REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(*Coram: Mutunga, CJ; Rawal, DCJ; Tunoi, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ*)

PETITION NO. 2A OF 2014

-BETWEEN-

GEORGE MIKE WANJOHI.....APPELLANT

-AND-

1. STEVEN KARIUKI
2. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
3. MILLAM WANJIRU GACHIHI
.....RESPONDENTS

(Being an Appeal from the judgement and decree of the Court of Appeal of Kenya at Nairobi in Civil Appeal No. 272 of 2013 (Maraga, Gatembu & Mohammed JJ.A), dated 18th March, 2014)

JUDGMENT

A. INTRODUCTION

[1] This is an appeal against the Judgment of the Court of Appeal sitting in Nairobi, overruling the decision of the High Court sitting at Nairobi *(Kimondo J.)* in *Election Petition No.2 of 2013,* delivered on 13th September, 2013. The decision of the Court of Appeal invalidated the election of the appellant as the duly-elected member of the National Assembly for Mathare Constituency.

B. BACKGROUND

[2] The genesis of this matter is the Mathare Constituency National Assembly Election held on `4th March, 2013. On 6th March, 2013 after the counting and tallying of votes, the Returning Officer, Millam Wanjiru Gachihi (3rd respondent) announced Steven Kariuki (1st respondent) as the duly-elected Member for Mathare Constituency, and issued him with a Certificate of Results (Form 38).

[3] On *7th March, 2013* the appellant lodged at the Constitutional Division of the High Court in Nairobi a petition, ***George Mike Wanjohi v. Steven Kariuki & Others,*** *High Court Petition No. 150 of 2013* (*Petition No. 150 of 2013*), in which he sought, *inter alia*, to be declared as the lawfully elected Member of the National Assembly for Mathare Constituency; to be issued with a certificate to that effect; and for the Court to declare that the 1st respondent had been wrongly certified as the winner.

[4] Two significant events occurred on *8th March, 2013*: the appellant withdrew his petition; and the 2nd and 3rd respondents wrote a letter to the 1st respondent cancelling his Certificate of Results (Form 38), on the basis that it had been issued in error. The letter also stated that the *appellant* was the rightful winner of the election and, as such, a new certificate had been issued to him. The appellant was consequently gazetted as the duly elected Member of the National Assembly for Mathare Constituency on *13th March, 2013*.

[5] In quick response, the 1st respondent filed a petition in the High Court, ***Steven Kariuki v. George Mike Wanjohi***, *Election Petition No. 2 of 2013*. He contended, *inter alia*, that the 2nd and 3rd respondents became *functus officio* after declaring him the winner and issuing Form 38 to him. Thus, they could not purport to cancel the certificate in his favour and issue it instead, to the applicant. He also sought, in the alternative, an order of scrutiny and recount of the votes cast, and a determination *that the election was null and void, and that a fresh election be held*.

[6] The crux of the matter, as identified by the trial Court, was *whether the 2nd and 3rd respondents had the power to cancel the Form 38 issued to the 1st respondent after the public announcement of results on 6th March, 2013*. In his judgment dated 13th September, 2013 the trial Judge based his decision on

Regulation 87(9) of the Elections (General) Regulations 2012 [Elections Regulations], and determined that the initial results announced by the Returning Officer, and the Form 38 issued to the 1st respondent, were *merely provisional*. He held that the 2nd and 3rd respondents were not *functus officio* and could, therefore, *correct the error they had made*. The net effect of this was that the cancellation of the certificate issued to the 1st respondent was validated by the Election Court.

[7] Aggrieved by this determination, the 1st respondent appealed to the Court of Appeal, seeking to set aside the trial Court's Judgment. He set out 23 grounds of appeal. The Court of Appeal reduced these grounds to the following main issues: *whether the election Court was right in holding that the 2nd and 3rd respondents did not become* ***functus officio*** *after declaring the 1st respondent as the winner at the tallying centre on 6th March, 2013; and, whether they had the power to cancel the Form 38 issued to the 1st respondent on the same date, and thereafter issue another one to the appellant on the 8th of March, 2013.*

[8] In overturning the decision of the High Court, the Court of Appeal observed that it could not ascertain the winner of the subject election. The appellate Court ordered that *fresh elections* be held for Member of the National Assembly for Mathare Constituency.

[9] In making this determination, the Court applied the reasoning in the Supreme Court decision in ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others,*** *Supreme Court Petition No. 10 of 2013; [2014] eKLR [*the ***Joho*** case], for the principle that *a Certificate in Form 38 declares the winner of the election, and terminates the mandate of the Returning Officer who acts on behalf of the Independent Electoral and Boundaries Commission (the*

IEBC). According to the ***Joho*** case, *any grievance regarding the electoral process, challenging the results of an election already conducted, is to be lodged in the Election Court*. The Court of Appeal held that it was bound by this decision, by dint of Article 163(7) of the Constitution, and ruled that the 2nd and 3rd respondents were precluded from cancelling the certificate in Form 38, issued to the 1st respondent.

[10] Aggrieved by the said Judgment, the appellant filed a Notice of Motion under certificate of urgency at the Supreme Court. The Notice of Motion was certified urgent on 31st March, 2014 by Wanjala, SCJ who ordered all the parties to appear before a two-Judge Bench for *inter partes* hearing on 4th April, 2014. During the scheduled hearing, the Court granted conservatory Orders, pending the delivery of the Ruling.

[11] On 29th April, 2014, Tunoi and Ibrahim, SCJJ (in *Civil Application No. 6 of 2014*) determined that the matter was an arguable appeal, and granted certain Orders including: stay of execution of the entire Judgement and consequential Orders of the Court of Appeal; conservatory Order against the 2nd respondent, from conducting fresh elections for the Mathare Constituency, pending the hearing and determination of the appeal before this Court.

C. THE PARTIES' RESPECTIVE CASES

[12] Learned counsel appeared as follows: Mr. Harrison Kinyanjui for the appellants; Mr. Nelson Havi for the 1st respondent; and Mr. Paul Nyamodi for the 2nd and 3rd respondents.

i) The Appellant's Case

[13] Counsel for the appellant summarised the 25 grounds of the Petition of

Appeal into four main grounds, as follows:

(a) *whether the Court of Appeal erred by exceeding its jurisdiction enshrined in Article 164(3) of the Constitution;*

(b) *whether the Court of Appeal correctly upheld Article 163(7) of the Constitution and the principle of* ***stare decisis;***

(c) *whether the Court of Appeal violated Articles 1, 2, 10(2), 25(c), 38, 51, 86(c), 88(5), 94(1), 159, and 259 of the Constitution; and*

(d) *whether the Court of Appeal violated Article 27 of the Constitution with regard to the party that bears the costs.*

(a) Jurisdiction

[14] Counsel for the appellant submitted that the Court of Appeal exceeded its jurisdiction in framing and deciding two extra issues beyond the twenty-three which the 1st respondent had raised in his Memorandum of Appeal. These two issues were framed as follows: *whether the Election Court was right in its determination that the 2nd and the 3rd respondents had the power to cancel the Form 38 issued to the appellant and to issue another to the 1st respondent [the appellant herein]; and, what was the standing of the Election Court's view that the 2nd and 3rd respondents did not become* ***functus officio*** *after announcing the appellant as the winner at the tallying center on 6th March, 2013?* Counsel submitted that such a definition of remit was in violation of the appellate jurisdiction of the Court of Appeal, under Article 164(3) of the Constitution, and Section 85A of the Elections Act.

[15] Counsel relied on the Supreme Court case, ***In Re The Matter of the Interim Independent Electoral Commission,*** *Supreme Court Constitutional Application No. 2 of 2011*; *[2011] eKLR* (***In Re IIEC*** case) (at paragraph 30), in which this Court concurred with the holding in ***Owners of***

Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Limited, [1989] KLR 1 that jurisdiction flows from the law. Further, this Court had held that a Court may not arrogate to itself jurisdiction through the craft of interpretation, and that the Supreme Court, the Court of Appeal and the High Court had their respective jurisdictions donated by the Constitution.

[16] Counsel submitted that the 1st respondent's appeal to the Court of Appeal was limited to the reliefs sought under the Memorandum of Appeal. The relief sought was framed as follows:

> ***"It is proposed to ask the Court of Appeal for an Order that the Appeal be allowed with costs, the Rulings and Orders of the High Court made on the 16th May, 2013, 1st July 2013, 2nd July, 2013 and Judgement and Decree made on 13th September, 2013 be set aside and the Appellant's Petition dated 19th March, 2013 be allowed in so far as it relates to the alternative prayers "e", "f", "g", "h", "i", "j", "k", "l" and "m"."***

[17] In view of such particulars of prayer, counsel argued that the Court of Appeal did not have jurisdiction to deal with the appeal because the Ruling and Orders of the Election Court dated 16th May, 2013 had struck out all the alternative prayers apart from those numbered as: "j", "k", "l" and "m". It was submitted that the prayers that were struck out dealt with issues of fact. Counsel submitted that in order to determine prayer "j", the Court of Appeal would have to conduct a scrutiny of the votes cast, which he argued, dealt with matters of fact, which fell outside its jurisdiction, as provided under the Constitution, the Elections Act and the Election Regulations, the Appellate Jurisdiction Act (Cap. 9, Laws of Kenya), and Court of Appeal Rules.

[18] Counsel submitted that the 1st respondent's prayer thus couched: "*It be determined that the parliamentary election held on the 4th day of March, 2013*

in Mathare Constituency was null and void and it be ordered that a fresh election be held," took it out of the Court of Appeal's and the trial Court's jurisdiction to deal with this matter, because it was improperly formulated, by its reference to 'Parliamentary elections'. It was argued that such formulation was contrary to Article 93 of the Constitution which provides that Parliament consists of the *National Assembly and the Senate*. Counsel urged that no competent order could be issued in answer to that prayer touching on 'Parliamentary elections'.

(b) The scope and application of Article 163(7) of the Constitution and the principle of stare decisis

[19]Counsel submitted that the issues before the Court were: whether the Court of Appeal in rendering its Judgement correctly interpreted and applied the ***Joho*** case; and whether the lower Courts should apply the principle of "restrictive distinguishing", so as to perceive the decision of the Supreme Court in the context of the mandate to develop the law, and uphold justice, in accordance with Articles 163(7), 159(2)(e) and 259(1)(c) of the Constitution.

[20] It was submitted that Article 163(7) of the Constitution deals with the doctrine of *stare decisis,* and precedent, which bind the lower Courts to the decisions of the Supreme Court. In support of this argument, counsel referred to the decision of this Court in ***Jasbir Singh Rai &3 Others v. Tarlochan Singh & 4 Others,*** *Supreme Court Petition 4 of 2012; [2013] eKLR* [the ***Jasbir*** case], in which the Court held that the rule of precedent *promotes predictability, diminishes arbitrariness, and enhances fairness, by treating all cases alike.*

[21] Counsel argued that in applying the ***Joho*** case to a different set of facts such as this, the Court of Appeal misinterpreted and misapplied Article 163(7) of the Constitution, thereby violating the political and voting rights of the

constituents enshrined in Article 38(2) and (3) of the Constitution. It was submitted that the Court Appeal also failed to properly apply the holding of the ***Joho*** case which recognized that the notion of 'declaration' takes place at every stage of vote-tallying.

[22] Counsel submitted that this Court needed to apply the principle of "restrictive distinguishing" to the ***Joho*** case, because the ***Joho*** case did not deal with *erroneous issuance* of the certificate in Form 38 to an electoral contestant. In advancing this argument, counsel relied on the persuasive authority in the English House of Lords case of ***Peabody Fund v. Sir Lindsay Parkinson Ltd.*** [1984] 2 W.L.R. 953 (H.L), in which the Court restricted the application of its earlier decision in ***Anns v. Merton London Borough***, [1978] A.C. 728.

[23] Counsel submitted that the Court of Appeal erred in concluding that the 3rd respondent violated the sanctity of Form 38 in the disputed election, because that Court failed to consider the distinction between the duty of the IEBC (2nd respondent) and the Returning Officer (3rd respondent) to render *accurate and verifiable results in a Form 36,* in the terms of Article 86(c) of the Constitution, and the position of the Returning Officer irrationally and unjustifiably cancelling a *Form 38* which had been given to the 1st respondent.

[24] Counsel contended that the ***Joho*** case, as applied by the Court of Appeal Judgment, presented an unconstitutional position: that the IEBC and the Returning Officer could neither exercise their constitutional mandate under Articles 86(c) to correct *typographical errors* in Form 38, nor concede to such errors in *Petition No. 150 of 2013*.

[25] Counsel argued that the 1st respondent had not appealed against the decision in his *Petition No. 150 of 2013,* in which the Form 38 erroneously issued

to the 1st respondent was cancelled, and the correct Form 38 backed with a Form 36, with the correct data, was issued to the appellant. In effect, counsel submitted that the matter became *res judicata,* and a fresh petition could not overturn or vary this decision – even though the appellant's said petition had *not* been brought before a duly gazetted "Election Court" (Petition No. 150 of 2013).

(c) Whether the Court of Appeal violated Articles 1, 2, 10(2), 25(c), 38, 51, 86(c), 88(5), 94(1), 159, and 259 of the Constitution

[26] Counsel argued that the lawful declaration of the election result for Mathare Constituency could only be made by the 3rd respondent through a *Form 36;* consequently, as the 1st respondent could not produce the Form 36, the Form 38 issued to him was not an accurate and verifiable reflection of the will of the Mathare constituents as indicated in the Form 35, collated in the Form 36 and declared in the Form 38. *Counsel argued that the first declaration was therefore not in conformity with Article 86(c) of the Constitution*.

[27] It was contended that the Court of Appeal erred in focusing on Article 88(4) of the Constitution in arriving at a decision, overlooking other constitutional provisions, in particular, Article 88(5) which provides that:

> ***"The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation".***

[28] Counsel submitted that the Court of Appeal erred in its interpretation of Article 105 of the Constitution, when it held that an Election Court could be reconstituted for the purposes of determining any issue in dispute, thereby violating Article 87(1) which empowers Parliament to enact legislation regarding the timely resolution of electoral disputes and Article 94(1) which provides that the legislative authority is vested in the people and is exercised by Parliament.

(d) Costs

[29] Counsel submitted that even though the Court of Appeal Judgment faulted the 2nd and 3rd respondents for the burdens of the cause, that Court had ordered the appellant to bear his own costs, and that this amounted to discrimination.

[30] In conclusion, counsel made the following prayers:

(i) that the Petition of Appeal dated 26th March 2014 be allowed;

(ii) that he be awarded costs; and

(iii) *that an order in terms of Section 74(3)(b) of the Elections Act, 2011 be made, as had been declared and held by the Election Court.*

(ii) *The 2nd and 3rd Respondents' Case*

[31] Learned counsel, Mr. Nyamodi focused his argument on three grounds: that, the determination by the Court of Appeal was made without jurisdiction; that the interference with the sovereign will of the voters of Mathare Constituency was inconsistent with the Constitution; and that, the findings of the Court of Appeal in respect of the provisions of Article 105 of the Constitution, though *obiter,* were unconstitutional.

(a) Jurisdiction

[32]Counsel submitted that the jurisdiction of the Court of Appeal to hear and determine election petitions is limited by the Constitution and the Elections Act, and by the common law. Counsel cited the ***In Re IIEC*** case, where this Court held that jurisdiction in Kenyan Courts is regulated by statute law and by principles laid out in judicial precedent. He referred to this Court's *dictum* in the same case, where we held that jurisdiction flows from the law and, therefore, a Court cannot arrogate to itself jurisdiction through the craft of innovation.

[33] Counsel invoked Article 164(3)(a) of the Constitution, which regulates the Court of Appeal's jurisdiction. He also cited legislation, particularly the provisions of Section 85A of the Elections Act, which restricts the jurisdiction of the Court of Appeal to entertain petitions. He urged that this Section limited the jurisdiction of the Court of Appeal to appeals on *matters of law* only, and the appeal must be lodged within 30 days of the decision of the High Court appealed against; and it must be heard and determined by the Court of Appeal within six months of the date of filing. These limitations, counsel submitted, were confirmed by this Court in ***Samuel Macharia & Another v. Kenya Commercial Bank Limited & Others,*** *Supreme Court Application No. 2 of 2011; [2012] eKLR.*

[34] Counsel urged that at common law, the jurisdiction of the Court of Appeal is limited to the extent of the prayer by the appellant in the Memorandum of Appeal, or by a respondent in a cross-appeal; and that a Court cannot make a determination on an issue not sought in the appeal before it. He referred to the decision in ***Peter Gichuki King'ara v. Independent Electoral and Boundaries Commission & Others***,*[2013] eKLR,* where the Court of Appeal, relying on ***Galaxy Paints Co. Ltd. v. Falcon Guards Ltd***., (2002) 2 EA 385, determined that a Court cannot pronounce itself on an issue that was not in the pleadings of the parties. Counsel cited several cases with similar holdings: ***Thomas De La Rue (K) Ltd. v. David Opondo Omutelema,*** *Civil Appeal No. 65 of 2012; [2013] eKLR*; ***Captain Harry Gandy v. Caspar Air Charters Ltd*** *(1956) 23 EACA 139*; and ***Jones v. National Coal Board****(1957) 2 All E.R. 155.*

[35] Counsel submitted that the Court of Appeal had correctly appreciated the limitation to its jurisdiction when it observed that it cannot *'engage in scrutiny of votes';* but it then erroneously, allowed an appeal based on a ground not pleaded.

[36] Counsel contended that the crux of the appeal to the Court of Appeal was a request for scrutiny and recount, and that all other prayers were anchored on this. Counsel submitted that having ascertained the question, the Court of Appeal proceeded to hear the appeal, and to frame yet another issue for determination – as to whether the 2nd and 3rd respondents had the power to cancel the certificate in Form 38 issued to the appellant on the *6th March, 2013;* and to thereafter issue another Form 38 in favour of the 1st respondent on *8th March, 2013*.

[37] Counsel argued that the issue of Form 38 could only have been re-introduced by way of amendment to the Memorandum of Appeal. He submitted that the Court of Appeal lacked jurisdiction to make the decision, as the only ground on which it allowed the appeal was an issue not specifically pleaded. He urged that the issue of Form 38 was only before the Election Court, and did not come up again till the stage of submission.

[38] Counsel urged that the issue of Form 38 had sprung up after the hearing of the appeal had closed, on 3rd February, 2014. However, on 14th February, 2014 counsel for the 1st respondent wrote to the Deputy Registrar of the Court of Appeal, requesting him to forward a further bundle of authorities comprising the Supreme Court decision in ***Joho,*** and the Court of Appeal decision in ***Peter King'ara,*** for consideration during Judgment-writing. On this basis counsel for the 2nd and 3rd respondents requested hearing date, for the purpose of addressing Court on the *additional authorities*. The Court of Appeal then set a hearing date for 10th February 2014.

[39] Counsel urged the Court to find that the 1st respondent's further bundle of authorities was an amendment to that appeal, and should have been lodged within the 30 days of filing an appeal, under Section 85A of the Elections Act.

(b) On violation of constitutional provisions

[40] Counsel submitted that the Court of Appeal failed to recognize that the sovereignty of the people, as enshrined in Articles 1(1) and 38(2) of the Constitution, envisages the electorate's right to express their political will freely. He urged that the Election Court is under duty to uphold the sovereign will of the people, as ordained by Article 105 of the Constitution, read together with Section 75(3) of the Elections Act – such will having been exercised by the electorate of Mathare Constituency on 4th March, 2013.

(c) An unconstitutional obiter dictum in respect of Article 105 of the Constitution

[41] Counsel argued that the Court of Appeal misinterpreted and misapplied Article 105 of the Constitution, when that Court found in an *obiter dictum* that, in appropriate cases, the Court would refer an Election Petition back to the High Court, with appropriate directions as to how to resolve the petition. Counsel submitted that the Court of Appeal arrived at this finding on the basis of its previous decisions holding that it can only exercise jurisdiction to hear appeals on interlocutory applications from Election Courts after judgement has been delivered: *see* ***Ferdinand Ndung'u Waititu v. Independent Electoral and Boundaries Commission& 8 Others,*** *Civil Application No. 137 of 2013 (UR 94 of 2013) [2013] eKLR* ***Cornel Rasanga Amoth v. William Odhiambo Oduol & 2 Others,*** *Civil Application No. 26 of 2013 (UR 13/13)*; [2013] eKLR the ***Peter Gichuki King'ara*** case; and ***Jared Odoyo Okeyo & Another v. Independent Electoral and Boundaries Commission & 6 Others,*** *Civil Appeal No. 16 of 2013; [2014] eKLR*.

(iii) *The 1st Respondent's Case*

(a) Jurisdiction

[42] Mr. Havi for the 1st respondent, contested the appeal. He submitted that the crux of the appeal at the Court of Appeal was the determination that the election held on 4th March, 2013 in Mathare Constituency, for Member of the National Assembly, was null and void. Learned counsel contested the argument that the Court of Appeal lacked jurisdiction in granting a remedy that was not prayed for. He submitted that Rule 31 of the Court of Appeal Rules empowers the Court of Appeal to deal with the issue.

[43] Counsel contended that the Court of Appeal can issue any directions, so long as they do not contravene the constitutional time-frame of six (6) months, within which it should hear an appeal. Any directions made within those time-frames, it was urged, are rightly within the Court's powers.

[44] He submitted that the Court of Appeal correctly exercised its jurisdiction by addressing issues of law, when it considered the question whether or not Forms 35, 36, and 38 were "provisional results," and whether Form 38 could be revoked after announcement of the winner of an election upon the tally of results in Form 35.

[45] Counsel contended that the Court of Appeal could not ascertain the winner, a factual inference. He submitted that the Court of Appeal had considered the three sets of results before the High Court, and concluded that a winner could not be determined from the conflicting results. In advancing this argument, counsel relied on the case, ***Simon Nyaundi Ongari & Another v Joel Omagwa Onyancha and 2 Others*** *Kisii High Court Election Petition No. 2 of 2008; [2008] eKLR.*

(b) Election Results, and the Mandate of the IEBC

[46]Counsel contested the appellant's claim that the Court of Appeal had focused on Article 88(4) of the Constitution, when the same had not been applied in the High Court. He referred the Court to the 1st respondent's High Court submissions on the said Article 88(4), and submitted that the issue had been addressed by the High Court in its Judgement. Counsel submitted that the 2nd respondent's role in electoral dispute resolution was limited by Article 88(4) of the Constitution and by Section 74 of the Elections Act, as indicated in paragraph 65 of the ***Joho*** case. He submitted that the declaration of election results occurs when Form 38 is issued after the tally of Forms 35 and 36, and the public announcement of the winner of the election at the duly gazetted tally-centre.

(c) The Scope and Application of Article 163(7), and the Principle of ***stare decisis***

[47] Counsel urged this Court to uphold the Court of Appeal's application of the ***Joho*** case, without distinguishing it from the instant case. He submitted that the decision applied retrospectively and relied on ***Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others*** *Supreme Court Application No. 2 of 2012; [2012] eKLR*, which holds (paragraph 62) that a Constitution may and does apply both prospectively and retrospectively.

(d) Costs

[48] Counsel submitted that, as costs follow the event, the appellant should be liable to shoulder his costs as ordered by the Court of Appeal, and further bear the costs of this appeal.

D. BELATED FILING OF SUPPLEMENTARY RECORD OF APPEAL BY 2ND AND 3RD RESPONDENTS

[49] During the hearing on the merits, learned counsel for the 2nd and the 3rd respondents, Mr. Nyamodi, made an oral application seeking leave to file a supplementary Record of Appeal, dated 5th May, 2014. He sought to file the said record because the appellant had inadvertently omitted certain documents in the main record.

[50] Although no party objected to the admission of the supplementary record, counsel for the 1st respondent expressed reservations regarding the enabling Rule under which the 2nd and 3rd respondents could file such a record. We allowed the application, for reasons set out below.

[51] We note that the Supreme Court Rules, 2012 do not envisage a situation in which a *respondent* may lodge a supplementary record of appeal. However, Rule 8(1) and (2) makes provision for any party, with leave of Court or with the consent of the other party, filing further pleadings or affidavits. Such an application for leave may be made informally. Rule 11 also provides that a respondent may file grounds of objection, an affidavit, or both. We note that no prejudice was occasioned by the additional material placed before the Court.

E. ISSUES FOR DETERMINATION

[52] From the pleadings and submissions of counsel, the following issues emerge for determination:

(i) *whether the Court of Appeal exceeded its jurisdiction as specified under Article 164(3) of the Constitution;*

(ii) *whether the Court of Appeal upheld the principles of* ***stare decisis*** *enshrined in Article 163(7) of the Constitution, in applying the* ***Joho*** *decision;*

(iii) *whether IEBC exceeded its mandate under Article 88(4)(e) of the Constitution;*

(iv) *whether the Court of Appeal misinterpreted or misapplied Article 105 of the Constitution;*

(v) *whether the Court of Appeal contravened Article 27 of the Constitution, in awarding costs to the 1st respondent only.*

[52A] *Did the Court of Appeal exceed its jurisdiction as specified under Article 164(3) of the Constitution?*

[53]Counsel for the appellant and for the 2nd and 3rd respondents submitted that the decision of the Court of Appeal was based on an issue that was not raised for determination, since it was not incorporated in the Memorandum of Appeal. However, counsel for the 1st respondent argues that his prayer 'j' was wide enough to cover all grounds that were raised in the Memorandum of the Appeal, and so, by determining the issue of the validity of the election under prayer 'j', the Court of Appeal was right in considering the validity of the Form 38, which had featured as a ground of appeal in the petition. However counsel for the appellant and the 2nd and 3rd respondents argue that that prayer was not an isolated one, and was integrally linked to the prayers preceeding it, namely, those seeking a re-tally, recount and scrutiny. The learned counsel argue that the Court of Appeal could not have disentangled the issue of the validity of the elections from the prayers preceeding it, due to the manner in which the 1st respondent had framed the Memorandum of Appeal. Prayer 'j' was thus formulated:

> ***"It be determined that the parliamentary election held on 4th day of March, 2013 in Mathare Constituency was null and void***

and it be ordered that a fresh election be held."

[54] Our reading of prayer 'j' does not reveal any integral link to the prayers for *scrutiny, recount and re-tally*. On the contrary, it appears to be inviting the Court to look at the entire election and, save for the fact that it was based on grounds within the memorandum, it could have been struck out as a vague prayer. However, the grounds of appeal have cured this defect by their focused challenge to the validity of the election. One of the clear issues in grounds 10, 11 and 20, is the *Form 38*.

[55] Counsel for the appellant has, therefore, challenged the Court of Appeal's determination of the issue of cancellation and re-issuance of Form 38, while that Court had decided to adjudicate the appeal in terms of prayer 'j' only.

[56] With regard to jurisdiction, this Court held in ***InRe IIEC*** case (paragraph 30) thus:

> ***"The Court of Appeal decision in*** *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited (1989) KLR 1* ***establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution."***

Article 164(3)(a) of the Constitution restricts the jurisdiction of the Court of Appeal to the hearing and determination of appeals in the following terms:

"The Court of Appeal has jurisdiction to hear appeals from –

a) The High Court; and
b) Any other court or tribunal as prescribed by an Act of Parliament."

[57] Did the Court of Appeal make a determination on unpleaded facts, or grant reliefs not specifically sought, thus acting in excess of its jurisdiction?

[58] Counsel for the appellant and counsel for the 2nd and 3rd respondents argued that the 1st respondent only appealed against the High Court's denial of his request for scrutiny and recount. It was contended that the Court of Appeal based its entire judgement on an issue that the 1st respondent did not raise, namely: *whether the 2nd and 3rd respondents had the power to cancel the 1st respondent's Certificate of Results (Form 38), and issue another one to the appellant*. Counsel for the appellant, and the 2nd and 3rd respondents urge that the Court of Appeal could not properly make a determination of an issue that was not before it.

[59] A review of the record confirms that in his Memorandum of Appeal dated 10th October, 2013 the 1st respondent raised 23 grounds of appeal. Three of these grounds in particular pointedly addressed the cancellation of his Form 38, thereby raising a question of constitutionality, as to the authority of the 2nd and 3rd respondents to cancel a Certificate in Form 38, and re-issue another to the appellant herein. The 1st respondent (at paragraphs 10, 11, 20) asked the Court of Appeal (at paras. 10, 11, 20) to find that:

"10. The learned Judge of the High Court erred in law in holding that the acts of the 3rd respondent in cancelling the Certificate in Form 38 issued to the appellant on 6th March, 2013 and issuance of another Form 38 to the 1st respondent were done in pursuit of the power to settle

electoral disputes *by the 2nd respondent, despite the learned Judge's own finding and holding that the 3rd respondent did not have the same power as the 2nd respondent as pertains to the final declaration of results and where there was no such electoral dispute by the 1st respondent before the 2nd respondent in any event as required by Section 74 of the Elections Act, No. 254 of 2011."*

"11. The learned Judge of the High Court misinterpreted the decisions of the Court of Appeal in ***Hassan Ali Joho and Another v. Suleiman Shabal****, Civil Appeal No. 12 of 2013 (2013) eKLR and* ***Nderitu Gachagua v. Thuo Mathenge and 2 Others****, Civil Appeal No. 14 of 2013 (2013) eKLR and misapplied the said decisions to support his erroneous finding and holding that* ***the 2nd and 3rd respondents had power and authority to alter the public announced results, cancel and re-issue the Certificate in Form 38 any time before the gazettement of the winner,*** *when the said decisions of the Court of Appeal did not say so."*

"20. The learned Judge of the High Court erred in law in holding that the existence of Election Petition No. 150 of 2013, ***George Mike Wanjohi v. Steven Kariuki and Others****, was an electoral dispute on the basis of which* ***the 2nd and 3rd respondents could justify the cancellation of the Certificate in Form 38 issued to the appellant on 6th March, 2013 and the issuance of another Form 38 to the 1st respondent on 8th March, 2013, despite the clear provisions of Articles 87 and 88 of the Constitution as read together with Section 74 of the Elections Act, No. 24 of 2011****, as to what constitutes an electoral dispute for resolution by the 2nd respondent"* [Emphases added].

[60] The Court of Appeal then distilled the twenty-three grounds into one main issue, stating (para. 14):

> ***"[T]he critical question for the determination by this Court is*** *whether the Election Court was right in its determination that the 2nd and 3rd respondents had power to cancel the certificate of results issued to the appellant* ***and to issue another one to the 1st respondent and also in taking the view that the 2nd and 3rd respondents did not become*** *functus officio* ***after announcing the appellant as the winner at the tallying centre on 6th March 2013."***

[61] In the instant matter, a perusal of the record reveals that there were no unpleaded issues at the Court of Appeal. *The question of Form 38 was the central issue before the High Court,* and the prayers in the Memorandum of Appeal though not clear in all respects, were of such a wide scope as to encompass the issue. We, therefore, find the assertion by the appellant and the 2nd and 3rd respondents to be without merit.

[62] Did the Court of Appeal conduct a further hearing beyond the constitutional and statutory timeline?

[63] Counsel for the 2nd and 3rd respondents argued that the Court of Appeal had erred in taking the ***Joho*** case into consideration after the close of proceedings. He contended that at that stage, the constitutional process was already complete, and the matter was no longer live.

[64] At the close of the Court of Appeal proceedings, but before the Judgement was issued, counsel for the 1st respondent wrote a letter to the Registrar of the Court of Appeal attaching a further list and bundle of authorities, asking that two relevant cases be brought to the attention of the Court. One of the authorities was this Court's recent decision in the ***Joho*** case, where we held that *the final declaration of election results is by the issuance of the certificate in Form 38, by*

the Returning Officer, to the winner of the election. The other case was ***Peter King'ara,*** in which the central issue on appeal was *scrutiny and recount*. In that case, the Court of Appeal in Nyeri overturned the decision of the trial Court, holding that due to various breaches of the law and regulations, the election was not administered in an efficient, accurate and accountable manner. In response, to the further list and bundle of authorities submitted by the 1st respondent, counsel for the 2nd and 3rd respondents wrote a letter to the Registrar of the Court of Appeal addressing the Court on the said authorities, and hearing date (10th March, 2014) was set in that regard.

[65] Counsel for the 2nd and 3rd respondents argued that the Court of Appeal should not have taken the ***Joho*** case into consideration because the relevant cycle of the constitutional and judicial process was already exhausted, and the matter was no longer live. We are not inclined to uphold this argument. In bringing the two cases to the attention of the Court of Appeal, counsel for the 1st respondent was merely carrying out his professional obligation under the Advocates Act. And indeed, it is to be noted that counsel *for the 2nd and 3rd respondents* had requested a hearing on ***Joho's*** applicability to the matter before the Court of Appeal. It is now too late in the day for him to reprobate the inclusion of that case in this Court's deliberations.

[66] This Court in its ruling in the ***Raila Odinga*** case, regarding a further affidavit filed by the petitioner, stated that its discretion in such circumstances would be exercised in accordance with certain principles:

> ***"...the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then***

the Court ought to be considerate, taking into account all aspects of the matter."

The Court further held that where the new material is voluminous, such that it is difficult or impossible for the other party to respond effectively:

"...the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence."

[67] The further list and bundle of authorities introduced by counsel for the 1st respondent was in support of their claim on the validity of the Form 38 issued to the appellant. None of the facts as to the withdrawal and reissuance of the Form 38 were in contention. Neither was there any contest to the factual findings of the trial Court, that the Form 36 issued by the Returning Officer was generated by the said officer without any input from, or consultation with the other parties; nor their signatures on the forms. The tallies on Form 36 were in contention, a factual element that was not challenged before the Court of Appeal. The Court of Appeal was asked to consider the *legal standing of such a Form 38*.

[68] In this case, the introduction of the further bundle of authorities did not require the reopening of the facts before the Court, and it was not of any prejudicial effect upon the parties, particularly where the parties were allowed to address the Court on a binding decision of the Supreme Court, and on its effect upon them. This position is to be seen in the context of this Court's decision in ***Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others***, *Supreme Court Petition No. 7 of 2014*, where the principle was established that a decision of this Court has a *retrospective effect* on cases pending before the lower Courts. We hold, therefore, that the matter was indeed 'live', when the 1st respondent

submitted his further bundle of authorities to the Court of Appeal, and when the Court subsequently heard arguments on the points of law raised from the two further case-authorities.

[69] Did the Court of Appeal uphold the principles of *stare decisis* enshrined in Article 163(7) of the Constitution, in applying the ***Joho*** decision?

[70] From the submissions of counsel for the appellant, Mr. Kinyanjui, the upshot of his argument is that the principle established in the ***Joho*** case ought not to have been applied by the Court of Appeal to this case, due to its peculiar circumstances. It was urged that the Court of Appeal should have found it necessary to distinguish the ***Joho*** case, and to arrive at a different conclusion. But a question arises: under what circumstances may another Court distinguish a decision of this Court, and hold it to be inapplicable to a case before it?

[71] This Court has pronounced itself on what a declaration of election results entails, in the ***Joho*** case. In that case, this Court found (paragraph 58), that the Presiding Officer and the candidates, or agents of candidates, are required by Regulation 79 of the Elections Regulations to sign the declaration in respect of the elections. This is to be done at the polling station immediately after the counting of the votes is completed. Regulation 79 provides as follows:

> ***" (1) The Presiding Officer, the candidates or agents shall*** *sign the declaration* ***in respect of the elections.***
>
> ***" (2) For purposes of sub-regulation (1),*** *the declaration* ***for –***
>
> ***(a) National Assembly, county women representatives, Senator, county governor and county assembly elections*** *shall be in Form 35* ***set out in the Schedule.***

"(3) The Presiding Officer shall –

> ***(a) immediately announce the results of the voting at that polling station before communicating the results to the returning officer;***
> ***(b) request each of the candidates or agent then present to append his or her signature;***
> ***(c) provide each political party, candidate, or their agent with a copy of the*** *declaratio**n*** ***of the results; and***
> ***(d) affix a copy of the*** *declaration* ***of the results at the public entrance to the polling station or at any other place convenient and accessible to the public at the polling station"*** *(Emphases added).*

[72] Regulation 79 requires that the results of the National Assembly, county women representatives, Senator, county governor and county assembly elections be entered in Form 35. Form 35 is the declaration, and is to be signed by the Presiding Officer and the candidates or their agents, after which the results will be announced at the polling station, and a copy affixed at the entrance to the polling station, or at a place accessible to the public at the polling station.

[73] From the ***Joho*** case (at paragraph 60), it emerges that it is incumbent upon the Presiding Officer to transmit the results from his/her polling station to the Returning Officer, electronically and, subsequently, by physical delivery of the declaration in Form 35. Regulation 83 of the Elections Regulations requires the Returning Officer to tally the results from all the polling stations within his or her domain, and to make a public announcement of the results, after which he or she shall complete Form 34 and Form 35.

[74] In the ***Joho*** case, this Court perceived the requirements of Regulation 87 as the *"final step"* of declaration of results, which culminates in the Returning Officer tallying the votes at the constituency level. The Regulation provides as follows:

> ***" (2) The returning officer shall after tallying of votes at the constituency level –***
>
> ***(a) announce the results cast for all candidates;***
>
> ***(b) issue certificates to persons elected in the National Assembly and county assembly elections in Form 38 set out in the Schedule; and***
>
> ***(c) electronically transmit the provisional results to the Commission."***

[75] In respect of declaration of results *vis-à-vis* the public announcement of the same, this Court held in ***Joho*** (para. 64) as follows:

> ***"It is clear from Regulation 83 that the tallying of votes and the public announcement of the total votes cast in favour of each candidate precede the*** *declaration* ***of election results. Tallying and public announcement are designed by the Constitution [Article 86 (b) & (c)] and the Elections Act [Section 39] to take place immediately after the close of polling. The Constitution specifically emphasises the promptness with which the collated and tabulated results ought to be announced. This is important because it signifies the urgency with which the public should be notified of the outcome of the election. Taking into account this requirement of efficiency, which runs through all the electoral provisions, this Court is of the opinion that the subsequent stage of*** *declaration* ***must take place immediately after the tallying and announcement of the election results*** (Emphasis added).

[76] It is clear that declaration of results, for the various elections, is made at different (progressive) stages by use of Forms 34, 35, 36, 37 and 38 as prescribed by the Regulations. In the election of Member of the National Assembly, the *declaration* of results is first made at the polling station, where Form 35 is completed by the Presiding Officer, indicating the votes cast in favour of the various candidates. Another *declaration* is made at the tallying centre, upon completion of the tallying process, and the Returning Officer completes Form 36 indicating, among others, the votes cast for each candidate.

[77] The Returning Officer is required to deliver the original Form 35 together with Form 36, containing the results of the election of Member of the National Assembly to the County Returning Officer. The Returning Officer is also required to announce the results of all candidates at the constituency level after tallying, and to *issue a certificate to the person elected in the National Assembly elections, in Form 38.*

[78] Counsel for the appellant submitted that the Court of Appeal had erred in applying the decision in the ***Joho*** case, by failing to appreciate that the certificate in this matter was issued *in error to the 1st respondent, and that it was not supported by the contents of Forms 35 and 36*. He urged that the Court of Appeal ought to have applied the ***Joho*** decision in a manner that *permitted the 2nd and 3rd respondents to rectify the said certificate, since it was issued in error.*

[79] How should the ***Joho*** case be viewed, in relation to the doctrine of *stare decisis*? Article 163(7) of the Constitution incorporates the doctrine of *stare decisis, as understood at* common law. This doctrine holds that decisions of a higher Court, unless distinguished or overruled, bear the quality of law, and bind all lower Courts in similar or like cases [*See K.* Malleson and R. Moules, ***The***

Legal System (Oxford: Oxford University Press 2010)at page 68; *see also the* ***Jasbir*** case (at paragraph 40)].

[80] The importance of this doctrine was recognized by the British House of Lords in 1966, when Lord Gardiner, LC issued practice directions to guide the Court, relaxing the strictures of earlier practice on precedent. In the ***Practice Statement (Judicial Precedent) [1966] 1WLR 1234 (HL) (Practice Statement)*** the Lord Chancellor extolled the virtues of precedent-law, thus:

> ***"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules."***

[81] In ***Jasbir***, we recognized the value of certainty and consistency in the law, as the justification for upholding the doctrine of *stare decisis,* or binding precedent. This Court, in that case, thus pronounced itself (para. 42):

> ***"The immediate pragmatic purpose of such an orientation of the judicial process, is to ensure predictability, certainty, uniformity and stability in the application of law. Such institutionalization of the play of the law gives scope for regularity in the governance of commercial and contractual transactions in particular, though the same scheme marks also other spheres of social and economic relations."***

[82] The guiding principle, therefore, is that decisions of the Supreme Court, as a matter of constitutional imperative, are binding on all other Courts, and are to

be adhered to so that certainty, predictability and consistency in the law is institutionalized within the legal system. It is, however, recognized that due to society's constant social mobility and re-ordering, the attendant dynamics may necessitate either a *departure* from, or a *distinguishing* of legal norms laid down by this Court. The House of Lords was conscious of this reality in the **Practice Statement** cited above; the learned Judges, thus remarked:

> ***"Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."***

[83] Different sets of facts present themselves in the adjudication of disputes before the Courts. These varying facts fall for evaluation, interpretation and analysis, outcomes of which are then weighed, in a process of judicial reasoning, against some defined principles of law, so as to determine the *respective rights of parties*. Indubitably, the differing fact-situations make every given case peculiar, and quite apart from the other. Bearing in mind that ascertained legal principles of binding precedent are applied to ascertained factual situations, regard should be had, in the course of identifying an applicable rule, to the principle that similar fact-situations should be treated in a similar fashion. Where facts are materially dissimilar, or the case is not analogous to the previous decision, this Court will always distinguish the rule and may, in the interest of justice, choose not to apply its previous decision. This is the guiding principle to be applied by this Court in distinguishing its decisions.

[84] Malleson and Moules, in their book *The Legal System,* give the basis upon which Courts may distinguish case-precedent, in light of dissimilarities of

circumstances. In applying the principle of binding precedent, the learned authors observe:

> ***"The first question the judges must ask themselves is whether the facts of the case are sufficiently similar that the earlier case constitutes a precedent. In practice, no two cases will have identical facts and a case is only applicable if the material facts are the same. The key question is whether the differences between the present and the previous case have a bearing on the outcome of the case.*** *If there are materially different facts, the court may distinguish the case from the earlier cases and so apply a different rule****. To decide whether the facts are material or not, the court must determine what the general rule is which was laid down by the earlier case. This is called ratio decidendi, which is the combination of the rule of law and the material facts to which it applies."***

[85] In ***Balfour v. Balfour*** [1919] 2 KB 571, the British Court of Appeal was dealing with a question whether domestic agreements between spouses are capable of creating contractual obligations. The Court held that domestic agreements do not create legally binding contractual relations. However, later in ***Merritt v. Merritt*** [1970] 2 All ER 760; [1970] 1WLR 1211 the Court distinguished the case from ***Balfour***, because the facts were materially different. In that case, Mr. and Mrs. Merritt, although still in a marriage relationship, were estranged at the time the agreement was made, and therefore the subsisting promise between them was made with the intention to create legal relations.

[86] It is clear that where the facts are different, the *ratio decidendi* of the precedent-setting case should not injudiciously be applied to a later decision. The earlier decision should be distinguished, on a case-by-case basis, through a

circumspect process of judicial reasoning, that gives a basis for a different *ratio,* even when the outcome is similar to that in the earlier case.

[87] The question before us is whether the ***Joho*** case is dissimilar to the appeal before us, and thus calling for a different *ratio*. In the ***Joho*** case the Court was presented with a question as to the *constitutional validity* of Section 76(1)(a) of the Elections Act, as evaluated against the constitutional principle of *timely resolution of electoral disputes*, envisaged in Article 87(2) of the Constitution. In order to determine the commencement of time for instituting electoral disputes in Court, this Court analyzed the bifurcated procedures antecedent to the declaration of results in an election. This Court laid (paragraph 56) the outlines of our objective in the dispute before us as follows:

> ***"In order to comprehensively determine this issue, it is imperative to outline the election process from the stage of casting of votes, up to the time when the results are announced, and the winner is eventually known."***

[88] This Court had to define the meaning of "*declaration"* of results, as used in the Constitution. Having demarcated the main question on which the Court's determination was to be rendered, we made an inquiry into the regulations and the procedures that govern the conduct of counting of votes, after the casting, to the time when the Returning Officer announces the results as provided in the Elections Regulations. This Court found that under Regulation 73, counting of votes begins when the Presiding Officer declares the polling station closed, and fills in a *Form 33* in any case other than a Presidential election. This first step takes place at the polling centre, where all candidates are to be presented with *Form 35*.

[89] The Court noted that '*tallying*' and '*public announcement*' of the aggregate of votes cast precede a *declaration of results* in Form 38. We noted that the twin issues are *constitutional principles* enshrined in Article 86(b) and (c) of the Constitution and Section 39 of the Elections Act. We observed that *promptness and efficiency* lie at the very core of the electoral procedures and laws. Therefore, a declaration of results in Form 38 must follow *"immediately after the tallying and announcement of the election results*."

[90] This general statement of principle led this Court to the observation that, once the election results have been declared, any dispute that has to do with the electoral process then *shifts from the electoral body, the IEBC, to the Judiciary*. In the unanimous view of this Court (paragraph 65):

> ***"The mandate of the returning officer, according to Regulation 83(3), terminates upon the return of names of the persons-elected to the Commission. The issuance of the certificate in Form 38 to the persons-elected indicates the termination of the returning officer's mandate, thus shifting any issue as to validity, to the Election Court. Based on the principle of efficiency and expediency, therefore, the time within which a party can challenge the outcome of the election starts to run upon this final discharge of duty by the returning officer."***

[91] This Court held that a declaration of results, and the subsequent issuance of a *Form 38* to a candidate, *effectively extinguishes any power of the IEBC whether administrative or otherwise,* and precludes it from reversing or otherwise interfering with the certificate. By virtue of this statement, it was the view of this Court that any dispute that would arise, falls for resolution within the terms of Article 88(4)(e) of the Constitution:

"The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

....

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results...."

[92] Counsel for the appellant challenged the Court of Appeal's application of ***Joho*** to this case. He argued that the Court failed to address the differing facts in the appeal before it, and arrived at a wrong decision, in violation of Article 38(2) and (3) of the Constitution.

[93] Counsel further contended that the Court of Appeal failed to address its mind to the declared results contained in *Form 35* from each polling station. He argued that the 1st respondent never laid claim to being the winner of the election, and that he did not object to the declaration of results in Form 35, or the transposition of those results in *Form 36,* nor did he complain of any illegality in the electoral process.

[94] It was further argued that the decision would be different, had the Court of Appeal distinguished the facts of this case. In particular, counsel contended that the duty to render accurate and verifiable results in Form 36 had been discharged by the Returning Officer; and the appellate Court was, for this reason, wrong to have faulted the 3rd respondent for violating the sanctity of Form 38. It was urged for the appellant that, no Form 36 existed to constitute a foundation for the 1st respondent's claim of victory symbolised by possession of Form 38.

[95] The question arising, therefore, is whether the Court of Appeal should have distinguished this case from the precedent in ***Joho***. It becomes necessary to examine the record. The High Court in its Judgment (paragraph 30), deduced the central issue as being '*the conduct of the returning officer at the tallying hall and the contested documentation and declarations that flowed from there*'. The primary issue for determination was set out at paragraph 38:

> ***"Whether the 3rd respondent or IEBC had power to cancel the Form 38 of the petitioner after the public announcement of results on 6th March, 2013 at the tallying hall."***

[96] The question whether the original announcement at the tallying centre constituted a final declaration occupied the trial Judge's attention. He described it as the 'elephant in the room'. He analysed several regulations, the provisions of the Constitution, and case law. He determined (paragraph 47 of the Judgment) that under Article 88(4)(e) of the Constitution and Section 74 of the Elections Act, the IEBC is entrusted with powers to *review the declared results*, which to his mind were *provisional results*, before gazettement. According to the learned Judge, the results declared by the Returning Officer remain provisional until confirmed by the IEBC in the *Kenya Gazette* and certified to clerks of the Houses of Parliament. In arriving at such a conclusion, the learned Judge said he found support in the Court of Appeal holding in ***Hassan Ali Joho & another v. Suleiman Shahbal & Others Court of Appeal***, *Malindi Civil Appeal No. 12 of 2013* – a finding which this Court later overruled in the ***Joho*** decision. The Court of Appeal, on its part, set out the issue for determination in the appeal (paragraph 32 of its Judgment) as: whether the '*trial Court was right in finding that the 2nd and 3rd respondents (Returning Officer and IEBC) did not become functus officio and still had the power to cancel Form 38 issued to the appellant*.'

[97] Counsel for the appellant urged us to apply the concept of "restrictive distinguishing", to the final ***Joho*** decision. In support of his argument, he cited the British House of Lords decision in ***Peabody***, where the Court held that its rule of general liability of a municipality would be *narrowed to specific situations* of owners and occupiers of buildings. He also cited the House of Lords' ***Practice Statement*** to alert the Court to the potential for constrained development of the law, through rigid adherence to precedent.

[98] Counsel urged that, on the basis of "restrictive distinguishing", the ***Joho*** authority should be narrowed, and made less general, so it is not applied to this instance, where the Returning Officer had discharged his duty to render accurate and verifiable results, once the appellant's *Petition No. 150 of 2013* was lodged. He contrasted this with a scenario where a Returning Officer may irrationally and unjustifiably cancel a Form 38 that has been rightfully issued to a winning candidate.

[99] The doctrine of "restrictive distinguishing" was propounded by Professor Glanville Williams, in *Learning the Law*, 9th ed. (1973). He distinguished restrictive and non-restrictive distinguishing thus:

> ***"Non-restrictive distinguishing occurs where a court accepts the expressed*** *ratio decidendi* ***of the earlier case, and does not seek to curtail it, but finds that the case before it does not fall within this*** *ratio decidendi* ***because of some material difference of fact. Restrictive distinguishing cuts down the expressed*** *ratio decidendi* ***of the earlier case by treating as material to the earlier decision some fact, present in the earlier case, which the earlier court regarded as immaterial."***

[100] It is to be stated that the determination in ***Joho*** is a principled enunciation by this Court, marking the essence of a *declaration of election*

results. By this definition, the issuance of a certificate in Form 38 connotes final results which can only be contested before the Courts under Article 105 (1)(a) and (2) of the Constitution. Since the definition bears a broad span, it takes quite specific illustration to portray a differing circumstance such as should be admitted as a qualification to the norm. We find no such meritorious exception to have been brought up by learned counsel.

[101] But counsel invoked our earlier decision in ***Jasbir***, urging this Court to depart from the ***Joho*** decision in the instant matter, and to reformulate the jurisprudence of the ***Joho*** case. It was urged that the context of this case is different from that of the ***Joho*** case. Counsel urged the Court to qualify the ***Joho*** precedent, to incorporate the principle that the issuance of a final election certificate in Form 38, ought to be on the basis of the complainant having "lawfully and constitutionally obtained" the same.

[102] It was the appellant's argument that the learned Judges of the Court of Appeal ought to have interpreted and applied the Supreme Court's decision in ***Joho*** only in a prospective manner, given that the appellate Court's decision which the Supreme Court overruled in ***Joho*** was, at the time, the applicable law which the Election Court had relied on, at the time it was rendering its Judgment of 13th September, 2013.

[103] The appellant's concern has been answered in the ***Mary Wambui*** case, where this Court held that, whether prospective or retrospective effect attends a declaration of nullity, is to be determined on a *case-by-case basis*. In giving retrospective effect to the annulment of Section 76(1)(a) of the Elections Act, this Court had drawn on the case of ***A. v. The Governor of Arbour Hill Prison*** [2006] IESC 45, [2006] 4 IR 88 (at paragraph 36) where Murray CJ, stated as follows:

> ***"Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position."***

[104] In this case the lack of transparency, attended with breaches of the law, on the part of the 2nd and 3rd respondents, has harmed both the appellant and the 1st respondent. As this is a 'live matter' before this Court, the application of the rule in ***Joho*** is essential.

[105] Did the IEBC (2nd respondent) exceed its mandate under Article 88(4)(e) of the Constitution?

F. DETERMINATION AND ORDERS

[106] The issue before us is whether the Returning Officer has the capacity to reverse a Form 38 after issuance of the certificate to a candidate. Counsel for the appellant contended that the Court of Appeal erred, in holding that the 2nd and 3rd respondents became *functus officio* after announcing the 1st respondent as the winner at the tallying centre on 6th March, 2013.

[107] It was also the appellant's case that the appellate Court's application of the ***Joho*** decision to the instant case was unreasonable and was in contravention of the provisions of Article 88(5) of the Constitution as read together with Section 39 of the Elections Act. The ***Joho*** decision, in counsel's view, does not presuppose the validity of a Form 38, without regard to mode of acquisition.

[108] Elections are conducted, managed and supervised by the IEBC pursuant to its mandate under Article 88 of the Constitution. Article 88(4)(e) deals with the settlement of electoral disputes, which include disputes relating to and arising from nominations, but exclude *election petitions and disputes subsequent to the declaration of election results*. This is restated in Section 4 of the Independent Electoral and Boundaries Commission Act, No. 9 of 2011 and Section 74(1) of the Elections Act.

[109] This Court has affirmed in the ***Raila Odinga*** case, that there is a general presumption of validity of discharge of public duties in conformity with the Constitution. We determined that:

> *"Omnia praesumuntur rite et solemniter esse acta:* ***all acts are presumed to have been done rightly and regularly."***

[110] By the design of the general principles of the electoral system, and of voting, in Articles 81 and 86 the Constitution, it is envisaged that no electoral malpractice or impropriety will occur that impairs the conduct of elections. This is the basis for the public expectation that elections are valid, until the contrary is shown, through a *recognized legal mechanism founded in law or the Constitution*. Any contests as to the credibility, fairness or integrity of elections, belongs to no other forum than *the Courts*. The charge of commission of administrative error, fraud, deliberate misconduct, or some element of corrupt practice in elections, are questions that go to the *root of the validity of elections*

and which, if apparent subsequent to the declaration of results, are expressly *excluded from the scope of the dispute-resolution powers of the IEBC under Article 88(4)(e).*

[111] In the instant case, the Returning Officer could not have, after issuing the Certificate of Results in favour of the 1st respondent, subsequently cancelled it and issued a fresh Form 38 to the appellant. The Returning Officer having declared the 1st respondent as the winning candidate, and duly issued the Form 38, became *functus officio*. There is neither scope for the Returning Officer to withdraw a declaration of the election result once made, and to cancel the certificate issued in favour of the winning candidate, nor is there a mandate to rectify the Form 38. Once the votes are polled, counted and results declared, it would be perilous to allow the Returning Officer to nullify the result, purportedly in rectification of some error. This would not only affect the very sanctity of the election process, but also encroach on the powers of the *Election Court*.

[112] The foregoing point is fundamental, in terms of *legal principle*. Apart from the priority attaching to the political and constitutional scheme for the election of representatives in governance agencies, the weight of the people's franchise-interest is far too substantial to permit one official, or a couple of them, including the Returning Officer, unilaterally to undo the voters' verdict, without having the matter resolved *according to law, by the judicial organ* of State. It is manifest to this Court that an error regarding the electors' final choice, if indeed there is one, raises *vital issues of justice* such as can only be resolved before the *Courts of law*.

[113] The question whether the 2nd and 3rd respondents could casually revoke a certificate of election results (Form 38) which they had issued in favour of the 1st respondent – issued with publicity and in the glare of the voters – is one to be

governed by legal principle. Such a context of issuance of the certificate bears such enormity, as to rule out the possibility of a unilateral cancellation such as would not only occasion grave prejudice to the first respondent, but would also undermine the legitimacy of the electoral process in the perception of the voters. An action of such gravity falls squarely to resolution through the *judicial process*. Withdrawal of the Form 38 from the first respondent was contrary to law and was a nullity *prima facie*. However, by the common law concept, *omnia praesumuntur rite et solemniter esse acta* ['all acts are presumed to have been done rightly and regularly'], the issuance of Form 38 to the appellant herein stood as an invalid process, and this Court will now declare its status henceforth as a nullity.

[114] It is clear from the ***Joho*** decision that once the Returning Officer issues the Form 38, his or her mandate is exhausted. The Returning Officer does not have the power unilaterally to "correct" any decisional errors after the declaration of the election result. The alternative would amount to conferring a power which is not recognized under the Constitution, the Elections Act, and the Rules and Regulations framed thereunder, as well as the IEBC Act.

[115] In light of Article 88(4)(e) of the Constitution, section 74(1) of the Elections Act and the decision in the ***Joho*** case, we hold that the jurisdiction of the 3rd respondent ended at the time the Returning Officer issued the certificate in Form 38, on 6th March, 2013; and no alteration could be made by its officers. Any disputes arising from the declaration could only be determined by the *Election Court*.

[116] Did the Court of Appeal contravene Article 27 of the Constitution, in awarding costs to the 1st respondent only?

[117] Counsel for the appellant submitted that although the Court of Appeal had ascribed fault to the 2nd and 3rd respondents, that Court had ordered that the parties should bear their own respective costs; and he urged that this was a discriminatory application of the law of costs, that had prejudiced the appellant.

[118] Counsel submitted that the appellant had suffered financially in defending the case at the Election Court and the Court of Appeal, and that the decision of the order that he bears his own costs had a punitive effect. Counsel relied on the South African Constitutional Court case, ***Harksen v. Lane NO and Others*** (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300, which dealt with the issue of equality, and which considered differentiation amounting to discrimination.

[119] The Court of Appeal, in its decision dated 18th March, 2014 (paragraph 40) thus ordered:

> ***"...As the unhappy state of affairs in this matter was brought [about] by the 2nd and 3rd respondents, the 2nd respondent will bear the costs of the appellant both in the High Court and in this Court capped at Kshs. 1 million in*** *the High Court and Kshs. 500,000/= in this Court. The 1st respondent will bear his own costs in the High Court and in this Court"* (Emphasis added).

Section 84 of the Elections Act, which deals with the issue of costs in election petitions, thus stipulates:

> ***"An election court shall award the costs of and incidental to a petition and such costs shall follow the cause."***

Rule 36 of the Elections Petition Rules further provides as follows:

"(1) The court shall, at the conclusion of an election petition, make an order specifying—

(a) the total amount of costs payable; and

(b) the persons by and to whom the costs shall be paid.

"(2) When making an order under sub-rule (1), the court may —

(a) disallow any costs which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the petitioner or the respondent; and

(b) impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense."

[120] It is, thus, evident that Section 84 of the Elections Act provides that costs follow the event. In addition, Rule 36 of the Election Petition Rules provides that the Court may disallow costs if, in its opinion, the petitioner or respondent caused unnecessary expense in the case. On this very issue of costs, this Court had thus held (para. 18) in the ***Jasbir*** case:

"It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. …."

[121] From the above statutory provisions and from case law, we are of the view that in election petition matters, Courts should in principle, award costs *following the event*. In instances where there is a vexatious claim brought by the petitioner or the respondents, the Court will determine whether a party is to be disallowed costs, or the burden of paying costs will fall on such a party. A firm statutory framework for the award of costs in electoral dispute-settlement is established by the wording of Section 84 of the Elections Act, and of Rule 36 of the Election Petition Rules. The scope for discretion in this regard, it is clear, is more limited than is the case in normal civil procedure. The purpose is to compensate the successful litigant for expenses incurred in prosecuting the case.

[122] The High Court and the Court of Appeal both found that the 2nd and 3rd respondents were the cause of the dispute before the Court; and the appellant incurred expenses in defending the matter. We hold that the Court of Appeal should have ordered the 2nd respondent to bear the costs of the 1st respondent, as it is only prudent and in the interests of justice to do so.

[123] We find that upon the execution of the 3rd respondent's mandate by issuing the Certificate of Results in Form 38 to the 1st respondent on *6th March, 2013*, both the 2nd and 3rd respondents became *functus officio*. We however note that the 2nd and 3rd respondents had improperly intervened in the electoral process after the conclusion of their task in Mathare Constituency, by cancelling the Certificate of Results in Form 38 already issued to the 1st respondent, and issuing a fresh one to the appellant on *8th March, 2013*. This conduct inevitably precipitated doubts upon the true position of the electoral outcome in that Constituency. Such a mystifying "variation" to the already-known electoral outcome executed some two days since polling day, and purely by State

employees, not only lacked the colour of legality, but also imprudently and brutally negated common perceptions of democratic electoral process.

[124] This Court in the ***Joho*** case, determined that the mandate of the Returning Officer is exhausted upon the issuance of the certificate in Form 38 to the *persons-elected*. The Form 38 issued to the appellant herein was given after the mandate of the Electoral Commission (IEBC) had expired. With respect to the election in question, only *one* Form 38 was issued by the Commission at a time when it was still vested with the vital mandate; and that was the Form 38 issued to the *1st respondent*. However, in the ***Joho*** case, this Court held that the process of result-declaration, and ultimate issuance of a Certificate in Form 38, is not a one-stop event, but rather, a plurality of processes based on proper execution of the Commission's mandate, and the ultimate upholding of the people's right, as envisaged under Article 38 of the Constitution. On account of the constitutional significance of these steps, especially in relation to the rights attached to franchise, any matter of dispute or contest fell to resolution by the *legal process,* and not by administrative fiat.

[125] One question raised before this Court is, whether the Form 38 issued to the 1st respondent was ever challenged and, if it was, whether the constitutional requirements regarding the conduct of elections were met. Article 87(2) of the Constitution requires that election petitions be filed within 28 days after the declaration of the election results. The corresponding statutory provision is Section 77 of the Elections Act, which echoes the language of the Constitution in Article 87(2), even though it bears the rubric, "*service of petition*". Article 87(2) of the Constitution and Section 77 of the Elections Act do not state *who* may file an election petition. Therefore, we would not impose restrictions as who may

petition before an Election Court, to invalidate *any aspect* of an election.

[126] Article 87(1) of the Constitution requires Parliament to "*enact legislation to establish mechanisms for timely settlement of electoral disputes*"; and pursuant to this, the Elections Act, Rules and Regulations were enacted. The Elections (Parliamentary and County Election Petition) Rules, 2013 in Rule 6, require that an *Election Court* be gazetted for it to be properly constituted. The record before us reveals that on 7th March, 2013 the appellant moved to the Constitutional Division of the High Court, as opposed to an Election Court, to challenge the issuance of Form 38 to the 1st respondent. However, that petition was withdrawn by the appellant on 8th March, 2013 after he was issued with a Form 38, which we have already declared invalid.

[127] The 1st respondent then filed an election petition seeking the invalidation of the Form 38 issued to the appellant, and the subsequent validation of the Form 38 issued to him. The appellant filed a replying affidavit taking issue with the Form 38 issued to the 1st respondent herein, and implored the trial Court to declare him as the person validly elected. The 1st respondent's petition was challenging a Form 38 that was improperly issued to the appellant, as the 1st respondent's Form 38 was the one issued by the IEBC while it still had the mandate to do so. The 1st respondent filed his petition at a time when he was the only holder of a Form 38 issued by the IEBC while it had the mandate to do so. But the Form 38 which the IEBC recognized was that of the *appellant,* who was subsequently sworn in as the Member of National Assembly, Mathare Constituency.

[128] When the petition was heard by the trial Court, the parties presented their issues for determination which included the issue: whether the election of the appellant was valid, and whether the Form 38 issued to the 1st respondent was valid.

[129] In this matter, it cannot be said that the Form 38 issued to the 1st respondent was "not challenged," merely because the *appellant* did not himself file a petition in an Election Court. When the 1st respondent filed an election petition in which he sought a declaration that the election results be invalidated, and his Form 38 be declared valid, *the validity of the Form 38 issued to him became an issue on which the trial Judge made a determination*. The 1st respondent's petition in the High Court presented the respondents thereto, with the opportunity to challenge his Form 38, despite the fact that they themselves had not filed an election petition. To this Court, it is inconsequential that the petitioner at the High Court had inadvertently facilitated the respondents thereat, in challenging his Form 38. The appellant and the 2nd and 3rd respondents, indeed, seized that opportunity, and impugned the 1st respondent's Form 38, in their replying affidavits. For this Court to hold that there was no petition challenging the 1st respondent's Form 38, merely because the petition filed was by the *1st respondent himself*, would be paying undue regard to technicality, in place of the substantive questions.

[130] The Constitution does not bar the winner of an election from filing an election petition, as such a petition may challenge any aspect of the election, in line with the *plurality of processes* considered by this Court in the ***Joho*** case. Neither does the Elections Act indicate that a petition by the declared winner lays no basis for a determination. It is simply perceived as a matter of practicality, that one would not challenge one's own victory. If we were to hold that the appellant did not properly challenge the 1st respondent's Form 38, we would be suggesting that despite there being Election Petition No. 2 of 2013, he should have proceeded to file *his own* Election Petition to raise the same issues contained in his replying affidavit in Petition No. 2 of 2013. Assuming that he had even filed another petition which substantially raised the same issues, there is a high probability that the two petitions would have been consolidated. It is

now evident that the only concern in this regard, is how the appellant brought his grievance with respect to the Form 38 issued to the 1st respondent, to the attention of the Court. That is an issue of procedure, the burden of which turns more on technicality than on substantive questions. We note that Article 87 of the Constitution makes no provision on *who* may file an election petition.

[131] The set of facts and the reality facing the Court in this petition is rather peculiar. The appellant, whose Certificate of Results in Form 38 was issued *outside the mandate-period* of the Commission, is the sworn-in and serving Member of the National Assembly for Mathare Constituency. This Court should in principle, not substitute a sitting Member of Parliament with another, without allowing the people to execute their political rights, as enshrined under the Constitution. To do otherwise would be to undermine the values and principles of democratic governance that bind us, in the execution of our judicial authority. It would also lead to an upset in the composition of the elected representatives who bear the people's sovereignty, and would stand out as a clear disregard of the founding provisions of the Constitution.

[132] We have anxieties about the stance of the 2nd and 3rd respondents, that: the Form 38 issued to the 1st respondent was issued in error; and it is not supported by evidence in Forms 35 and 36 completed by the 3rd respondent. In clear disregard of electoral law, the 3rd respondent re-tallied the results, and c*ompleted another Form 36 in the absence of the candidates and/or their agents*. In plain language, and indeed as the Commission admits, the Returning Officer issued a Form 38 that was inaccurate, unverifiable and unaccountable.

[133] As a Court, we have had to contend with the question whether these are the kind of election results that we would uphold. A declaration that the Form 38 issued to the 1st respondent is valid, will be tantamount to upholding results of

such a kind, in which even the electoral body mandated (Article 81 of the Constitution) with conducting free and fair elections has owned up to having contravened the prescribed constitutional requirements. Article 81(e)(v) of the Constitution imposes a duty on the IEBC to ensure that the elections are administered in an *efficient, accurate and accountable manner*. To hold that the Form 38 issued to the 1st respondent is valid, despite the *glaring breaches of the law by the IEBC,* would be an affront to Article 81(e)(v) of the Constitution.

[134] If we were to declare the Form 38 issued to the 1st respondent to be valid, in circumstances in which Articles 81 and 86(c) have been contravened by the IEBC, we would as a Court, have advanced the cause of flagrant disregard of universal suffrage, thereby disenfranchising the electorate in Mathare Constituency. In determining whether election results are valid or not, a Court will endevour to establish whether such results are broadly reflective of *the will of the electorate*. If the Court is satisfied that constitutional provisions have been contravened, as a result of which the election results do not reflect *the will of the electorate*, the Court should not aggravate the problem by upholding those results. Instead, the Court should seek the *most appropriate remedy that safeguards the will of the electorate.* The Court has always to bear in mind that its final determination should not stand out as a substitute for the ballot. This is the preserve of the electorate.

[135] The Elections Act sets out the powers of an Election Court, as follows Section 80(1):

> ***"An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if—***
>
> ***(a) upon recount of the ballots cast, the winner is apparent; and***

(b) that winner is found not to have committed an election offence."

[136] The Election Court is thus expected to have conducted a recount of the ballots cast and found that *the winner is ascertainable,* before directing the Commission to issue a certificate of election results (Form 38) to a Member of the National Assembly. This indicates the importance which the statute attaches to the issuance of Form 38, after the Court makes its determination that a new Form 38 ought to be issued. This factor is to be borne in mind by this Court, were it to invalidate the status of one candidate while declaring another to have been the winner in the General Elections of 4th March, 2013.

[137] The trial Court in its Judgement (paragraph 59) found that the petitioner (1st respondent herein) did not adduce evidence to rebut the Form 35 produced by the appellant herein. By virtue of this *finding by the trial Court which had the benefit of the occasion to investigate the veracity of evidence,* the validity of the Form 38 issued to the *1st respondent* becomes an issue which this Court cannot overlook. In the least, a declaration by this Court that a certain person won the elections, *must be supported by the aggregate of declarations* referred to in the ***Joho*** case. This Court held (paragraph 72) that:

"Declaration takes place at every stage of tallying. For example, the first declaration takes place at the polling station; the second declaration at the Constituency talling centre; and the third declaration at the County returning centre. Thus the declaration of election results is the aggregate of the requirements set out in the various forms, involving a plurality of officers. The finality of the set of stages of declaration is depicted in the issuance of the certificate in Form 38 to the winner of the election. This marks the end of the electoral process, by affirming

and declaring the election results which could not be altered or disturbed by any authority."

[138] The decision in ***Joho*** recognizes that the declaration in Form 38 has to be the *aggregate of the various declarations made prior to it*. In the election of Member of the National Assembly, the declarations are made in Forms 35 and 36, which are the basis of completion of Form 38. Thus, a breach of any link in the chain of declarations disrupts the vital quantitative aggregation of those forms, *fatally affecting the declared results*. This makes it imperative for the *Election Court* to verify the validity of the declared results, by ordering for scrutiny and recount or re-tally, in order to *mend the breach in that chain of declarations*. The Court would then *make its own declaration as to who won the election*. Unfortunately, this was not done by the trial Court; and so, there is not an established factual foundation upon which this Court (just as was the case at the Court of Appeal) can identify the winning candidate in the Mathare Constituency election.

[139] At this advanced stage of the progression of this matter, an order for scrutiny and recount or re-tally is *unavailable*, since that can only be done by the *trial Court*. This Court, therefore, has no means of verifying the validity of the declared results, in light of the discrepancies in results in Forms 35, 36 and 38. This is sufficient for this Court not declaring that the Form 38 issued to the 1st respondent was valid. Having declared the Form 38 issued to the appellant invalid, as it was issued by the 2nd respondent in a cloudy process and when the second respondent had become *functus officio;* and having found that the Form 38 in favour of the 1st respondent was issued without a supporting basis, we will make appropriate Orders, pursuant to the terms of Section 20 of the Supreme Court Act, 2011.

[140] The circumstances of the matter before this Court, however, have drawn our attention to situations of the most reprehensible impropriety in the functioning of the constitutional obligation to conduct democratic elections – an obligation entrusted to the second respondent. The issuance to the first respondent of the Certificate of Election Results, that had no foundation in authenticated records, was in the first place a gross violation of the mandate reposed in the Independent Electoral and Boundaries Commission under Article 88 of the Constitution. The erratic and unprincipled decision to then revoke the said certificate, and to confer it instead upon the appellant, in total disregard of the law, was so censurable as to call – as we now signal – *for a properly-conducted investigation and requisite redressive action by the relevant authorities.*

[141] Article 81(e)(v) of the Constitution imposes a duty on the IEBC to ensure that elections are administered in an efficient, accurate and accountable manner. In conducting the elections for Mathare Constituency, the 3rd respondent, as agent of the 2nd respondent, arrogated to herself a role not bestowed upon her by law. Either singly or in alliance, the said respondents sacrificed the values, principles and mechanisms of fair election, thus gravely undermining the concept of democratic governance as enshrined in the Constitution.

[142] Our Orders are as follows:

(i) The appellant's appeal is disallowed, and the determination made by the Court of Appeal is upheld.

(ii) The declaration of election results in Form 38 issued to George Mike Wanjohi on 8th March, 2013 is hereby declared null.

(iii) The declaration of election results in Form 38 issued to Steven Kariuki on 6th March, 2013 is declared null.

(iv) ***The Registrar shall forthwith serve these Orders upon the parties and upon the Speaker of the National Assembly.***

(v) The 1st respondent's costs shall be borne by the 2nd respondent.

(vi) ***The appellant shall bear his own costs.***

THE CONCURRING OPINION OF K.H. RAWAL, DCJ & VICE-PRESIDENT

[143] I have considered the majority decision and concur with the reasons leading to, and the conclusion and final orders derived after a careful consideration of the case set forth in this matter. There are certain aspects of the judgement upon which, I concur, but wish to expound. One of the issues considered and determined by the majority is ***whether the Court of Appeal upheld the principle of*** *stare decisis* ***enshrined in Article 163(7) of the Constitution, in applying*** the ***Joho*** decision**.** It is this issue that my *concurring opinion* primarily considers.

[144] The submission on *stare decisis* was put forth by counsel for the appellant. The submissions are dealt with at length in the majority decision. More specifically, the issues raised by the appellant were, *inter alia*: *whether in applying Article 163(7) of the Constitution, the Courts such as the Court of Appeal in Civil Appeal No. 272 of 2013 are bound to apply the doctrine of*

"restrictive distinguishing" *so as to align the Supreme Court's decision, sought to be applied, with the constitutional mandate to do justice and develop the law under Article 159(2)(e) and Article 259 (1)(c) of the Constitution respectively and whether Article 163(7) of the Constitution permits the application of* ***non-restrictive distinguishing*** *of this Honourable Court's decision in their application by the Court of Appeal and other Courts.*

[145] Counsel argued that the Court of Appeal, did not have full regard to the reasons of this Court in the ***Joho*** decision. More particularly, that the Court of Appeal failed to properly apply the holding that *declaration takes place at every stage of tallying*. As such, counsel urged the Court to apply the decision in ***Joho restrictively*** given the context of the Election petition's pleas, the Nairobi election Petition 150 of 2013; the application of Article 88(5), Article 86(c) of the Constitution, as read with Section 39 of the Elections Act. Counsel cited the House of Lords decision in ***Peabody Fund v Sir Lindsay Parkinson Ltd***, *[1984] 2. W.L.R 953 (H.L) (*the ***Peabody*** case*)* in which the Court *restricted* its earlier decision in ***Anns v Merton London Borough****[1978] A.C 728.* In the converse, counsel for the 1st respondent was of the opinion that this Court's decision in ***Joho*** ought to be applied without distinguishing it from the instant case.

[146] As elaborated in the ***Joho*** case, the Court set down certain parameters to be met in arriving at a *declaration of election results* as required by the Constitution. This plurality of events is the main consideration of any Court faced with a question of declaration in an election petition. The Court at **paragraph 72** of the ***Joho*** decision held that:

> *"Declaration"* ***takes place at*** *every stage of tallying****. For example, the*** *first declaration* ***takes place at the polling***

station; the *second declaration* ***at the Constituency tallying centre; and the*** *third declaration* ***at the County returning centre. Thus the*** *declaration of election results is the aggregate of the requirements set out in the various forms, involving a plurality of officers****. The finality of the set of stages of declaration is depicted in the issuance of the certificate in Form 38 to the winner of the election. This marks the end of the electoral process by affirming and declaring the election results which could not be altered or disturbed by any authority.”***

[147] I have taken the time to go through the House of Lords decision in ***Peabody*** being the authority that was cited by counsel to support the submission on *restrictive distinguishing*. In that case, the doctrine under examination was the duty of care and the extent of its examination and application by Courts in England. There were, as the Lords pointed out, several decisions whose outcome was determined by the examination of the duty of care and on whom it befell. Lord Keith of Kinkel for the majority examined the decision of Lord Wilberforce in ***Anns v Merton London Borough Council*** *[1978] A.C 728, 751-752* on the issue as to whom a duty of care was owed. Lord Keith distinguished this holding based on the set of facts before him. It becomes then clear that the guiding consideration was the aspect of ‘duty of care’ as applied to the specific set of facts before the Court.

[148] Applying the principle in ***Joho***, the primary consideration of a Judge must be whether the declaration of the election results at every stage of tallying validates the issuance of the final Certificate of Results in Form 38. The references to be looked at must be the Constitution, the Elections Act and the

Rules and Regulations thereunder. As held by this Court (Ojwang, Wanjala SCJJ) in ***Gatirau Peter Munya v. Dickson Kithinji & 2 Others***, SC Application No. 5 of 2014, *"the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and in interpreting them, a Court of law cannot disengage from the Constitution."* This written law is illuminated by the principles set by this Court from time to time. These principles will apply across the entire spectrum of electoral disputes and a Court before which a matter is presented should evaluate the facts of each case against these principles. As such, and as elaborated in ***Joho*** and affirmed by the majority in this case, the guiding consideration in electoral disputes must be the electoral process and the principles attendant thereto.

[149] I observe that the House of Lords in ***Peabody*** was applying common law principles which are subject to change over the years and whose application varies with justifiable attendant circumstances. Electoral disputes in Kenya are resolved with particular reference to constitutional values and principles which should be emphasised and, as demonstrated by this Court, upheld and interpreted in the manner required by the Constitution. Therein lies the distinction of applying the principle of restrictive or un-restrictive distinguishing in a system of constitutional application and one of common law. The principles set by this honourable Court in the course of its constitutional adjudication are principled and well considered. Therefore, an argument to consider a departure from these principles or to distinguish either restrictively or un-restrictively must be weighed against the most serious inclinations of justice and social utility. Any departure from the decisions of this Court by a lower Court must be viewed as a hazardous expedition and should only be to the extent that there is an elaborate distinction on the facts.

[150] With the above observations, I shall adopt the Orders made by the Court in the main Judgement.

DATED and **DELIVERED** at **NAIROBI** this 23rd day of May, 2014.

.....	.....
WILLY MUTUNGA **CHIEF JUSTICE & PRESIDENT** **OF THE SUPREME COURT**	**K.H. RAWAL** **DEPUTY CHIEF JUSTICE/** **DEPUTY PRESIDENT OF** **THE SUPREME COURT**
.....	**.....**
P.K. TUNOI **JUSTICE OF THE SUPREME** **COURT**	**M.K. IBRAHIM** **JUSTICE OF THE SUPREME** **COURT**
.....	**.....**
J.B. OJWANG **JUSTICE OF THE SUPREME COURT**	**S. C. WANJALA** **JUSTICE OF THE SUPREME COURT**

.....
N.S. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA