Rule

4(1) which states that the Rules apply to appeals from decisions of the High Court in election petitions. Rule 27 on the other hand, provides for the deposit of security for costs and the consequences of non-compliance. Rule 5 highlights that failure to comply with the rules is subject to the Court's discretion, considering the provisions of article 159(2)(d) of the Constitution and the need to observe constitutional timelines. The Court found that while rule 17(1) allows for the extension of timelines for sufficient reasons, it is constrained by constitutional and statutory timelines. Therefore, the Court has the discretion to extend the time for depositing security, provided the reasons are substantial and do not infringe upon constitutional or electoral timelines.

The Court then examined whether the Appellant provided sufficient reasons to merit the extension. The principles from ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR** were considered, including the necessity of a reasonable explanation for the delay and the absence of prejudice to the Respondents. It asserted that the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degree of lateness, the explanation therefore, and the nature of the case only to mention but some. Ordinarily, these facts are interrelated; they are not individually decisive. An unsatisfactory explanation for any period of delay will normally be fatal to an application.

The Court noted that the Appellant's failure to comply with the Court's directions and the arguments presented by Mr. Mungai were insufficient. The Appellant's claim that the delay was due to financial hardship and the need for a complete record was deemed unconvincing. The Appellant had ignored previous directions and had not demonstrated that the delay was justified. Ultimately, the Court concluded that the Appellant's non-compliance and lack of a satisfactory explanation disentitled him to the Court's discretion. The application for an extension of time was dismissed, the appeal was struck out, and costs were awarded to the Respondents.

4.3.4 Deferred and sequential jurisdiction of the Court of Appeal

Beatrice Saki Muli & Another v Hon. Jude Kang'ethe Njomo & Another

Civil Application No E021 of 2023

Court of Appeal at Nairobi

Omondi, Laibuta & Ali-Aroni, JJ.A.

14 April 2023

Summary of Facts

Hon. Jude Kang'ethe Njomo (1st Respondent), dissatisfied with the election outcome, filed a petition on September 8, 2022. She later filed

an interlocutory application on 7 November 2022, seeking orders for the Independent Electoral and Boundaries Commission (IEBC) to produce various election-related documents and for scrutiny of exhibits.

On 9 January 2023, the High Court dismissed Njomo's application, stating she had not provided sufficient evidence to warrant scrutiny of the requested documents. Aggrieved by this ruling, Njomo filed a Notice of Appeal on 24 January 2023, in the High Court.

Beatrice Saki Muli (1st applicant), an IEBC officer, and the IEBC itself (2nd applicant) filed a motion on 27 January 2023, seeking to strike out Njomo's Notice of Appeal. They argued that the notice was improperly filed in the High Court instead of the Court of Appeal and that it was filed out of time.

The applicants, Beatrice Saki Muli and the IEBC argued that the Notice of Appeal filed by Hon. Jude Kang'ethe Njomo should be struck out. They contended that the notice was improperly filed in the High Court on 24 January 2023, instead of being lodged in the Court of Appeal's registry as required by Rule 6(1) of the Court of Appeal (Election Petition) Rules, 2017.

Additionally, they claimed that the notice was filed out of time, as it should have been filed within seven days of the impugned decision. The applicants argued that striking out the notice would be in the interest of justice and emphasized the need for timely resolution of election disputes, citing several precedent cases to support their position.

Hon. Njomo, the 1st Respondent, raised a preliminary objection to the applicants' motion. Firstly, Hon. Njomo argued that the Court of Appeal lacks jurisdiction to hear and determine the application until a notice of appeal against the final judgment of the High Court in the election petition is filed. He further contended that the applicants' motion was premature, as it was filed before the Court of Appeal's jurisdiction under Section 85A of the Elections Act, 2011 was triggered.

Hon. Njomo posited that the motion contravened the principle established in previous Court of Appeal rulings, particularly in the case of ***Jared Odoyo Okello & Another vs. IEBC & 6 Others* [2014] eKLR.** This principle states that issues arising from interlocutory determinations should be addressed on appeal after the final determination of the election court.

Finally, he averred that the rules cited by the applicants (Rules 6 and 19 of the Court of Appeal Election Petition Rules, 2017) do not apply to determinations made by the election court at the interlocutory stage. Njomo argued that interlocutory matters in election petitions should be heard and determined together with the main petition in the election court to avoid delays and adhere to the strict timelines prescribed for resolving election disputes.

Issues for Determination

1. Whether the Court of Appeal has jurisdiction to entertain the applicants' motion to strike out the Notice of Appeal at this stage of the proceedings.

2. Whether interlocutory matters arising from election petitions should be heard and determined separately by the Court of Appeal or together with the main petition in the election court.

Decision of the Court

The court referred to the mandatory provisions of section 80(3) of the Elections Act, 2011, which require that interlocutory matters in election petitions be determined by the election court and only appealed after the final judgment. The court reiterated its position from ***Jared Odoyo Okello & Another v IEBC & 6 Others* [2014] eKLR**, and ***Peter Gichuki King'ara v IEBC & 2 Others***, stressing that interlocutory issues must be addressed in the final appeal to prevent clogging the judicial process. The court also referenced ***Mae Properties Limited v Joseph Kibe & Another* [2017] eKLR**, emphasising the importance of adhering to procedural rules and timeliness

Notice of Appeal was incompetent and effectively non-existent. The conclusion was reached based on several factors, including that the notice was incorrectly filed in the election court, it failed to comply with Rule 6(1) of the Court of Appeal (Election Petition) Rules, it pertained to an interlocutory application rather than a final decision of the election court, and therefore did not satisfy the statutory and case law requirements. The court further noted that since the Notice of Appeal was not properly before it, the question arose whether it had jurisdiction to entertain the applicants' Motion. The 1st Respondent argued that the court lacked jurisdiction until a Notice of Appeal against the final judgment of the High Court in Kiambu HCEP No. E003 of 2022 was filed. The court agreed with the 1st Respondent, ruling that the Motion was premature as the court's jurisdiction under section 85A of the Elections Act had not yet been triggered. Consequently, the 1st Respondent's preliminary objection was upheld, and the applicant's Notice of Motion was struck out, with no order as to costs.

4.3.5 Transfer of appeal filed in the wrong court

Dolphine Nyangara Onkoba v Michelle Kemuma Omwonyo & 2 Others

Election Petition No. E014 of 2023

Court of Appeal at Kisumu

Ali-Aroni, JA (In Chambers)

5 July 2023

Summary of Facts

This case originates from a judgment delivered by Justice Lucy Njuguna in the High Court of Kenya at Nyamira on May 29, 2023, concerning Election Petition Appeal No. E001 of 2023

(consolidated). Following this decision, an appeal was filed, becoming Election Petition No. E014 of 2023 in the Court of Appeal.

Despite the case originating from Nyamira, which falls under the jurisdiction of the Court of Appeal sitting in Kisumu, the appeal was initially filed at the Nairobi registry of the Court of Appeal. This procedural irregularity came to light on July 5, 2023, when the matter was brought before Justice Ali-Aroni for a pre-trial conference in Nairobi.

During this mention, the appellant's counsel, Mr. Achoki, informed the court of the filing error, expressing uncertainty about how the case ended up in Nairobi when it should have been filed in Kisumu. The Respondents' counsels had mixed views on the matter, with representatives for the 1st and 3rd Respondents suggesting the case could proceed in Nairobi, while the 2nd Respondent's counsel was absent from the proceedings.

After considering the situation, Justice Ali-Aroni determined that the proper venue for hearing the appeal was indeed Kisumu, given its origin from the Nyamira High Court. To rectify the procedural misstep, the judge directed the court Registrar to transfer the case to the Court of Appeal sitting in Kisumu, instructing that it be mentioned there on a priority basis. This decision aimed to ensure that the appeal would be heard in the appropriate jurisdiction, aligning with the established judicial administrative practices.

Issues for Determination

1. Whether the Nairobi Court of Appeal was the proper venue for hearing the appeal.

Decision of the court

In this case, the Court of Appeal, represented by Justice Ali-Aroni, made a procedural ruling rather than a decision on the merits of the appeal. The core of the ruling addressed the issue of the appropriate venue for hearing the appeal.

Justice Ali-Aroni determined that the appeal, which originated from a judgment of the High Court in Nyamira, should rightfully be heard by the Court of Appeal sitting in Kisumu, not in Nairobi where it had been erroneously filed. The judge emphasized that there was no valid reason to hear the matter in Nairobi when it properly belonged in the Kisumu jurisdiction.

To rectify this procedural error, Justice Ali-Aroni issued a directive to the court Registrar. The Registrar was instructed to transfer the case from the Nairobi registry to the Court of Appeal sitting in Kisumu. Furthermore, the judge ordered that upon transfer, the case should be mentioned in Kisumu on a priority basis.

This ruling effectively resolved the venue dispute, ensuring that the appeal would be heard in the correct jurisdictional setting. It demonstrated the court's commitment to following proper administrative procedures in handling election petition appeals, even when

it meant redirecting a case to a different registry.

The decision prioritized adherence to established judicial practices over convenience, underlining the importance of hearing cases in their appropriate jurisdictional venues.

5.0 Take-Aways at a Glance

A summary of key take-aways at a glance is provided below.

1. The Independent Electoral and Boundaries Commission (IEBC) had the jurisdiction to summon witnesses, hear complaints, and make findings related to breaches of the Electoral Code, as stipulated in Article 88(4)(e) of the Constitution. In addition, the Electoral Code of Conduct is constitutionally valid. See ***IEBC v Sabina Chege Supreme Court Petition* No 23 (E026 of 2022).**

2. Section 34(d) of the PPA was declared unconstitutional as regulation of political party nominations is the mandate of the Independent Electoral and Boundaries Commission and not the Registrar of Political Parties. See ***Salesio Mutuma Thuranira & 4 Others v Attorney General & 2 Others; Registrar of Political Parties & 4 Others* (Interested Parties) Petition E043, E057 & E109 of 2022.**

3. The requirement that public officers resign before seeking elective office is not inconsistent with the Constitution and facilitates proper electoral planning by the IEBC. See ***Public Service Commission & 4 others v Cheruiyot & 20 others* [2022] KECA 15 (KLR)**

4. The obligation to resign from public office before seeking elective office applies to all public officers, not only to those who draw a salary from the Consolidated Fund or the Exchequer. See ***Mwawaza v Mwaidza & another* Petition E001 of 2022**

5. A Petitioner can sue a political party in an election petition in line with the definition of a Respondent in section 2 of the Elections (Parliamentary and County Elections) Petitions Rules 2017. See ***Dr. Evans Odhiambo Kidero & Another v IEBC & 4 Others*, Election Petition No. E001 of 2022.**

6. The election court has no jurisdiction in pre-election nomination issues in election petitions. However, such issues can be raised in the High Court exercising judicial review or supervisory jurisdiction under Article 165 (3) or (6) of the Constitution. See ***Dr. Evans Odhiambo Kidero & Another v IEBC & 4 Others*, Election Petition No. E001 of 2022.**

7. The Court considers several factors when awarding the costs of the petition. These factors included the complexity of the case, the number of parties involved, the industry involved by the counsel, the time taken, the cost involved such as accommodation and travel for witnesses and the distance travelled by parties based on the location of the court.

8. Printing photographs of candidates in party colours on the ballot paper does not amount to campaigning at the polling station. The purpose of the photograph is for the identification of the candidate. The law has not banned the printing of a photo in the party colours on the ballot paper- See ***Peter Kung'u Kibathi v IEBC & 2 Others*, Election Petition No. E002 of 2022.**

9. No law prohibits public officers from being appointed as election officers – See ***Paul Kipaa Karembu & Another v IEBC & 4 Others*, Election Petition No. E001 of 2022.**

10. Petitioner must provide a basis to order for audit and scrutiny of the system and technology used in the election - See ***Paul Kipaa Karembu & Another v IEBC & 4 Others*, Election Petition No. E001 of 2022.**

11. Although the Elections Act is silent on the aspect of the review, where circumstances call for it, the Court can invoke Article 159(2)(d) of the Constitution and Section 80(1)(d) of the Elections Act to ensure the ends of justice are met. Further, nothing bars the Court from borrowing procedures in the Civil Procedure Act where demands for justice call for it. This is more important in cases of election petitions arising from county assembly elections where the route of appeals ends at the High Court level - See ***Evans Okacha v Democratic Action Party Kenya (DAP -K) &3 Others*, Election Appeal No. E008 of 2022.**

12. The Court has jurisdiction to review orders of a Judge with concurrent jurisdiction when the grounds for review are proved. The High Court is not fuctus officio on matters when it is seeking to correct an error on the face of the record or consider some evidence that was inadvertently left out by the parties or was not available at the time of the hearing. This complies with section 80 of the Civil Procedure Act- See ***Evans Okacha v Democratic Action Party Kenya (DAP -K) &3 Others*, Election Appeal No. E008 of 2022.**

13. The court will dismiss an application for review of a decision where no explanation was given as to why such evidence could not be obtained before the hearing of the matter and the applicant does not demonstrate that he exercised due diligence but still failed to get the evidence before the hearing- See ***Evans Okacha v Democratic Action Party Kenya (DAP -K) &3 Others*, *Election Appeal* No. E008 of 2022.**

14. Failure to state the results of the election is not enough reason to strike out a petition. Procedural infractions that do not cause injustice should not be used to strike out a petition – See ***Ong'era Rogers Moturi v IEBC and 2 Others, Election Petition* No. E001 of 2022.**

15. Petitioner must provide a clear basis for procurement, admissibility and production of new evidence in election petition – See ***Amin Deddy Mohamed Ali v IEBC & 2 Others,* Election Petition No. E001 of 2022.**

16. It is mandatory to attempt to exhaust IDRM and PPDT mechanisms before approaching the High Court for the resolution of pre-election disputes. – See ***Odongo v Murimi & Another,* Civil Appeal 72 of 2022.** Similarly, the applicant must first attempt to exhaust the IDRM and the PPDT mechanisms before approaching the Court on matters of party list. The role of IEBC is limited to gazetting the list provided by the party – See ***Dorcas Monyangi Mogaka v. Orange Democratic Movement (ODM) & 4 Others, Election Petition* Appeal No. E003 of 2023.**

17. PPDT has no power to dictate to a party the method of conducting its nominations. Parties retain autonomy to select nomination methods, which must be communicated to the ORPP within 7 days of nominations and to members within 3 days (section 38E PPA). However, the method must conform to the provisions of the law and nomination rules of the party.

18. Where a nomination exercise is nullified, the party must use the method of nomination used in the first instance when conducting a repeat nomination exercise. This will conform with the principle of legitimate expectation -*See* ***ODM National Elections Board & another v Gare & 2 others*, Civil Appeal 44 & 45 of 2022 (Consolidated).**

19. According to Order 9 Rule 5 of the Civil Procedure Rules, an appeal is fatally defective if it is filed by an advocate who was not on record at PPDT and no change of advocates was filed in Court - See ***ODM National Elections Board & another v Gare & 2 others*, Civil Appeal 44 & 45 of 2022 (Consolidated).**

20. The publication of the party list in the Kenya Gazette after the general elections cannot be reviewed or amended during the term of the County Assembly unless by an order of the Court – See **Amos Liyayi Munasya v Geofrey Muhongo Mitalo & 2 Others, Election Petition Appeal No. E001 of 2023.**

21. Limiting nominations to the County Assembly to only residents and locals of a specific county may be discriminatory. A voter does not need to be from a particular county to qualify for nomination to its assembly. See ***Richard Masese Makori v IEBC & 3 Others, Election Petition* Appeal No. E006 of 2023; *Lydia Matuli & ANC v IEBC and 2 Others Kapsabet* High Court Election Petition Appeal No. E001 of 2022.** For a contrary finding on this issue, see ***Mary Charles Kalunga v IEBC & Others* Mombasa High Court Election Petition Appeal No. E087 of 2023.**

22. In an election petition relating to the county assembly, appellants cannot appeal to the High Court on matters of facts. Only matters of law. A party cannot introduce new pleading and evidence in the appeal at the High Court. See ***Richard Masese Makori v IEBC & 3 Others*, Election Petition Appeal No. E006 of 2023.** However, a different High Court took the contrary view in *Erick Ntabo Omwenga v IEBC & 2 Others* Kisii High Court Election Petition Appeal No. E005 of 2023.

23. IEBC is allowed to use its discretion to identify female nominees from party lists to achieve the two-third gender rule in the county assembly. See ***Richard Masese Makori v IEBC & 3* Others, Election Petition Appeal No. E006 of 2023.**

24. The Court may order a recount and scrutiny of the ballots cast in the contested polling stations where there were significant irregularities and errors in the election process, including the denial of access to polling stations for the Petitioner's agents and discrepancies in vote counts. See ***Kenga Stanley Karisa v IEBC & 2 Others*, Election Petition No. E001 of 2022.**

25. The Court may, under section 87 of the Elections Act direct that the findings of electoral offences be reported to the Office of the Director of Public Prosecutions for further action. See ***Kenga Stanley Karisa v IEBC & 2 Others*, Election Petition No. E001 of 2022.**

26. The Court may declare a candidate validly elected as a Member of the County Assembly. See ***Josiah Obegi Mang'era v Joseph Nyarang'o Ondari & 2 Others*, Election Petition Appeal No. E002** as consolidated with **No. 005 of 2023; *Mochumbe Jackson Mogusu v Nyaribo Dennis Kebaso and 4 Others* Election Petition Appeal No. E 006 of 2023 (as Consolidated with Petition Appeal No. E 007 of 2023)**

27. The Court may order a recount and scrutiny of ballot casts where irregularities, including KIEMS kit failures and unauthorized manual

voting, are proved to ascertain their impact on the election results – See ***Bardad Mohamed Farah v IEBC & 2 Others*, Election Petition No. E001 of 2022**

28. The non-joinder of the Deputy Governor is fatal to the election petition challenging the election of a county governor. The election of the Governor and Deputy Governor, while intertwined, did not mandate the Deputy Governor's inclusion in the petition unless specific allegations were made against the Deputy Governor. While previously some election courts declined to strike out petitions on this basis (see *Hussein Tuneya v Dhadho Godhana & 2 Others*, Election Petition No. E001 of 2022; A similar finding was made by the High Court in Mombasa in ***Dziwe Pala Zuma & Another v The Election Boundaries Commission & 2 Others [2023] eKLR; the Court of Appeal has now ruled in Mutula Kilonzo Jr v IEBC & 2 Others* Election Petition Appeal No. E002 of 2022** that failure to join a deputy governor is fatal to petition.

29. Failure to serve the petition to Respondents within 15 days and failure to deposit security for costs within 10 days make a petition liable to be struck out – See ***James Babira Ndeda v. IEBC & 2 Others*, Election Petition No. E001 of 2022.**

30. The error of filing a notice of appointment instead of a notice of address for service is not fatal, as both documents serve similar purposes. The notice of appointment of advocates should not be struck out as it fulfils the requirement of notifying the address for service. – See ***Geoffrey Omwenga Getuba & Another v Kibagendi & 2 Others*, Election Petition E002 of 2022 (Ruling).**

31. The classification of members as "special seat members" is constitutional and aligned with the relevant electoral laws and the Constitution. Once the IEBC has gazetted the nomination results, any challenges to those results are to be treated as election disputes, appropriately addressed through election petitions in the courts. See ***Josephat Shambu v. Doreen Rodgers & 2 Another*, Election Petition Appeal No. 1 of 2023.**

32. The IEBC should use a national ID, not a birth certificate as a valid document for age verification in the party nomination process for youth representatives in the National Assembly. Senate and County Assembly where ID and birth certificate indicate different dates of birth. See ***Dennis Matundura Mogeni v. IEBC & 2 Others, Election Petition* Appeal No. E004 of 2023.**

33. A party's organ/Executive structure has no power to review or overturn the decisions of its IDRM mechanisms. PPDT is the next forum for aggrieved individuals with IDRM mechanism – See ***Midiwo v. Odhiambo & 2 Others*, Civil Appeal No. 26 of 2022.**

34. Just like political parties, coalition political parties are required to attempt IDRM before approaching PPDT to challenge coalition agreements See ***Maina v Registrar of Political Parties & another; Maendeleo Chap Chap (Interested Party)*, Civil Appeal No. E303 of 2022.**

35. Parties who seek an extension of timelines before the fora for election disputes should make a formal application for extension of timelines. See ***Khala v National Elections Board Orange Democratic Movement Party (ODM) & 2 others;* IEBC (Interested Party), Civil Appeal No. E314 of 2022.**

36. An application for political party membership alone is not proof of membership. See ***Clare Moraa Obino v IEBC and 2 Others*, Election Petition No. E002 of 2023.**

37. Political parties reserve the right to choose who to represent them in an election. However, the choice must be in line with the Party Constitution, Rules as well as the candidate's constitutional rights such as fair administrative action. See ***Jubilee Party of Kenya v Ouma; Gichangi & Another (Interested Parties)*, Election Petition Appeal No. E327 of 2022.** Political parties, being public institutions which receive public funding, are required to conduct their affairs constitutionally.

38. Repeat nominations which are also called fresh nominations must be conducted by political parties in such a manner that promotes intra-party democracy. See ***ODM National Elections Board & another v Gare & 2 Others*, Civil Appeal No. 44 & 45 of 2022 (Consolidated).**

39. Failure by a nomination candidate to participate in the repeat nominations constitutes a waiver of their political rights. See ***Gideon Nzioka Susa v Mahbub Musyoka Mueni and Wiper Democratic Movement Election Board*, Election Petition Appeal No. E285 of 2022.**

40. Exhaustion of party IDRM happens when a complainant uses the prescribed format in line with the party Constitution and nomination rules in lodging the complaint in the party process. See ***National Elections Board, Orange Democratic Movement Party v Odongo & another*, Civil Appeal No. E317 of 2022.**

41. The indirect nomination processes that political parties undertake must comply with the requirement under section 38G of the Political Parties Act 2011 (as amended in 2022) See ***Ntabo v Maranga & 2 others*, Civil Appeal No. 26 of 2022.**

42. Section 34(10) of the Elections Act does not allow amendment of the party lists submitted to nominate a candidate for election to the National Assembly, Senate and County Assemblies during the term of Parliament or County Assembly for which candidates were elected. See ***Mwangi Priscilla Wangui & Another V Margaret Njeri Mwaura & 3 Others.* Election Appeal No. 1 of 2023.**

43. Sections 75(3) and 80(4) of the Elections Act allow the Court to declare someone to be the winner. However, the sections should be invoked and used very sparingly where the issues are clear and no traces of illegality. *See* ***Mochumbe Jackson Mogusu versus Nyaribo Dennis Kebaso and 4 Others*, Election Petition Appeal E 006 of 2023 (as Consolidated with Petition Appeal E 007 of 2023).**

6.0 Concluding Observations and Recommendations

6.1 Concluding Observations

A summary of concluding observations is provided below. The observations relate to the management of political parties, alignment of the jurisprudence of courts and proposals for legal reform emanating from decisions of the court.

6.1.1 Weak Political Parties IDRMs

Political parties should enhance their intra-party democracy. Furthermore, they should ensure that their IDRM systems are effective and efficient. There were cases where political parties lost appeals because they had challenges with the internal documentation of their nomination processes leading to aggrieved candidates using such gaps to challenge the outcome of the nomination before the party appeals tribunal or elections board. A case in point is the case of ***Midiwo v Odhiambo & 2 Others*, Civil Appeal 26 of 2022,** the issue arose from ODM nominations in the Gem constituency. The appeal dealt with the question of how many levels of dispute resolution mechanisms exist within the Orange Democratic Movement (ODM) Constitution and whether the Central Committee established under Chapter 7 of the Party Constitution is one of the organs in the ODM structure that is mandated to hear and determine nomination disputes.

6.1.2 Lack of settlement on the impact of failure to provide security for costs

The elections courts in Kenya are yet to settle on the legal impact of failure by a Petitioner to furnish the security for costs. As it stands, there are two conflicting schools of thought on the issue. These conflicting schools continue to influence different outcomes on the issue. This may cause a confusion in addressing the issue in the next electoral cycle. In the case of ***Kelly Barasa Walubengo v IEBC and 2 Others,*** for example, the Court recognized these different schools of thought on the implications of the non-payment of security costs. The Court observed that one school notes that the failure to provide security for costs goes to the root of the election petition. The other school considers that failure to provide security for costs is a merely procedural matter that cannot be fatal to the fate of the electoral petition. There is a need to settle this issue.

6.1.3 Lack of judicial settlement on the effect of commissioning by Advocates without practising certificates

The law is not settled on what is the effect of having Advocates without practising certificates to sign or certify election petition documents. One position is shown by the experience in ***Kelly Barasa Walubengo v IEBC and 2 Others***. In this case, the court noted that the technicality that the oaths as commissioned by an Advocate who has not taken out a practicing certificate is cured by Article 159. The Court went on to explain

that the failure to obtain a current practicing certificate does not mean that the Advocate is in the same position as an Advocate who has been deregistered or removed from the Roll of Advocates. The Court also observed that taking out a certificate to practice is seen as having more to do with taxation than anything else. Similarly, going by the same principle, the commissioning of documents by Advocates without practicing certificates ought not to affect the validity of the document. A similar finding was made in *Juma v Nyongesa, Budalangi Constituency Returning Officer & 2 others* Election Petition E001 of 2022

The contrary position was taken by Ougo J in *Richard Jesome Wasike v Anthony Lusenaka & another*. In this case, the court stated that Affidavits that were not signed by the Commissioner for Oaths were not affidavits. The case involved an Affidavit in support of the petition that was commissioned by an advocate without a practising certificate at the time it was commissioned. The Court held that the commissioning of affidavits used for administering oaths is guided by section 4 of the Oaths and Statutory Declaration Act and Advocates Act. Under this law, Commissioners for oaths must be such a person who is appointed by the Chief Justice and must be practicing advocates. To be a practising Advocate, the person must be admitted as an advocate, their name be listed on the roll, and hold a valid practising certificate.

Settling the law on the effect of commissioning election petition documents and related documents by Advocates without practicing certificates will bring certainty to court proceedings and uniformity in decisions rendered by the Court.

6.1.4 Inconsistency in the transition from pre-election disputes into election dispute

There were some inconsistent judicial stances on the jurisdiction of PPDT to handle party list disputes once the names have been submitted to the IEBC. One stance is represented by the decision in ***Josephat Shambu v. Doreen Rodgers & 2 Others*, Election Petition Appeal No. 1 of 2023** where the Court noted that once the IEBC had gazetted the nomination results, any challenges to those results were to be treated as election disputes, appropriately addressed through election petitions in the courts. It stated that IEBC's role was to manage the pre-election nomination process, but post-election disputes fell under the purview of the courts. However, in the case of ***Jubilee Party of Kenya v Ouma; Gichangi & Another (Interested Parties)*, Election Petition Appeal E327 of 2022,** the Court did not accept the submission that PPDT did not have jurisdiction just because the party had submitted the names to IEBC. The Court ruled that PPDT has jurisdiction to hear and determine a matter after the names have been submitted to the Commission. The Court reasoned that based on the developments in the amendment of section 40(10) (fa) of the Political Parties

Act by 2022 amendments, the term 'party primaries' was deleted and replaced with party nominations.

6.1.5 Jurisdiction of Courts

There are instances where a court determined that it lacked jurisdiction on a matter but continued to make findings on the merits of cases. This issue came to the attention of Justice Mugambi in *Nyanchoka Ongeri and Another v Manson Nyamweya and others*, Election Appeal Petition No. E004 of 2023. The judge observed that though the lower trial court found that it did not have jurisdiction to entertain the matter, it did not down its tools. The Judge stressed what ought to be a general lesson that when courts determine that they do not have jurisdiction, they should down their tools and not proceed and make determinations on the substantive issues as the lower court did. Courts should take up this lesson and ensure that issues of jurisdiction are thoroughly addressed. Where Courts make positive findings of lack of jurisdiction, they should down their tools.

6.2 Proposals for Law Reform from the Court Decisions

Some judges made two main observations and suggestions for law reform which could be taken forth to inform the legislative development.

6.2.1 Clarification of the term 'votes secured' in section 25 of the Political Parties Act

A proposal came from the case of ***United Democratic Alliance v Registrar of Political Parties; Maendeleo Democratic Party & 5 others (Interested Parties)*, Civil Application E045 of 2023**. In this case, the Appellant challenged the division formula for the political party's fund. PPDT dismissed its appeal thus necessitating the appeal to the High Court. The judge noted that the terms 'votes secured' referred to under section 25 of the Political Parties Act may be unclear, especially in regard to places in elections where candidates are declared to be elected without a vote, for lack of opponents for instance. On that note, the Court encouraged Parliament to clarify the meaning of 'votes secured' as found in Section 25 of the Act for the distribution of the Political Parties Fund in these types of elections.

6.2.2 Inconsistency of timelines for filing an appeal from party IDRM to the PPDT

The Court also considered inconsistency in the law in ***Khala v National Elections Board Orange Democratic Movement Party (ODM) & 2 others;* IEBC (Interested Party) Civil Appeal E314 of 2022**. In this case, the Court observed that the rule on timelines for instituting an appeal to the PPDT is guided both by the Political Parties Disputes Tribunal (Procedure) Regulations 2017 and the Elections Act 2011. The Court observed that the timelines for filing a complaint before the PPDT that is fixed by

rule 8 of the Political Parties Disputes Tribunal (Procedure) Regulations is inconsistent with the timeline fixed by the Elections Act.

Regulation 8(1) of the Political Parties Disputes Tribunal (Procedure) Regulations 2017 provides that:

> *A complaint against the decision of an internal political party dispute resolution mechanism arising out of political party primaries shall be filed with the Tribunal not more than fourteen days from the date of the decision, and in any case, at least one day before the day set aside by the Commission for submission of names of the party candidates who have been selected to participate in the general elections pursuant to section 31 (2A) of the Elections Act.*

On its part, section 31(2A) and (2B) of the Elections Act provides that:

> *Every political party shall submit the names of the party candidates who have been selected to participate in the general elections under this Act at least sixty days before the elections. (2B) A political party shall, at least twenty-one days before the nomination day, submit to the Commission the names of the persons contesting in its party primary and the date of its party primary.*

Under the Elections Act, and specifically with respect to the general elections on 9 August 2022, the PPDT could be seized of the nomination dispute up until 9 June 2022 being sixty days before the general elections. However, IEBC had used its powers to gazette 28 April 2022 as the date for nomination. Therefore, going by Regulation 8(1) of the Political Parties Disputes Tribunal (Procedure) Regulations 2017, matters that had been filed after 27th April 2022 (being the day before the date set by the IEBC for submission of party candidate names) would be outside the jurisdiction of the PPDT. This is the inconsistency that both the PPDT and the election court noted in the stated case. Correction of the statutory and regulatory inconsistency is necessary to align the practice of instituting challenges before the PPDT.

6.2.3 Timelines for amending election-related laws

Due to the late amendment to the Political Parties Act in 2022 close to the August 2022 general elections, there was an inconsistency between the nomination methods captured by section 38G of the Political Parties Act and the nomination methods contained in party constitutions which the parties submitted 6 months before election by virtue of section 28 Elections Act. The experience shows that the amendment to the Political Parties Act in 2022 came in quite late in the day. This late amendment meant that the political parties could not align their party constitutions and nomination rules to the new law. This led to certain cases where the political party

nominations was conducted in accordance with the rules that had been submitted to the IEBC six months before the general elections were found to be invalid. In ***Ntabo v Maranga & 2 Others*, Civil Appeal 26 of 2022,** which related to ODM nominations for the Member of County Assembly in Gesusu Ward, the Court found that ODM nominations had not complied with section 38G of the Political Parties Act 2011 (as amended in 2022) which prescribed new procedure for conducting indirect party nominations.

Electoral and political party laws that affect an electoral cycle should be passed promptly to allow the political parties time to align their rules and Party Constitutions before they are submitted to the IEBC before the general elections.

6.2.4 Role of party agents in elections

The decision in ***Ayiera v Kimwomi & 3 Others Kisumu* Election Appeal E001 of 2023** highlights a critical gap in electoral law concerning the role and impact of a party agent's actions in elections. The court's analysis revealed that there is no explicit legal provision that directly attributes the actions of a party agent, including any electoral offenses, to the candidate or the candidate's party. This absence creates ambiguity in determining the extent of liability for candidates when their party agents are involved in electoral misconduct.

7.0 Proposals for Reform

The following recommendations will address the gaps identified above that require legal and administrative interventions.

7.1 Proposals for Legal Reforms

1. The conduct of scrutiny at the Supreme Court has been problematic under the post-2010 architecture due to the use of technology for the transmission of presidential election results. The rules on scrutiny do not make provision for scrutiny of election technology, and little guidance is given to the Registrars and the parties on the same. It is recommended that the Supreme Court, in consultation with relevant stakeholders, craft relevant rules for the conduct of scrutiny at the Supreme Court. The rules will take into account concerns of security, and intellectual property as well as timelines for the hearing and determination of the presidential election petition (s).

2. The Supreme Court also expressed concern that the IEBC's functionality was hampered by institutional dysfunction, necessitating urgent legal, policy, and institutional reforms. The court made several recommendations:

    a. **Constitutional Reforms**: The court recommended extending the 14-day period for hearing presidential election petitions to allow for better case management and more thorough hearings.

    b. **Corporate Governance**: Parliament should strengthen the legal framework governing the IEBC's policy and administrative functions. Internal guidelines should clearly separate the roles of the chairperson, commissioners, CEO, and other staff to avoid overlap in responsibilities.

    c. **Election Technology**: To build trust, server access during elections should be restricted to IEBC staff, with election and administrative servers kept separate. This would allow for forensic examination without violating third-party agreements.

    d. **Statutory Forms**: The IEBC should simplify Form 34A, include a section for stray ballots, and provide comprehensive training on what constitutes valid votes. Mechanisms for special voting, as outlined in regulation 90 of the Elections Regulations 2012, should be implemented.

3. Parliament should review the Political Parties Act 2011 by defining the term 'votes secured' referred to under section 25 of the Political Parties Act for distribution of the Political Parties Fund. In ***United Democratic Alliance v Registrar of Political Parties; Maendeleo Democratic Party & 5 others (Interested Parties),* Civil Application E045 of 2023**, the court noted that the terms 'votes secured' referred to under section 25 of the Political Parties Act may be unclear, especially in regard to places in elections where candidates are declared to be elected without a vote, for lack of opponents for instance. On that note, the Court encouraged Parliament to clarify the meaning of 'votes secured' as found in Section 25 of the Act for the distribution of the Political Parties Fund in these types of elections.

4. Parliament should follow through and adopt the recommendations by the Kriegler Report and which was again captured in the National Dialogue Committee (NADCO) that amendments to the electoral and political party legislation be done not less than 18 months before the next general elections.

5. Parliament should consider an amendment to section 74(2) of the Elections Act to extend the period for determining the complaints before IEBC to 14 working days to give DRC sufficient time to hear and determine the complaints effectively.

6. Under statutory amendments enacted in 2016, the filing of an appeal against the final judgment and decree of a High Court sitting as an EDR court results in the automatic stay of the certificate of election results until the appeal is heard and determined (s 85A (2), Elections Act, 2011). This means that it is not necessary to file an application for conservatory orders or stay pending appeal from such final judgments and decrees. However, for appeals from the Magistrate's Court, the decision of the court does not operate as a stay of the certificate of the election court certifying the results of that election until the appeal is heard and determined. This means that for such appeals, a specific application for stay must be made. Section 75 (4) of the Elections Act ought to be reviewed to harmonise the provisions on stay of execution of decisions of the election court pending appeals for both the High Court and the Court of Appeal.

7. Rule 34(11) of the Elections (Parliamentary and County Elections) Petition Rules 2017 provides that an appeal must be heard and determined

within three months of the date of lodging the appeal. This is inconsistent with s 75(4) of the Elections Act which provides for 6 months. The rules ought to be harmonised with the Act.

8. Section 80 of the Elections Act which stipulates the power of the election court does not confer on the election court the power of review. The power of review is necessary to address apparent mistakes or errors on the face of the record. As electoral disputes are sui generis, the Civil Procedure Rules do not apply to them, and thus the provisions of the Civil Procedure Act and Rules cannot be applied to electoral matters. The absence of clear guidelines on this issue has led to differing interpretations by-election courts, highlighting the need for a legislative clarification.

9. Parliament should enacy a legislation, in line with Article 100 of the Constitution, to facilitate inclusion of persons with disabilities as noted by the High Court in the Reuben Kigame case. In addition, the IEBC should amend the existing Election (General) Regulations to lower the threshold for the prescribed requirements for registration as a candidate for persons with disabilities to remove the barriers for those PWDs interested in running for a political seat and comply with Article 54 of the Constitution and international human rights obligations.

10. Parliament should amend Regulation 8(1) of the Political Parties Disputes Tribunal (Procedure) Regulations 2017 to address the inconsistency which it has with section 31(2A) and (2B) of the Elections Act. The amended Regulation should not have the effect of taking away the jurisdiction of the PPDT over nomination disputes that are filed after the date that IEBC gazettes for nomination but before the lapse of the 60 days' timeline to the general election prescribed under the section 31(2A) and (2B) of the Elections Act.

11. Election courts should settle the law on whether the impact of failure to provide security for costs in election petitions is procedurally or substantially fatal to the fate of the electoral petitions.

12. The Elections (Parliamentary and County Elections) Petition Rules should be amended to include provisions for the abatement of appeals in the event of a party's death. Currently, the rules only address the abatement of petitions, despite being applicable to both initial petitions and appeals to the High Court.

13. The Election Offences Act does not prescribe a specific timeframe for the hearing and determination of election offences. As a result, some cases experience prolonged delays within the criminal justice system, ultimately hindering timely access to justice. Similar to the strict timelines set for election petitions, it is necessary to establish a limit for the resolution of election offences. This would significantly contribute to promoting justice and ensuring more efficient handling of such cases.

14. There is a need to review the existing framework for election campaign financing in light of the challenges in its implementation under the 2010 Constitution. This will allow clarity on the goal of the implementation framework and how those goals can be realistically achieved within the Kenyan legal context.

7.2 Proposals for Administrative Reforms

1. The judiciary should, in collaboration with KenyaLaw, centrally organize the court decisions for easy access by stakeholders in the justice sector.

2. The judiciary should continuously train judicial officers and legal researchers on research and analytical skills to enhance their ability to isolate issues for determination in a dispute.

3. In relation to party nomination disputes, it is necessary to have specialised training for the judges who handle party nomination appeals from PPDT and disputes concerning the registration of candidates by the IEBC. This is because the focus of the Judiciary is often on the disputes after the declaration of election results, yet increasingly there are numerous disputes on the electoral process that filter through the courts. This would require cascading of trainings beyond the year of the election.

4. As the High Court serves as the final appellate court for party list disputes, there are instances where courts of concurrent jurisdiction reach differing conclusions. This has led to a lack of clear jurisprudence on several issues, such as when a party list is considered final, the powers of the election court in party list disputes, and the procedure for gazetting new nominees following a court order when IEBC commissioners are not present. Providing training on party list disputes could help harmonise jurisprudence in preparation for the 2027 elections.

5. The judiciary should prepare a case digest of decisions of the election courts and PPDT to document and preserve emerging jurisprudence from the courts in every electoral cycle.

6. The Judiciary Committee on Elections should consider appointing a Registrar. The Registrar would assist with electoral cycle planning, manage knowledge, and build relationships with relevant stakeholders. Their role would ensure effective planning and capacity building for the Committee, while also preserving institutional memory for its administrative functions.

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