

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
AT NAIROBI

(CORAM: Rawal, DCJ, Tunoi, Ibrahim, Ojwang, Ndungu, SCJJ)

PETITION NO 10 OF 2013

-BETWEEN-

1. HASSAN ALI JOHO.....1st APPELLANT

2. HAZEL EZABEL NYAMOKI OGUNDE.....2nd APPELLANT

-AND-

1. SULEIMAN SAID SHAHBAL.....1st RESPONDENT

2. INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....2nd RESPONDENT

3. MWADIME MWASHIGADI.....3rd RESPONDENT

(An appeal from the Ruling of the Court of Appeal sitting at Malindi (Githinji, Makhandia and Sichale, JJA) which dismissed the Appellants Appeal and allowed the 1st Respondent's Cross-Appeal dated 25th July, 2013 in Malindi, Civ. Appeal No. 12 of 2013)

JUDGEMENT OF THE COURT

A. BACKGROUND

[1] The 1st appellant is the Governor for Mombasa County, whereas the 2nd appellant is the Deputy Governor. The 1st respondent filed a petition in the High Court at Mombasa on 10th April 2013, challenging the validity of the election of the 1st appellant as the Governor of Mombasa County and consequently, that of the 2nd appellant as the Deputy Governor.

[2] In response to the petition the appellants herein (respondents in the petition) averred that the 1st respondent had filed his petition outside the timelines prescribed by the Constitution. Accordingly, the appellants filed an application dated 29th April, 2013 seeking that the petition be struck out or dismissed on the ground that it had been filed 34 days after the declaration of the election results - outside the 28 days mandated by Article 87(2) of the Constitution.

[3] The application was anchored on the ground that the provisions of **Section 76(1)(a) of the Elections Act, No. 24 of 2011 (hereinafter, the Elections Act)** were inconsistent with **Article 87(2)** of the Constitution and hence the High Court lacked jurisdiction to entertain the matter.

[4] The crux of the applicant's argument at the High Court was that Section 76 (1)(a) of the Elections Act is inconsistent with Article 87 (2) of the Constitution, because it introduces the element of publication of the results of the election in the **gazette**, whereas the Constitution simply provides for filing of an election petition 28 days after the **declaration** of the election results by the Independent Electoral and Boundaries Commission (hereinafter, IEBC).

[5] The High Court ruled that **Section 76(1)(a) was inconsistent with the provisions of Article 87(2) of the Constitution and recommended the amendment of either Article 87 (2) of the Constitution or Section 76 of the Elections Act.** The Court however declined to strike down the petition for the reason that the 1st respondent was not to blame as Section 76 (1)(a) of the Elections Act was lawful until the Court's declaration of its invalidity. Secondly, that had the Court struck out the petition and the Court of Appeal subsequently overturned its decision, the decision of the appellate Court would have been futile as the six (6) months stipulated by law for hearing and determining an election petition would have lapsed.

[6] The appellants, being aggrieved by the decision of the High Court, appealed to the Court of Appeal on grounds, *inter alia*, that the trial judge erred in law in finding that Section 76(1)(a) of the Elections Act was *prima facie* lawful at the time of filing the petition. The Court of Appeal, however, dismissed the appeal and nullified the High Court's ruling to the effect that Section 76(1)(a) of the Elections Act is inconsistent with Article 87(2) of the Constitution.

[7] Aggrieved by the said judgment, the appellants further appealed to the Supreme Court as of right, pursuant to Article 163(4)(a) of the Constitution, seeking a determination of the question whether Section 76(1)(a) of the Elections Act, 2011 is inconsistent with the provisions of Article 87(2) of the Constitution. The appeal was anchored on the ground that, the Court of Appeal erred in elevating the provisions of the Elections Act (Section 76(1)(a)) above those of the Constitution (Article 87(2)), by holding that the computation of time started running 28 days after the publication of the election results in the *Kenya Gazette*. The 2nd and 3rd respondents also filed a cross-appeal supporting the appellants' position.

[8] While this appeal was pending before this Court, the 1st respondent filed a preliminary objection dated 12th November, 2013 disputing the jurisdiction of this Court to hear the appeal. The grounds of objection were that the appellants had not sought leave from the Court of Appeal or this Court certifying that the instant appeal involved a *matter of general public importance*. Further, the 1st respondent contended that the High Court having delivered the ruling at an interlocutory stage, the appellants had no right to lodge an appeal in the Court of Appeal, as the election petition filed in the High Court had not been fully heard and determined and as such the Court of Appeal had no jurisdiction to entertain such an interlocutory appeal.

B. SUBMISSIONS BY THE PARTIES

(a) *The appellants' case*

[9] Learned counsel for the appellants, Mr. Buti submitted that, an appeal on a matter involving the interpretation or application of the Constitution may be filed at the Supreme Court *as of right*, in accordance with **Article 163 (4)(a) of the Constitution**. Accordingly, counsel submitted that the present appeal was properly before the Court, as it involved a question of *interpretation and application of the Constitution*.

[10] Further, counsel argued that the issues raised in the present appeal had been presented to the Court of Appeal culminating in the decision being challenged. In particular, it was submitted that the Court of Appeal erred in law in holding that the 28 days limitation period for filing an election petition started to run *after the publication of the election results in the Gazette* as provided for by *Section 76(1)(a) of the Elections Act*.

[11] In regard to the Section 76 (1) (a) of the Elections Act, counsel submitted that the words '*publication of election results in the Gazette*' were not included in Article 87(2) of the Constitution. Consequently, it was argued, Section 76 (1) (a) of the Elections Act was inconsistent with the provisions of Article 87(2) of the Constitution. Counsel further submitted that the Elections Act, by its **Section 77 (1)**, made a *restatement of Article 87 (2) of the Constitution*, thus confirming the *correct position in law*. In this regard, it was argued that the inclusion of Section 76 (1)(a) in the Elections Act was *unnecessary*; and that if Section 76 (1)(a) were to be declared invalid, there would be no lacuna in the electoral law.

[12] One of counsel's main contentions was that the Court of Appeal had not considered the import of Section 77 (1) of the Elections Act, in its decision. It was argued that the Court of Appeal failed to consider the effect of Section 77(1), in

the determination of the constitutionality of Section 76 (1)(a). Counsel urged that the practice at common law, where there is a conflict between two provisions of the law, is to *uphold the later provision*. To buttress this argument, counsel cited the case of ***Wood & Another vs. Riley [1867] 3CP26 (per Keating, J)***:

“if two sections are repugnant, the known rule is that the last must prevail”.

(b) *The meaning of “election results” is certain: Appellants’ further contention*

[13] Counsel submitted that ‘election results’ has been defined under Section 2 of the Elections Act, as follows

“election results means the *declared outcome of the casting of votes by voters at an election*” [*emphasis added*].

Counsel referred to this definition while making submissions on the question of *the person empowered to declare the outcome of the election*. In building an argument towards the appellants’ position, on who declares the *outcome* of the elections, counsel referred to the provisions of Section 109 of the Elections Act, empowering the *Commission to put in place regulations generally for the carrying out of the purposes and provisions of the Elections Act* [**The Elections (General) Regulations, 2012 (hereinafter, the Regulations)**]. In particular, counsel referred to Section 109 (1) (bb) empowering the Commission to put in place *regulations to provide for the mode of declaration of the result of an election*:

109(1) “The Commission may make regulations generally for the better carrying out of the purposes and provisions of this

Act, and in particular, but without prejudice to the generality of the foregoing, may make regulations to -

(a) ...

(b) ...

(c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u) (v), (w), (x), (y), (z), (aa)...

(c)

(bb) provide for the *mode of declaration* of the result of an election;" [Emphasis added].

[14] It was submitted that **Regulation 3 (3) (e)** empowers the returning officer to declare the tallied results *at the constituency*;

3(1) "The Commission shall appoint a returning officer for each constituency and may appoint such number of deputy returning officers for each constituency as it may consider necessary.

(2)...

(3) the returning officer shall be responsible for -

(a)...

(b)...

(c) the tallying of results from each polling station in the constituency;

(d) announcing results from the constituency for purposes of the election of the President, Senator, Governor, Woman representative to the National Assembly, member of National Assembly and county representatives;

(e) the declaration of the results tallied under paragraph (c) above;" [emphasis added].

[15] Counsel further urged the Court to be guided by Regulation 4 (1) which empowers the County returning officers to declare and announce the results tallied at the County level in determining the issues; it thus provides:

4 (1) “The Commission shall appoint county returning officers to be responsible for-

(a)...

(b) *tallying results from constituencies in the county for purposes of the election of the President, county Governor, Senator and county women representative to the National Assembly;*

(c) *the declaration and announcement of results tallied under paragraph (b);’* [emphasis added].

[16] In this regard, counsel submitted that the term ‘*declaration*’ as used in these regulations was in tandem with the wording used in Article 87 (2) of the Constitution, and in Section 77(1) of the Elections Act. Counsel relied on the decision by the Court of Appeal in ***John Njenga Mututho vs Jayne Kihara & 2 Others, Civil Appeal No. 102 of 2008*** to support his argument. He referred to the determination by the Court of Appeal regarding Rule 40(1) of the repealed National Assembly and Presidential Elections Regulations which in counsel’s opinion, mirrors Regulation 83 of the Elections (General) Regulations, 2012. In this case, the Court held that:

“The marginal note to regulation 40 reads, Announcement of results. A careful reading of that regulation clearly suggests that the result is not confined to just declaring who won. The detailed result is what is envisaged. The regulation deals with votes cast, votes spoilt, and those garnered by each candidate. So when rule 4(1) of The National Assembly Elections (Election Petition)

Rules, provides that the date of the election, the results and the grounds relied on must be stated it does not merely connote stating the name of the winner as Mr. Kihara suggested. It is clear from rule 4(1)(b), above that *the issue in any election petition is the result of the election*” [emphasis added].

[17] It was argued that the **Kenya Gazette No. 3155** did not show the election results but rather just the names of the persons elected as Governor and Deputy Governor. It was emphasized that what mattered was the election results, and not the naming of the winner in the election. In regard to the Gazette notice, counsel argued that the Commission published it in accordance with **Regulation 87 (4)(b)**, which requires the Chairperson of the Commission to publish the names of the persons elected in the **Kenya Gazette**; Regulation 87 thus provides:

“(1) The returning officer shall, as soon as practicable, forward to the county returning officer, in the case of—

(a) a presidential election, a certificate in Form 37 showing the total number of votes cast for each candidate;

(b) a member of National Assembly, county woman representative, Senate, county assembly, county governor or county assembly election, a certificate in Form 38 set out in the Schedule showing the total number of votes cast for each candidate.

“(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.

“(3) The county returning officer shall upon receipt of the results from the returning officers as contemplated under regulation (1)—

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

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

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

“(4) Upon receipt of a certificate under sub-regulation (1), the Chairperson of the Commission shall—

(a) in the case of a presidential election, hold the certificate until the results of that election in every

county have been received and thereafter publish a notice in the *Gazette* within seven days declaring the person who has received the greatest number of votes in the election, and has complied with the provisions of Article 138(4)(a) and (b) of the Constitution, to have been elected President:

Provided that the Chairperson of the Commission may declare a candidate elected as the President before all the counties have delivered their results if in the opinion of the commission the results that have not been received will not make a difference as to the winner on the basis of Article 138(4)(a) and (b) of the Constitution; and

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

“(5) Where no candidate is elected in a presidential election a fresh election shall be held within thirty days after the previous election in accordance with Article 138 of the Constitution and the Commission shall for that purpose, issue a notice in the Gazette to that effect.

“(6) Where a governor, parliamentary or county assembly election results in a tie, the Commission shall proceed to conduct fresh elections without notifying the

speaker within thirty days, in accordance with the Act and these Regulations.

“(7) The Commission shall certify to the clerk of each respective House of Parliament the candidates who have been elected in the parliamentary election.

“(8) The Commission shall, after delivery of a written notification of the results of the presidential election to the Chief Justice and the incumbent President as required by Article 138(10)(b) of the Constitution, issue and deliver a certificate in Form 37 set out in the Schedule to the candidate who has been elected President.

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

“(10) The county returning officer shall on completion of the tallying of the results at the county level, electronically submit the tallied provisional results to the Commission” *[emphasis added]*.

[18] In conclusion, counsel urged the Court to harmonise the Elections Act with the Constitution.

(c) The 2nd & 3rd respondents’ case

[19] The 2nd and 3rd respondents were represented by Mr. Khagram and Mr. Nyamodi who both addressed the Court on separate issues. Learned counsel Mr.

Nyamodi commenced the 2nd and 3rd respondents' case on the issue of jurisdiction. In arguing that this Court had been properly moved to exercise its appellate jurisdiction, counsel urged that the High Court did not lose its status as the High Court when it sat to consider election petitions. Rather, Article 165(3) of the Constitution entitles the High Court to determine any constitutional issue arising before it in an election petition. In this regard, counsel urged that the High Court, had considered and determined *the constitutional questions arising* in the election petition before it. He submitted that the decision of the High Court on the constitutional question had been the subject of an appeal before the Court of Appeal and subsequently, this Court. Counsel concluded that the Court had been properly moved to consider the appeal.

[20] Mr. Khagram on the other hand addressed the Court on the issue of constitutionality of *Section 76 (1) (a) of the Elections Act*. Counsel urged that the signification of the word '*declaration*' was of cardinal importance, in the determination of the appeal.

[21] Counsel invited the Court to consider the roles of persons officiating, within an election process in determining what constitutes a *declaration of election results*. He submitted that Article 86(c) of the Constitution states that the results from the polling stations are openly and accurately collated and promptly *announced by the returning officer*.

Article 86 provides thus:

At every election, the Independent Electoral and Boundaries Commission shall ensure that—

(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at

- each polling station;*
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and*
- (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials” [emphasis added].*

[22] It was argued that the Constitution and the election laws recognise the central role of the returning officers in the electoral process. According to counsel, the Commission is an entity with various officers and these officers act on behalf of the Commission. In this regard, one of the key roles of the returning officers was the completion of **Form 36** titled ‘*declaration of election results.*’

[23] Finally, counsel urged the Court to consider the import of ‘*casting of votes*’ as used in the definition of election results under Section 2 of the Elections Act, in determining the appeal.

(d) Submissions on behalf of the 1st respondent

[24] Learned counsel for the 1st respondent, Mr. Gikandi, submitted that the Court lacked jurisdiction to entertain the appeal. It was counsel’s submission that the appellants had not sought leave in the Court of Appeal to file this appeal. He contested the submission by the appellants that the primary issue for consideration by the High Court concerned the interpretation and application of the Constitution, and therefore warranting the appellants lodging the appeal in accordance with Article 163(4)(a) of the Constitution.

[25] Counsel argued that the petition in question concerned the issue of *validity of the election of the Governor for Mombasa County*. He urged that the issues

before the Court arose in the course of the determination of that petition, and thus were not the *primary issues* for consideration by the Superior Court.

[26] On the issue of “*declaration*”, counsel submitted that Article 86 of the Constitution only provided for the *counting, tabulation and announcement* of the election results, and did not contain any provision on *declaration* of the election results. In developing this argument, counsel referred to Article 87(1) of the Constitution, and argued that it donated legislative power to Parliament to enact legislation to establish a mechanism for the timely settling of electoral disputes: hence the enactment of the Elections Act.

[27] In relation to this parliamentary mandate, counsel argued that Section 39 (1) of the Elections Act had to be the starting point in evaluating the Commission’s duty in the determination and declaration of election results. Section 39 provides that:

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

(2) Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.

(3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed” [emphasis added].

Counsel urged the Court to take judicial notice of the fact that not every Kenyan had access to the tallying centre and the only avenue available to know the winner of the election with certainty was by way of *published results*. Counsel argued that the form of this publication was the *Kenya Gazette* No. 3155, titled,

‘declaration of persons elected as Governors and Deputy Governors.’ Counsel was emphatic that the cause of action, therefore, ought to have arisen only from this Gazette notice.

[28] Learned counsel concluded by urging that although Section 77 of the Elections Act was a *later* section, it could not be used to undo the *effects of Section 76*. He argued that the Court of Appeal was right in *applying Articles 10 and 259 of the Constitution to harmonise the provisions of the Elections Act with the Constitution*. In applying the principle of harmonization, counsel submitted, the Court of Appeal also applied *principles that would enhance accountability and transparency as codified under Article 86 (a) of the Constitution*. Counsel submitted that the Gazette notice was a key document for purposes of *public information and transparency* with regard to the elections results.

C. ANALYSIS

[29] The preliminary issue for determination is whether this Court has jurisdiction to entertain this appeal.

[30] The chamber summons in the High Court, dated 29th April, 2013, by the appellants, specifically sought an *interpretation of Section 76(1)(a) of the Elections Act, in line with Article 87(2) of the Constitution*. The appellants sought orders that the provisions of Section 76(1)(a) of the Elections Act were inconsistent with Article 87(2) of the Constitution, and hence Section 76 (1)(a) was void, to the extent of the inconsistency. This application was first heard and determined by the High Court, because *its outcome would have had a major bearing on the status of the pending petition*. The application was in the nature of a *preliminary objection*, as it raised a *pure point of law which if successful, would have disposed of the petition*.

[31] To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696*:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

[32] In essence this was an application in the nature of a preliminary objection, seeking to strike out the petition, on the ground that *the petition had been filed outside the bounds of the time allowed by the law* and specifically, *the Constitution*. The application was heard and determined on its merits and an appeal against the decision of the trial judge filed in the Court of Appeal.

[33] The main contention of the petitioner (the 1st respondent herein) in the High Court was that the gubernatorial elections for Mombasa County fell short of meeting *the threshold of free and fair elections as laid down by the Constitution*. The Court was asked to set aside the results of the gubernatorial elections as announced by the IEBC on 7th March, 2013 and the subsequent declaration and gazettelement of those results on 13th March, 2013. However, at paragraph 14 of their joint response to the petition, the 1st and 2nd respondents (the 2nd and 3rd respondents herein) raised the issue of *time* in the following terms:

“In the premises, the respondents aver that by virtue of the provisions of *Article 87(2) of the Constitution of Kenya 2010*, this petition is *time barred* and consequently *invalid* and this Honourable Court has *no jurisdiction* to hear and/or determine the dispute questioning the validity of the aforesaid election which is the subject of this petition. The right to question the validity of the aforesaid election bestowed by Article 87 (2) aforestated was *extinguished upon the expiry of 28 days from the date of the declaration of the results on 6th March 2013*, i.e on 3rd April 2013. In this respect, the Respondents shall crave leave to refer to the various forms 35 and 36 filed in Court”
[emphasis added].

[34] Further, the 3rd and 4th respondents [the 1st and 2nd appellants herein], in their joint response to the petition, indicated that they would challenge the validity of the petition at the earliest opportunity, because the same had been filed outside the constitutionally - mandated timelines. The respondents asserted that the *declaration of the election results* had been done on 7th March 2013. According to the respondents, the *computation of time* to file the petition should have commenced on this date.

[35] The main prayer of the interlocutory application was for the Court to declare that it lacked jurisdiction to entertain the petition and as such, strike it out. Issues primarily raised in the petition bearing on the fairness of the elections were not canvassed at the hearing of that interlocutory application.

[36] Besides, the issue of the constitutionality of Section 76 (1)(a) of the Elections Act was not canvassed during the substantive hearing of the main petition; and the Judge did not delve into it, as evidenced in his *judgement dated*

27th September, 2013 legitimizing the election of Ali Hassan Joho as the Governor-elect, by declaring the Mombasa County gubernatorial elections free and fair. The main decision is, therefore, not pending before the Court of Appeal.

[37] In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, is *whether the appeal raises a question of constitutional interpretation or application*, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under Article 163(4)(a) of the Constitution. Indeed, ordinarily, in our view, a question regarding the interpretation or application of the Constitution may arise from a multiplicity of factors and interrelationships in the various facets of the law. Consequently, the Constitution should be interpreted broadly and liberally, so as to capture the principles and values embodied in it.

[38] The Supreme Court has clarified its position with regard to appeals filed in accordance with Article 163(4)(a) . This Court has previously held that a party is not at liberty to move the Court to hear and determine a particular appeal by way of a constrained typification as an issue of interpretation or application of the Constitution. The Court in ***Peter Oduor Ngoge v Hon. Francis Ole Kaparo*** ***Petition No. 2 of 2012*** declined to hear an appeal and stated:

“In the petitioner’s whole argument, we think, he has not rationalised the transmutation of the issue from an ordinary subject of leave-to-appeal, to a meritorious theme involving the interpretation or application of the Constitution - such that it becomes a matter falling within the appellate jurisdiction of the Supreme Court.”

Further, the Court in the ***Ngoge case*** stated that:

“the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment will deserve further input of the Supreme Court” [emphasis added].

Subsequently, in ***Erad Suppliers & General Contractors Ltd. vs. National Cereals & Produce Board*** **Petition No. 5 of 2012** the Court held that:

“...a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a Superior Court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained.”

[39] On this basis alone this case is properly before this Court because *the High Court conclusively dealt with the issues arising in the interlocutory application and rendered a ruling which did not terminate the main petition.*

[40] The instant appeal involves a cardinal issue of law. The issue for determination in the High Court and the Court of Appeal was one of *interpretation of the Constitution and an Act of Parliament*: particularly on the issue as to when the time-limit envisaged under Article 87 (2) of the Constitution is set in motion, and whether section 76 (1) (a) of the Elections Act is *ultra vires* the Constitution. This remains the issue before this Court.

[41] As regards, the jurisdiction of the High Court, Article 165 of the Constitution empowers it to hear and determine *any question respecting the interpretation of the Constitution*. Article 165(3) states as follows:

“Subject to clause (5), the High Court shall have—

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution” [Emphasis added].

[42] It is clear, as we have established, that the issue for determination in the application before the High Court was the *constitutionality of Section 76(1)(a) of the Elections Act*; and the appellants invited the High Court to exercise its jurisdiction as conferred by Article 165(3)(d)(i), to *interpret the Constitution and determine the validity of the provision of the Elections Act*. The High Court exercised this jurisdiction and rendered a decision which was then appealed to the Court of Appeal and ultimately, to this Court.

[43] As evidenced by the judgement of the Court of Appeal, the main grounds of appeal were that, *the High Court erred in law in finding that Section 76(1)(a) of the Elections Act was **prima facie** lawful at the time of filing the petition, and further, in finding that an unconstitutional provision in an Act of Parliament (section 76 (1) (a) of the Act) was lawful in its enactment until declared unlawful*.

It is to be noted that, the 1st respondent in this matter, on the other hand, filed a *cross-appeal averring that the High Court erred in law in finding that section 76(1)(a) of the Elections Act contravenes Article 87(2) of the Constitution and finding that Gazette Notice No. 3155 did not constitute a declaration of results*.

[44] As elaborated by Githinji, J.A, ***“the important and threshold question raised in the appeal was whether the 28 days limitation period for filing an election petition starts running after the declaration of election results by the IEBC as provided by Article 87(2) of the Constitution or after the publication of the election results in the Kenya Gazette as provided by Section 76(1)(a) of the Elections Act. This is a pure question of the construction of Article 87(2), section 76(1)(a) and all other relevant laws”*** [page 11] .

[45] Drawing from the exercise of the High Court’s jurisdiction in hearing and determining the application whose ultimate appeal is now before this Court, it follows that this appeal is one *seeking the interpretation of Article 87 (2) of the Constitution and its application to the computation of time as elaborated under Section 76 (1) (a) of the Elections Act*. The matter falls to this Court’s jurisdiction, as granted by *Article 163(4)(a) of the Constitution*.

[46] During the hearing of this appeal, the 1st respondent argued that this Court was devoid of jurisdiction to entertain the appeal because the decision appealed against was the outcome of an *interlocutory application*. The case of ***Benjamin Ogunyo Andama vs. Benjamin Andola Andali & 2 Others, Civil Application No. 24 of 2013 (UR 11/13)***, where the Court of Appeal declined jurisdiction to hear an interlocutory matter, was cited to persuade us that we too did not have jurisdiction. In that authority, the Court of Appeal considered the effect that granting orders of stay as sought, would have on the *pending petition before the High Court*. It must be noted that *the orders sought in the interlocutory applications before the High Court were pegged on the life of the petition*. The applicant in that matter was seeking leave to file additional affidavits to a supplementary petition as well as the grant of witness summons. *These applications were declined* and the main petition thereafter heard and determined. The Court of Appeal considered the *timelines set by the Constitution*, for hearing and determining elections petitions, in arriving at its

decision. The Court, however, went further and considered the import of **Section 80 (3) of the Elections Act** which states that:

“Interlocutory matters in connection with a petition challenging the results of a presidential, parliamentary or county elections shall be heard and determined by the Election Court.”

[47] The Court of Appeal interpreted this section to mean that the Court of Appeal is not an “*Election Court*”, and therefore, is not empowered to hear interlocutory matters in connection with petitions challenging results of Parliamentary or County elections.

[48] While the principle of *timely disposal of election petitions* affirmed by the Court of Appeal, must be steadfastly protected by any Court hearing election disputes, or applications arising from those disputes, the interests of justice and rule of law must be constantly held paramount. As held by this Court in ***The Matter of the Principle of Gender Representation In the National Assembly and the Senate, SC Advisory Opinion No. 2 of 2012***:

“A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions. Where a Constitution takes

such a fused form in terms, we believe a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other.”

[49] In the present case, the issues arising out of the interlocutory application determined by the High Court, the Court of Appeal and now before this Court are *issues of law* that touch directly on the *interpretation of the Constitution* and the statute governing the electoral process. As the apex Court, we must always be ready to settle legal uncertainties whenever they are presented before us. But in so doing, we must *protect the Constitution as a whole*. Election Courts and the Court of Appeal, have a discretion in ascertaining the justice of each case to balance justice, but that discretion must be concretised in enforcing the Constitution.

[50] As emphasized by a bench of this Court in the case of the ***Board of Governors, Moi High School, Kabarak & 2 Others vs. Hon. Daniel Toroitich Arap Moi, Application No. 1 of 2013***:

“...where the Supreme Court has appellate jurisdiction derived from the Constitution and the law, it is equally empowered not only to exercise its inherent jurisdiction but also make any essential or ancillary orders such as will enable it to sustain its constitutional mandate as the ultimate judicial forum.”

[51] In conclusion, the issue before the Court calls for a pragmatic approach in its adjudication, for the reason that Kenya as a nation has largely been shaped by

the *occurrences within the electoral system*. There is a reason for this. Kenya today has undergone significant transformations along the paths of democracy and constitutionalism; and, necessarily, the majoritarian expression through *electoral practice* has had a major role, of which this Court takes cognizance. Thus the Constitution of Kenya, 2010 set out to streamline that *electoral system*. Part of that streamlining was the clear provisions on the *settlement of electoral disputes*, the *timelines* involved and various principles running across the entire span of the Constitution. In defending the Constitution and the aspirations of the Kenyan people, this Court must always be forward-looking, bearing in mind the consequences of legal uncertainty upon the enforcement of any provision of the Constitution. This aspect of defending the Constitution is replicated under Article 163 (4) (a), which allows appeals from the Court of Appeal to the Supreme Court *as of right, in any case involving the interpretation or application of the Constitution*. Such is the approach that this Court in hearing this appeal must seek to apply.

[52] Applying a principled reading of the Constitution, this Court responds to the demands of justice by adjudicating upon issues that tend to bring the interpretation or application of the Constitution into question. However, it is to be affirmed that any appeal admissible within the terms of Article 163 (4) (a) is one founded upon cogent issues of constitutional controversy. The determination that a particular matter bears an issue or issues of constitutional controversy properly falls to the discretion of this Court, in furtherance of the objects laid out under Section 3 of the Supreme Court Act, 2011 (Act No. 7 of 2011).

[53] Article 259 of the Constitution requires the interpretation of the Constitution to be in a manner that advances the rule of law, permits the development of the law, and contributes to good governance. As noted in the preceding paragraph, the decision of this Court should serve the objectives laid out in Section 3 of the Supreme Court Act as follows:

“The object of this Act is to make further provision with respect to the operation of the Supreme Court as a Court of final judicial authority to, among other things -

- (a) assert the supremacy of the constitution and the sovereignty of the people of Kenya;**
- (b) *provide authoritative and impartial interpretation of the Constitution;***
- (c) *develop rich jurisprudence that respects Kenya’s history and traditions and facilitates its social, economic and political growth;***
- (d) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to circumstances, history and cultures of the people of Kenya;**
- (e) improve access to justice; and**
- (f) provide for the administration of the Supreme Court and related matters.”**

It is, therefore, our considered opinion that this Court *has jurisdiction* to hear and determine this appeal. While we appreciate that the appeal in respect of the main petition is pending before the Court of Appeal, we must also fulfil the constitutional mandate bestowed upon this Court. We are also guided by the principle affirmed under Article 159 (1) (2) (b) of the Constitution, that justice shall not be delayed. Therefore, this Court must set out to determine in a timely manner any controversy properly lodged before it by a party. The essence of an appeal was clearly elaborated by a Bench of this Court in ***Board of Governors, Moi High School, Kabarak & Another vs. Malcolm Bell , Application No. 1 of 2013*** as follows:

“The term “appeal” is thus defined in *Black’s Law Dictionary*, 8th ed. (2004) [at p.105]:

A proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court’s or agency’s decision to a higher court for review and possible reversal.....Review and possible reversal are the constant objects in view, as a Court entertains an appeal from a lower Court.”

Therefore, the issues of controversy burdening a party, and from whose determination by a lower Court a party seeks a possible review or reversal, must be determined efficaciously, *without hindrance from other matters pending before such lower Courts*. The Court is empowered to *weigh the effects of its decision and to apply its inherent power to determine whether to address the contents of the appeal at the time it is filed by a party*. The principle of justice, however, must prevail at all times. In the instant case, the immediacy of determining *the question of constitutionality* overrides any desired options that will await the determination of the appeal on the main petition, by the Court of Appeal.

[54] Having declared that this Court has the jurisdiction to entertain the appeal, we must embark upon the primary issue before us: *whether Section 76 (1)(a) of the Elections Act is ultra-vires Article 87 (2) of the Constitution?*

[55] Article 87 (2) of the Constitution provides:

“Petitions concerning an election, other than a presidential election, shall be filed within 28 days after the *declaration of the election results* by the Independent Electoral and Boundaries Commission.”

On the other hand, Section 76 (1) (a) of the Elections Act provides:

“A petition -

(a) To question the validity of an election shall be filed within *twenty eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of presentation*” [emphasis added].

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

[57] The provisions regarding the counting of votes and the declaration of results are laid out in **Part XIII of the Regulations**. According to **Regulation 73**, the process of **counting of votes begins when the presiding officer declares the polling station officially closed**. He or she then proceeds to seal the ballot boxes and, immediately thereafter, enters into the polling station diary a written statement of: the number of ballot papers issued to him or her under regulation 61; the number of ballot papers, other than spoilt ballot papers, issued to voters; the number of spoilt ballot papers; and the number of ballot papers remaining unused.

[58] The presiding officer is mandated to commence the counting of votes for that polling station immediately after declaring the polling station officially closed. During the counting process, which is regulated by **Regulations 74, 75 and 76**, the presiding officer is required to fill the first document, **Form 33**, which is the **vote tallying form** used for recording the count of votes. After the tallying exercise, including the consideration of rejected ballot papers, the presiding officer, and the candidates or agents of candidates are required (by **Regulation 79**) *to sign the declaration* in respect of the elections.

Regulation 79 provides:

79(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) presidential election results shall be in *Form 34* set out in the Schedule;

(b) National Assembly, county women representatives, Senators, county governor and county assembly elections shall be in *Form 35* set out in the Schedule” [*emphasis added*].

[59] At this first stage which takes place *at the polling station*, the *declaration* for the National Assembly, county women representatives, Senator, county governor and county assembly elections is presented in **Form 35**. Regulation 79(2)(c) & (d) goes further to mandate the presiding officer “to provide each political party, candidate or their agent with a copy of the *declaration of results*,” and also “**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.**”

[60] Once Form 35 has been duly completed and signed, the presiding officer is required to *submit the election results electronically to the returning officer*, before ferrying the actual results to the constituency tallying centre. According to **Regulation 82**, electronically-transmitted results are *provisional*. The returning officer at the Constituency tallying centre is also mandated by Regulation 83 (1) (c) to complete Form 35.

[61] Regulation 83 provides as follows:

“(1) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present-

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

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

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

(i) name of the respective electoral area;

(ii) total number of registered voters;

(iii) votes cast for each candidate or referendum side in each polling station;

(iv) number of rejected votes for each polling station;

(v)aggregate number of votes cast in the respective electoral area; and

(vi) aggregate number of rejected votes; and

(d) Sign and date the form and -

(i) give to the candidate, or agent present a copy of the form; and

(ii) deliver to the Commission the original of Form 34 and 35 together with Form 36 and Form 37 as the case may be.

“(2)

“(3) The decisions of the returning officer on the validity or otherwise of a ballot paper or a vote under this regulation *shall be final except in an election petition*” [emphasis added].

[62] Consequently, once the returning officer receives a declaration of the Governors’ results in Form 35 from the presiding officer, he or she then proceeds to tally the results from the different polling stations in respect of each candidate, and publicly announces the total number of valid votes cast for each candidate. Thereafter, he or she completes Form 35 through which he or she *declares* the following: *name of the respective electoral area, total number of registered voters, votes cast for each candidate in each polling station, number of rejected votes for each candidate and the aggregate number of rejected votes.*

[63] The final step is the ‘**Returns of persons elected**’ elaborated under **Regulation 87**. In particular, Regulation 87(3) provides:

“The county returning officer shall upon receipt of the results from the returning officers as contemplated under regulation (1) -

(a) Tally and announce the results for the presidential elections, elections for the county

- governor, senator, and county woman representative to the National assembly; and
- (b) **Submit all the results received from the returning officers, together with the results tallied under this regulation to the Commission; and**
 - (c) ***Issue the persons elected pursuant to the results announced under paragraph (a) with certificates indicating their elections in Form 38 set out in the Schedule***” [emphasis added].

[64] 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*.

[65] The jurisdiction to handle disputes relating to the electoral process shifts from the Commission to the Judiciary *upon the execution of the required mandate by the returning officer*. Once the returning officer makes a decision regarding the validity of a ballot or a vote, this decision becomes final, and only challengeable in an *election petition*. 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*.

[66] After these results have been delivered to the Commission, the *Commission is mandated to publish a notice in the Gazette*, which may form part of a composite notice, showing the names of the person or persons elected **[Regulation 87 (4)(b)]**. With respect to the 2013 gubernatorial elections, the Commission fulfilled this mandate through **Gazette Notice No. 3155, Vol CXV-No. 45 dated 13th March, 2013**. This **Gazette Notice** *did not contain the election results of the elections held on 4th March, 2013 but was published by the Commission in compliance with Regulation 87 (4)(b)*. In our considered view the **Gazette Notice** and/or publication of election results, is simply the *affirmation of the election results declared by the returning officer*.

[67] Against this background, several issues arise, as follows:

- (i) *What is the meaning of ‘declaration of election results’?*
- (ii) *Who declares the election results?*
- (iii) *Which instrument, if any, is used to declare election results?*
- (iv) *What is the import of the Gazette notice, and what is the role of the Chairperson of the Commission in declaring election results?*

[68] Since the Constitution and the Elections Act do not define what amounts to a declaration of election results, the meaning of the term ‘*declaration*’ in our opinion can only be inferred *from the various contexts in which it has been used in the Constitution, the Elections Act and the Regulations to the Elections Act*.

[69] To begin with, **Article 138** of the Constitution provides that:

“(1) If only one candidate for President is nominated, that candidate shall be *declared* elected.

“(2) If two or more candidates for President are nominated, an election shall be held in each constituency.

“(3)

“(4) A candidate shall be declared elected as President if the candidate receives -

(a) more than half of all the votes cast in the election, and;

(b) at least twenty-five percent of the votes cast in each of more than half of the counties.

.....

“(10) Within seven days after the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall -

(a) *declare the result of the election*; and

(b) deliver a written notification of the result to the Chief Justice and the incumbent President.”

[70] This provision informs the requirement under **Regulation 83 (2)** which *mandates the Commission to confirm the results of the Presidential election after a tally of the votes cast in the election*. It also informs the provisions of Regulation 87(4)(a). The term ‘*declaring*’ is used in Regulation 87(4)(a) *maintaining the language of the Constitution*, and the “time perspective”. More importantly, Regulation 87(4)(b) which pertains to *other elections* uses the word ‘*showing*’ rather than the word ‘*declaring*’.

Regulation 87(4) provides:

“Upon receipt of a certificate under sub-regulation (1), the Chairperson of the Commission shall –

(a) in the case of a presidential election, hold the certificate until the results of that election in every county have been received and thereafter publish a notice in the Gazette within seven days declaring the person who has received the greatest number of votes in the election, and has complied with the provisions of Article 138(4)(a) and (b) of the Constitution, to have been elected President:...

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

[71] **Article 180(4)** of the Constitution provides that:

“If two or more candidates are nominated, an election shall be held in the county and the candidate who receives the greatest number of votes shall be declared elected.”

The word “*declared*” in the above Article, has been used to depict the *finality* culminating in the *declaration of the winner* of an election.

[72] “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.

[73] In *James Omingo Magara vs. Manson Onyongo Nyamweya & 2 others, Civil Appeal No. 8 of 2010*, the Court of Appeal (Omolo J.A as he then was), in a case that gives historical perspective, described Form 16A of the time, thus:

“What then are Forms 16A? They are forms which are to be filled in after the votes at a polling station have been counted by a presiding officer at that station. They (Forms 16A) are provided for in Regulation 35A (4) of the National Assembly and Presidential Elections Regulations. That regulation provides: -

‘35A (4) The presiding officer, the candidates or their agents shall then sign the declaration set out in Form 16A which shall state –

- (a) the name of the polling station;*
- (b) the total number of registered electors for the polling station;*
- (c) the total number of valid votes cast;*
- (d) the number of votes that were rejected; and*
- (e) the number of disputed votes;*

Sub-rule (5) then provides –
The presiding officer shall –

- (a) *immediately announce the results of the voting at the polling station before communicating them to the returning officer;*
- (b) *request each of the candidates and in the absence of a candidate, such of his agents then present to append his signature or write down reasons for the refusal to sign the declaration of the results of the count of the votes at that polling station;*
- (c) *provide each candidate or agent with a copy of the declaration 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.'*

“There can be no doubt from these provisions that Form 16A is an important document in the electoral process. It deals with a particular polling station, the number of registered voters in that station, the number of the candidates, the votes which each one of them has secured in that station, and, for obvious reasons, is to be signed by the presiding officer at that particular station and by the candidates or their agents. If a candidate or his agent refuses to sign, the reason for the refusal should be given and recorded. It is from Forms 16A from all the polling stations in a constituency that the returning officer who is in charge of the whole constituency will carry out a tally of all the votes polled in the constituency and having tallied all the votes from each polling station, enter them on Form 17A and *declare the winner of the election in that constituency*” [emphasis added].

[74] The Constitution and the Elections Act provide a safeguard against the problems that often arose previously, as witnessed by the voluminous petitions bearing on Forms 16A and 17A of the past. This shows that the process of declaration used to be done *at the polling station* (Form 16A) and by the returning officer at the *constituency level* (Form 17A). The returning officer was then mandated to publicly declare the candidate who had won the election. *The time taken to settle election petitions often dragged onto the next election-cycle*, thereby denying the persons disputing the elections justice. Hence the current Constitution introduced *strict time-limits* within which to lodge, hear and conclude election petitions. In the case of an election other than a Presidential election, the Constitution *mandated Parliament to enact legislation to establish mechanisms for timely settling of electoral disputes*. However, on the issue of lodging a petition other than a Presidential election-petition, the Constitution prescribed a timeline pegged on a certain event: *28 days after the declaration of results by the IEBC*.

[75] We take cognizance of the hesitancy of the Court of Appeal to determine appeals arising from *interlocutory applications* filed during the pendency of an election petition. The Court of Appeal, in ***Ferdinand Waititu vs. Independent Electoral and Boundaries Commission, (IEBC) & 8 Others, Civil Appeal No. 137 of 2013*** dealt with the question of timelines dictated by the Constitution and the Elections Act. In seeking to resolve the issue whether the applicant had a right to appeal to the Court of Appeal from the High Court ruling of 26th June, 2013, (an interlocutory decision), the Court held:

“In our determination of the first issue we wish to start by making reference to Article 87(1) of the Constitution of Kenya 2010 which states as follows:

‘Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.’

“That provision was informed by the persistent delays in finalization of election petitions by our Courts which was largely caused and/or contributed to by respondents in such petitions. To meet that constitutional requirement, parliament enacted the Elections Act....

“These timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any Court for whatever reason. It is indeed the tyranny of time, if we may call it so. That means a trial Court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously. It was therefore imperative that the Election Petition Rules be amended to bring about mechanisms of expediting trials.

“The Elections Act and the Rules made there under constitute a complete code that governs the filing, prosecution and determination of election petitions in Kenya. *That being the case, any statutory provision or rule of procedure that contradicts or detracts from the expressed spirit of Article 87 (1), and 105 (2) and (3) of the Constitution is null and void. The Constitution is the Supreme law of the land and all statutes, Rules and Regulations must conform to the dictates of the Constitution*” [Emphasis added].

[76] Judicial expediency in resolving election controversies was a paramount consideration by Parliament in enacting the Elections Act. In an attempt to ensure that parties had a clear and unambiguous avenue to challenge the results of an election, Parliament provided certain Forms and processes that would

encapsulate the delivery of the results, for the parties concerned, and for the public.

[77] Bearing in mind the nature of election petitions, the declared election results, enumerated in the Forms provided, are *quantitative*, and involve a *numerical composition*. It would be safe to assume, therefore, that where a candidate was challenging the declared results of an election, a quantitative breakdown *would be a key component* in the cause. It must also be ascertainable *who the winner, and the loser (s) in an election, are. The certificate in Form 38 declares the winner of the election and terminates the mandate of the returning officer*, who acts on behalf of the Commission, shifting the jurisdiction in respect of the electoral process to challenge the results of the election to the election Court. We hold that *the certificate in Form 38 comprises the declaration of election results. This declaration sets in motion the time-frame within which to lodge an election petition, and it is hereby so held*. Consequently, the provision of Section 76 (1) (a) of the Elections Act is inconsistent with the provisions of Article 87 (2) of the Constitution, as elaborated hereinbefore, and is hereby declared unconstitutional to that extent.

[78] For purposes of comparative analysis, we hereby outline the electoral process in India, as elucidated by two key electoral scholars in that jurisdiction.

[79] An election, according to **V.S Rama Devi and S.K Mendiratta (2007), *How India Votes: Election Laws, Practice and Procedure*, (Lexis Nexis, 2nd Edition, 886), “connotes the entire process to return a candidate, commencing with the issue of the notification calling the election and culminating in the declaration of the result. Once the election is declared, the electoral process comes to an end and the jurisdiction to go into the question of any irregularity**

in the conduct of the election passes over from the Election Commission under Art. 324 to the election Courts under Art. 329 (b).”

[80] The authors indicate that the declaration of the result of the election can come about in two ways; first where the election is uncontested, and therefore it is not necessary to take the poll; and, secondly, where there is a contest, and the poll is taken and votes counted for ascertaining the choice of the electorate. They state that in a contested election, where a poll becomes necessary, *the declaration of the result can be made only after the completion of the counting of votes in all respects.* Accordingly, in India, the result of an election can be *declared by the returning officer only on the completion of counting, including recounting where directed, in all respects, and after seeking prior permission of the Commission where so required, under any general or special direction of the Commission to that effect.* On the completion of counting, the returning officer is required to prepare, in the case of an election to the House of the People or a State Legislative Assembly, *the final result sheet in Form 20*; and, in the case of an election of the Council of States, or a state legislative council, *the return of election is in Form 23B.*

[81] Thus in India, the publication of the result of election is made by a returning officer in the appropriate forms 21, 21A, 21B, 21C, 21D, 23 or 23A, which are required to be published in the official Gazette. This then translates to the publication of declaration. The Supreme Court of India, in ***Krishna Ballabh Prasad Singh vs. Sub-Divisional Officer, Hilsa-cum-Returning Officer and ORS (1985 AIR 1746, 1985 SCR Supl.(2) 532***), held that the process of election came to an end only after the declaration in Form 21C was made by the returning officer *and the consequential formalities were completed.*

[82] The two Indian scholars have identified the processes culminating in a declaration of results; first, where the election is contested, and secondly, where

it is uncontested. It is clear that the question of contested elections and uncontested elections is at the centre of a *declaration*. This separates a single election (for a single Member of Parliament, Governor, Senator, Women Representative or County Representative) from a conglomerate of the entire set of elections. *The declaration focuses on the results of a single election, and the number of valid votes cast determines the person to be declared elected.*

[83] We note the finding of the Court of Appeal, where Githinji, J.A in ***Joho & Another vs. Suleiman Shahbal & 2 others, Civil Appeal No. 12 of 2013*** (at page 18) held that the various *Gazette Notices* in the Special issue of the *Kenya Gazette* published on 13th March 2013 constituted a valid declaration of the election results. Justice Makhandia, concurring, held that the declaration of results for purposes of an election petition was by *gazettement* of the election results in the *Kenya Gazette*, and time started running *from the date of gazettement*. Lady Justice Sichale, also concurring, held that Parliament, in introducing the obligation of gazettement, did not offend the Constitution.

[84] With due respect to the Court of Appeal, the honourable judges did not evaluate and consider all the relevant provisions of the Constitution, the Elections Act and Regulations thereunder. The holding by the Court of Appeal that the returning officers *are only authorized to announce the election results*, and that the declaration the presiding officers are required to make relates only to the accuracy of the ballot and not to the winner of the election, with respect, is incorrect and incomplete. Further, the holding that the declaration in Form 35 and 36 is merely a return of or written record of the provisional election results, and not a declaration of election results, in our view, arises from an inadequate consideration of all the relevant provisions of the law, as well as the nature of the electoral process. This Court has considered all the provisions of the law aforesaid, in the earlier part of this judgment, and, without hesitancy has come to the conclusion *that the final declaration of election results is by the issuance of*

the certificate in Form 38 to the winner of the election. This certificate is issued by the returning officer.

[85] As rightly submitted by the appellants, the Court of Appeal interpreted Article 87(2) of the Constitution so as to place it in conformity with the provisions of Section 76(1)(a) of the Elections Act. This is tantamount to elevating a statutory provision above that of the Constitution, and is not tenable, in the light of the provisions of Article 2 of the Constitution. The provisions of the Constitution are superior to any legislation. As such, when interpreting the provisions of an Act of Parliament, the Court must always ensure that the same conform to the Constitution and not *vice versa*. In order to ensure that justice is not sacrificed at the altar of technicality, the Court is, however, enjoined to invoke its *inherent power* while interpreting the Constitution and legislation, to preserve the *values and principles of the Constitution*.

[86] We note that there are numerous decisions of the High Court on this single issue. A selection of these cases reveals the fact that there is no uniformity in the interpretation of the term ***declaration*** as used in the Constitution. In ***Waititu vs. IEBC and 8 Others, Election Petition No. 1 of 2013***, Justice Mumbi Ngugi, relying on the definition from ***Black's Law Dictionary (9th Edition)***, held that a declaration is “*a formal statement, a proclamation, or announcement especially one embodied in an instrument.*” She determined that *the term declaration must be considered in the context of, and from the provisions of the law governing elections*. In interpreting Article 87(2) together with Article 86(b) and (c) of the Constitution, Ngugi J. held that a returning officer is required to announce the election results, but the formal and official *declaration* of the election results must be done *by the IEBC (the Commission) and not any other party*. On the mode of declaration, the Judge held that it had to be *by formal publication of the results* in the **Kenya Gazette**, and not simply the announcement of the results at the polling station. This finding was also adopted by Mabeya, J. in ***Josiah Taraiya Kipelian Ole Kores v. Dr. David ole Nkediemye & Others, Petition no.6 of 2013***.

[87] And Justice Majanja in ***Caroline Mwelu Mwandiku v. Patrick Mweu Musimba & 2 Others, Election Petition No. 7 of 2013***, considering the terms of Article 87(2) of the Constitution, together with Section 39 of the Elections Act and Regulation 3(3) of the Election Regulations, concluded that Parliament must have intended that the twenty-eight day period for challenging election results begins to run as *from the time the results are published in the Gazette*, as opposed to the time of the announcement by the returning officer. He further held that the IEBC has the *duty to declare the results*, according to Article 87(2) of the Constitution and Section 76 of the Elections Act, by way of a Gazette notice.

[88] In ***Gideon Mwangangi Wambua v. IEBC & Others, Election Petition No. 4&9 of 2013(consolidated)***, Justice Odunga, stated that since Article 87(2) of the Constitution does not define what amounts to declaration of results, the Court had to resort to legislation enacted for the purpose of timely settlement of electoral disputes. He held that the insertion of the word ‘Gazette’ in Section 76(1)(a) of the Elections Act was meant to bring certainty to the computation of time for the purpose of filing an election petition.

[89] Further in the case of ***M’Njiria Petkar Shen Miriti v. Ragwa Samuel & 3 Others, Election petition No.4 of 2013***, Justice Lessit held that the word declaration as set out in Article 87(2) of the Constitution, meant the publication of the election results in the Gazette.

[90] In all these cases, none of the learned judges took into account the salient features of the electoral process culminating in the issuance of the certificate in Form 38, as elaborated hereinbefore. However, we note with appreciation that Justice Fred Ochieng, in ***Suleiman Said Shahbal v. The Independent Electoral and Boundaries Commission & 3 Others, Election Petition No. 8 of 2013***, rightly held as follows:

“If a declaration must be in a formal instrument, I find that the forms containing the results of the elections at every level constitute such formal instruments. When the forms 34, 35, 36, 37 or 38 have been duly signed by the authorized returning officer, [they become] instruments which cannot be challenged save through election petition.”

[91] We are in agreement with the learned Judge, in his interpretation of the collective and interlocking provisions of the law relating to the entire electoral process.

(ii) Who declares the election results?

[92] At the outset, we observe the provisions of Regulations 3 and 4 which stipulate as follows:

Regulation 3(3)

“The returning officer shall be responsible for -

- (c) the tallying of results from each polling station in the constituency;**
- (d) announcing results from the constituency...**
- (e) *the declaration of the results tallied under paragraph (c) above.*”**

Further, Regulation 4 in turn provides:

“(1) The Commission shall appoint county returning officers to be responsible for—

- (a) receiving nomination papers in respect of candidates nominated for the post of Governor or county woman representative to the National Assembly and the Senate;**
- (b) tallying results from constituencies in the county for purposes of the election of the President, county Governor, Senator and county women representative to the National Assembly;**
- (c) *the declaration and announcement of results tallied under paragraph (b); and***
- (d) such other functions as may be assigned by the Commission.”**

We discern from the above regulations that one of the *specific mandates* of the returning officers is to *declare* the election results. As we have depicted in the analysis, these officers *declare the election results at various stages in the election*. For the purposes of computation of time in respect to the filing of the election petition, we hold that the *final declaration* presents the *instrument of declaration* in accordance with Article 87 (2) of the Constitution.

[93] *The Commission* is further mandated by the Constitution (Article 86 (b) and (c) to ensure that the results from the polling stations are openly and accurately collated and *promptly announced by the presiding officer* at each polling station, and that the same is done *by the returning officer*. This signifies the urgency with which election results should be delivered. It also mandates the Commission to ensure the *integrity of these election results at the various stages of announcement*, by the various officers at those stages: hence the *signing of the declaration at various stages of the election*. The officers at these stages are

appointed by the Commission with specific mandates of, *inter alia*, declaring election results.

(iii) *Which instrument is used to declare election results?*

[94] Black's Law Dictionary, 9th Ed., p. 467 defines "**declaration**" as "**a formal statement, a proclamation, or announcement, especially one embodied in an instrument.**" It defines "**publication**" (p.1347) as "**generally, the act of declaring or announcing to the public.**" It then defines "**announce**" (p.106) as "**to make publicly known; to proclaim formally**" and defines *Gazette* as "**an official newspaper of the British Government in which acts of state, crown appointments, notices of bankruptcy and other legal matters are reported.**"

[95] Declaration, from a legal perspective, requires the use of an **instrument**. *Black's Law Dictionary* (p. 869) defines "an instrument" as "**a written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note or share certificate.**" From the above definitions, it is clear that *an instrument* bears legal force particularly because of its content, and its formal face of authority and validity. The process of election culminates in the issuance of a certificate which squarely falls within the said definition of the instrument.

(iv) *The import of the Gazette Notice and the role of the Chairperson of the Commission*

[96] Regulation 87(4) provides:

"Upon receipt of a certificate under sub-regulation (1), the Chairperson of the Commission shall -

(a) in the case of a presidential election, hold the certificate until the results of that election in every county have been

received and thereafter publish a notice in the Gazette within seven days declaring the person who has received the greatest number of votes in the election, and has complied with the provisions of Article 138(4)(a) and (b) of the Constitution, to have been elected President:...

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

[97] The wording of Regulation 87(4)(a) shows that the *Gazette* notice in case of a presidential election is specifically used to declare the winner of the presidential election. Indeed, this is in line with Article 138(10)(a) which states that *the Chairperson of the Commission shall within 7 days after the presidential election, declare the result of the election*. The regulation has, therefore, provided for the mode of declaration of those results without deviating from the time-frame provided in the Constitution. In addition, *the chairperson is mandated to declare only presidential results and not any other results*. County returning officers are on the other hand empowered to declare the election results of the *County Governors*.

[98] In terms of Regulation 87 (4) (b), the publication of the notice in the *Gazette* is meant to *publish the information to the public as to which persons are elected in elections other than the Presidential election*. Article 35 of the Constitution of Kenya 2010 upholds the right of access to information. Specifically, this Article provides as follows:

**“(1) Every citizen has the right of access to –
(a) information held by the State; and**

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

“(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

“(3) The State shall publish and publicize any important information affecting the nation.”

[99] We are of the view that gazetteement (Section 76 of the Elections Act) is one of the mechanisms through which the State publishes information to the public. The public nature of elections demands that the outcome of the polling is shared with the public. This is done in various ways, but most importantly, through a *Gazette Notice*, which forms part of Government records. Further, public information thus published, can be adduced as *evidence* in a Court of Law, pursuant to the provisions of the Evidence Act (Cap.80, Laws of Kenya). The purpose of the *Gazette Notice*, in view of the process detailed in this judgment, cannot be termed as the instrument of *declaration* of the election results.

D. CONCLUSION

[100] After considering the relevant provisions of the law, as well as the submissions made before us, and after taking due account of the persuasive authorities from a number of jurisdictions, we have come to the conclusion that the ultimate election outcome, for the gubernatorial office which is in question here, is the one declared *at the county level by the County Returning Officer* who issues the presumptive winner with a certificate in Form 38.

[101] Insofar as the Constitution (Article 87(2)) provides that:

“Petitions concerning an election other than a presidential election, shall be filed within twenty-

eight days after the declaration of the election results...,”

while the Elections Act, 2011 (Section 76 (1)) provides that:

“A petition –

(a) to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette...,”

and as it is clear that expedition in the disposal of electoral disputes is a fundamental principle under the Constitution, we hold the said provision of the Elections Act to be inconsistent with the terms of the Constitution.

By Article 2(4) of the Constitution,

“Any law...that is inconsistent with this Constitution is void to the extent of the inconsistency, any act or omission of the Constitution is invalid”.

[102] Finally we shall deal with the issue of validity of the order of costs granted by the Court of Appeal, canvassed in the joint cross-appeal filed by the 2nd and 3rd respondents. From the record before us, it cannot be disputed that the respondents have failed to comply with the jurisdictional requirements of Article 163 (4) (b) of the Constitution. On this account, we cannot entertain the same and thus reject the cross-appeal, to this extent.

ORDERS

[103] The Appeal is allowed, with the holding that Section 76(1)(a) of the Elections Act, 2011 is inconsistent with Article 87(2) of the Constitution of Kenya, 2010 and, to that extent, a nullity.

[104] The cross-appeal to the extent of the grounds raised in respect of costs awarded by the Court of Appeal, is dismissed.

[105] For this appeal, parties shall bear their own costs, respectively.

Orders Accordingly.

DATED and DELIVERED at NAIROBI this 4th day of February, 2014

.....
KALPANA RAWAL
DEPUTY CHIEF JUSTICE/
PRESIDENT OF THE SUPREME COURT

.....
P. K. TUNOI
JUDGE OF THE SUPREME COURT

.....
MOHAMMED K. IBRAHIM
JUDGE OF THE SUPREME COURT

.....
J.B. OJWANG
JUDGE OF THE SUPREME COURT

.....
N. NDUNGU
JUDGE OF THE SUPREME COURT

**I certify that this is a true
copy of the original**

REGISTRAR, SUPREME COURT