REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Rawal, DCJ & V-P; Tunoi, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ)

PETITION NO. 21 OF 2014

-BETWEEN-

SULEIMAN SAID SHAHBAL.....APPELLANT

-AND-

1.THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....
2.MWADIME MWASHIGADI..... RESPONDENTS
3.HASSAN JOHO.....
4.HAZEL EZABEL NYAMOKI OGUNDE.....

(*Being an Appeal from the Judgment and Order of the Court of Appeal (Maraga, M'Inoti & Murgor JJ.A) sitting in Nairobi on 23rd April, 2014 – striking out Malindi Civil Appeal No. 42 of 2013)*

JUDGMENT

A. INTRODUCTION

[1] This is an appeal against the Judgment of the Court of Appeal, dated 23rd April, 2014, declaring the appeal incompetent and consequently, striking it out.

B. BACKGROUND

[2] The appeal arose from an election dispute in the Mombasa gubernatorial election held in March, 2013. The outcome of this election touched off a prolonged course of litigation. The dispute began in the aftermath of the elections. On 10th April, 2013, the appellant challenged the declaration of the 3rd and 4th respondents as the duly-elected Governor and Deputy Governor for Mombasa County, at the Mombasa High Court, in ***Suleiman Said Shahbal v. Independent Electoral and Boundaries Commission (IEBC) and Three Others,*** Election Petition No. 8 of 2013.

[3] On 30th April, 2013, the 3rd and 4th respondents filed an application under Rule 17(1)(d) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 seeking a declaration of invalidity of the provisions of Section 76(1)(a) of the Elections Act (Cap 7, the Laws of Kenya), on grounds of inconsistency with the provisions of Article 87(2)of the Constitution, and the subsequent striking out of the petition, for being filed out of time. In a Ruling dated 23rd May, 2013, the High Court (*Ochieng J)* held that Section 76(1)(a) of the Elections Act, which imported a requirement of gazettement of election results, as a basis for the filing of electoral disputes, was not in keeping with the terms of Article 87(2) of the Constitution. Despite this finding, the trial Judge did not strike out the election petition as being invalid, on grounds that the petitioner had relied on a *prima facie* lawful statute at the time of filing the petition. The Judge was of the view that in the circumstances prevailing, the striking out of the petition would have hindered the Court of Appeal's consideration and possible reversal of the said Ruling.

[4] Dissatisfied with the findings of the trial Judge, the 3rd and 4th respondents lodged an appeal at the Court of Appeal in Malindi, *Civil Appeal No. 12 of 2013*. The appellant, likewise, filed a cross-appeal, challenging the trial Court's decision that Section 76(1)(a) of the Elections Act was unconstitutional. On 25th July, 2013,

the Court of Appeal (*Githinji, Makhandia and Sichale, JJ.A*) dismissed the appeal, allowed the cross-appeal, and set aside the trial Court's decision.

[5] Aggrieved by the decision of the Court of Appeal, the 3rd and 4th respondents filed an appeal to the Supreme Court: ***Hassan Ali Joho and Another v. Suleiman Said Shahbal and Two Others*** Sup Ct. Petition No. 10 of 2013 – pursuant to Article 163(4)(a) of the Constitution. While the appeal was pending hearing before this Court, the High Court (*Ochieng J)* delivered a Judgment dated 27th September, 2013 dismissing the election petition and upholding the election of the 3rd and 4th respondents as the Governor and Deputy Governor of Mombasa County.

[6] Following the Judgment of the High Court (*Ochieng J)*, the appellant filed an appeal at the Court of Appeal in Malindi (*Civil Appeal No. 42 of 2013),* challenging the outcome, and the consequential Orders of the High Court. As a measure to preserve the substratum of the appeal pending before this Court, an order staying the hearing of *Civil Appeal No. 42 of 2013* was issued on 20th November, 2013. After hearing submissions by the parties regarding the constitutionality of Section 76(1)(a) of the Elections Act, this Court, in a Judgment dated 4th February, 2014 held that Section 76 (1)(a) of the Elections Act was inconsistent with Article 87(2) of the Constitution and, to that extent, void *ab initio*.

[7] Soon after this Court's decision in the ***Joho*** case the appellant went back to the Court of Appeal, and set down the appeal (*Civil Appeal 42 of 2013*) for hearing on the merits. At the hearing, the appellant's main contention was that this Court had merely declared Section 76(1)(a) of the Elections Act unconstitutional, without striking out the pending election appeal, and that in the circumstances, the appeal remained live, and valid for hearing and determination.

[8] The Court of Appeal rejected the appellant's claim of validity of the appeal, and held that the declaration of nullity by this Court, of the provision upon which the petition was anchored, had effectively disposed of the appeal. The Court of Appeal held that in a system where the Constitution was the supreme law, it was incorrect to hold that a statutory provision which was contrary to the Constitution was a mere irregularity, rather than nullity. Based on this analysis, the Appellate Court held that the appeal was incompetent, and dismissed it with costs in favour of the respondents.

[9] Aggrieved by the Appellate Court's finding, the appellant appealed to this Court on 3rd June, 2014. The said appeal raised the following issues for determination:

(a) *whether the Court of Appeal was right to "re-write the Judgment of the Supreme Court" in the **Joho** case (Petition No. 10 of 2013);*

(b) *whether the Court of Appeal had the jurisdiction to "re-write the said Judgment";*

(c) *whether the Court of Appeal had the jurisdiction to nullify Section 76(1)(a) of the Elections Act;*

(d) *whether the ends of justice were best served by sustaining or terminating Mombasa Election Petition No. 8 of 2013 (and therefore Malindi Civil Appeal No. 42 of 2013);*

(e) *whether the Court of Appeal exercised its judicial authority in accordance with the Constitution and other laws;*

(f) *what is the status of Malindi Civil Appeal No. 42 of 2013, and should it proceed for hearing and determination on its merits?; and*

(g) whether the Court of Appeal erred in its determination of the issue of costs, in respect of Mombasa Election Petition No. 8 of 2013 and Malindi Civil Appeal No. 42 of 2013.

[10] On 23rd June, 2014, the 3rd respondent filed a preliminary objection dated 21st June, 2014 challenging the legality of the appeal, and seeking an Order that it be struck out. The basis of the objection was that the appellant did not have the right to institute an appeal bearing on costs, as a matter of right pursuant to Article 163(4)(a) of the Constitution. In addition, the 3rd respondent objected to the appellant's argument that the Court of Appeal, and by extension the High Court, ought to have deemed the time for filing the petition to have been extended by dint of the Interpretation and General Provisions Act (Cap. 2, Laws of Kenya). Finally, the 3rd respondent objected to the jurisdiction of this Court to hear the appeal, on the ground that the matters for determination had not been subject to systematic adjudication through the hierarchy of Courts.

C. THE PARTIES' RESPECTIVE CASES

(i) The Appellant

[11] Counsel for the appellant, Mr. Gikandi justified the cause herein as a direct appeal in the terms of Article 163(4)(a) of the Constitution, following the decision of the Court of Appeal in *Civil Appeal No. 42 of 2013,* striking out the appeal before it, with an Order for costs in favour of the respondents. Counsel submitted that in the ***Joho*** case, this Court did not pronounce itself on the retrospective effect of its declaration of invalidity of Section 76(1)(a) of the Elections Act. He also urged that this Court had not struck out the High Court decision in ***Suleiman Said Shahbal v. Independent Electoral & Boundaries***

Commission (IEBC) & 3 Others Election Petition No. 8 of 2013; [2013] eKLR, and that the said annulment of Section 76(1)(a) of the Elections Act was not meant to apply retrospectively but rather, only prospectively as from the date of the Court's decision; and thus, the Court of Appeal should not have acted on the basis that the Judgment of this Court in the ***Joho*** case had decreed retroactive scope in that Court's decision-making.

[12] Mr. Gikandi contended that the Court of Appeal had erred in its interpretation of this Court's decision in the ***Joho*** case. According to him, it was not to be assumed that a declaration of invalidity applied retrospectively. He argued that Courts in Kenya had no power to annul any statutory provision retrospectively, because by Article 94 of the Constitution, legislative authority emanated from the people and was vested in Parliament at the national level. Counsel contended that a finding of nullity with respect to legislation, amounted to a judicial attempt to legislate retrospectively, and that such an attempt was *ultra vires*.

[13] Counsel urged that, by Section 3 of the Judicature Act (Cap 8, Laws of Kenya), the jurisdiction of the High Court and all Subordinate Courts ought to be exercised in conformity with the Constitution and the relevant legislation. He relied on the persuasive authority in ***Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).*** In that case, *Hughes CJ,* in the Supreme Court, expressed the view that whether or not the invalidity of a statute was retrospective or prospective, depended on the facts of the case. In his words:

> *"The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree.... It is quite clear, however, that such broad statements as to the effect of a*

determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact, and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. ***The effect of the subsequent ruling as to invalidity may have to be considered in various aspects -- with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified"*** [emphasis supplied].

[14] Relying on the foregoing persuasive authority, learned counsel submitted that the Court of Appeal had not considered the special circumstances of the instant case, nor adverted to the rights and obligations already accrued; and that if the Appellate Court had done so, it would have found that the appellant did comply with the applicable law as at the date of filing the election petition.

[15] Learned counsel urged, consequently, that the Court of Appeal violated Articles 10, 47, 50(1) and 259 of the Constitution when it struck out the appeal, with costs. He urged that *the appeal had been struck out due to an improper retrospective application of the declaration of invalidity of Section 76(1)(a) of the*

Elections Act. Counsel further submitted that the Court ought not to have ordered the applicant to bear the costs of the appeal, as he had relied on a valid law at the time of filing his petition. Counsel urged this Court to reject the preliminary objection, and allow the appeal.

(ii) The 1st and 2nd Respondents

[16] Counsel for the 1st and 2nd respondents, Mr. Khagram submitted that, by Article 163(4)(a) of the Constitution, the Supreme Court lacks jurisdiction to hear this matter, as the appeal was about costs awarded at the Court of Appeal, and the question of costs bore no relation to interpretation or application of the Constitution. He submitted that this question was also not one "of general public importance", but rather, one concerning the appellant's private affairs, and thus, falling short of the threshold for appeal to this Court, as laid down in Article 163(4)(b) of the Constitution. Counsel relied on the ***Joho*** case, to argue that the parties to the cross-appeal ought to seek leave to challenge the Court of Appeal's finding on costs, in accordance with Article 163(4)(b) of the Constitution.

[17] Counsel further urged that by dint of Article 2(4) of the Constitution, Section 76(1)(a) of the Elections Act was void to the extent of its inconsistency; and once this statutory provision had been declared unconstitutional, it became void and not just voidable. Counsel sought to distinguish the ***Chicot County*** case which had been relied on by the appellant as persuasive authority. He argued that the Court of Appeal indeed considered the circumstances of the present case and was persuaded by the case of ***A.A. Sisya & 35 Others v. The Principal Secretary, Ministry of Finance & Another,*** High Court Dodoma Civil Case No. 5 of 1994, in which the High Court of Tanzania declared a statute that was contrary to the provisions of the Tanzanian Constitution to be void.

[18] Mr. Khagram urged that Sections 23 and 26 of the Interpretation and General Provisions Act, insofar as they suggested that void law was still applicable, were inconsistent with Article 2(4) of the Constitution. Besides, he submitted, the provisions of the Interpretation and General Provisions Act did not relate to the application or interpretation of the Constitution, as they were subordinate to the Constitution.

[19] Now as to the several submissions by learned counsel regarding the relationship between the terms of the Constitution and those of the Interpretation and General Provisions Act, it is necessary to clarify the position. Both Sections 23 and 26 of that Act are concerned with the situation in which a statute is repealed or amended by the Legislature, rather than with a situation of invalidity of statute emanating from Court declaration. The submissions by counsel in this regard, therefore, have been, with respect, out of focus.

[20] Learned counsel took up the issue of costs, urging that whereas the appellant could have advisedly opted to abandon his claim following *Ochieng, J's* determination at the High Court, he chose to appeal to the Court of Appeal and to the Supreme Court, subjecting other parties to unnecessary expenses; and on this account, the appeal should be dismissed with costs.

(iii) The 3rd Respondent/Applicant

[21] Learned counsel for the 3rd respondent, Mr. Buti concurred with the broad position of the 1st and 2nd respondents, and opted only to present additional arguments. He submitted that Sections 23 and 26 of the Interpretation and General Provisions Act could not be relied on, as Section 2 of the Act excludes it from application to the interpretation of the Constitution. The Appellate Court in that case, counsel urged, had by no means been sitting on appeal, or review, over

the decision of this Court on the unconstitutionality of Section 76(1)(a) of the Elections Act; and consequently, the appeal from the Appellate Court's decision bore no relation to the question of the validity of Section 76(1)(a) of the Elections Act.

[22] Mr. Buti urged that the present appeal had no basis, because this Court had decided in the ***Mary Wambui*** case that the declaration of invalidity dated back to the commencement of the Elections Act; for greater effect, he cited paragraph 89 of the ***Mary Wambui*** case:

> ***"From the analysis above, and from a review of the principles in the*** *Joho* ***case as regards the settlement of electoral disputes, we are convinced that for the benefit of certainty and consistency, the declaration of invalidity must apply from the date of commencement of the Elections Act, i.e. 2nd December 2011."***

(iv) The 4th Respondent

[23] Learned counsel, Mr. Mosota submitted that the appeal did not fall within the purview of Article 163(4) of the Constitution. He urged that the petition was a quest by the appellant to become the Governor of Mombasa County, and was in no respect, a matter of public importance. He urged the Court to dismiss the appeal, with costs to the respondents.

(v) The Appellant's Response

[24] Counsel for the appellant urged that the present appeal had been filed against the entire decision of the Court of Appeal, pursuant to the provisions of

Article 163(4)(a) of the Constitution; and that in the circumstances, the question of leave as perceived by counsel for the respondents, was inapplicable. He also submitted that since this Court had not specifically annulled the petition, upon its retrospectivity-finding in the *Joho* case, the appellant had every right to pursue the election-petition matter.

[25] Counsel relied on the holding of this Court (paragraph 84 of the ***Mary Wambui*** case) to submit that the Court's stand had been that, despite its silence on the *effect of its declaration of invalidity* in the ***Joho*** case, it would adopt a case-by-case approach in assigning to its constitutional interpretation, prospective or retrospective effect. So, it was urged, this Court left an open window, for an appeal such as the instant one.

[26] A constant issue in the submissions of counsel was costs. Counsel for the appellant asked the Court to take the "own-costs" preference, as in the ***Mary Wambui*** case.

D. ISSUES FOR DETERMINATION

[27] From the submissions of counsel on the preliminary objection and the main appeal, the following issues emerge for determination:

(a) whether this Court has the jurisdiction to hear and determine this appeal;

(b) *whether it was right in law for the Appellate Court to apply retrospectively this Court's declaration of invalidity of Section 76(1)(a) of the Elections Act – notwithstanding that the said declaration was silent on its application time-span.*

(c) costs.

E. ANALYSIS

(a) ***Jurisdiction***

[28] It was the 3rd respondent's submission that the appeal, on the issue of costs, ought to have satisfied the procedural requirements of Article 163(4)(b) of the Constitution, by proceeding on the basis of a grant of leave. Examination of the petition of appeal filed on 3rd June, 2014 shows that the appellant had proceeded on the basis of Article 163(4)(a) of the Constitution, and Section 15(2) of the Supreme Court Act, 2011 (Act No. 7 of 2011).

[29] Article 163(4)(a) of the Constitution relates to appeals brought before this Court "as of right" – an issue clarified in ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another*** Sup Ct. Petition No. 3 of 2012; [2012] eKLR (*Tunoi* and *Wanjala SC JJ*) in the following terms (at paragraph 28):

> ***"... Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)****If an appeal is challenged at a preliminary level on grounds that it does not meet the threshold in Article 163(4) (a),****the Court must determine that challenge before deciding whether to entertain the substantive appeal or not"*** [emphasis supplied].

[30] Similarly, in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others,*** Sup Ct. Application No. 5 of 2014; [2014] eKLR, the Court (*Ojwang* and *Wanjala SC JJ)* held (paragraph 74) that:

"...not every election petition decision is appealable to the Supreme Court under Article 163 (4) (a) of the Constitution. ***What we must decide, however, is whether this appeal has arisen from a decision of the Appellate Court in which issues of the interpretation and application of the Constitution were at play***" [emphasis supplied].

[31] In ***Lemanken Aramat v. Harun Meitamei Lempaka & Two Others*** Sup Ct. Petition No.5 of 2014; [2014] eKLR we considered the issue of the appellate jurisdiction of this Court under Article 163(4)(a) of the Constitution, and held as follows (paragraph 107):

"The Supreme Court's special jurisdiction merits express recognition. The Constitution's paradigm of democratic governance entrusts to this Court the charge of assuring sanctity to its declared principles. The Court's mandate in respect of such principles cannot, by its inherent character, be defined in restrictive terms. Thus, such questions as come up in the course of dispute settlement (which, itself, is a constitutional phenomenon), especially those related to governance, are intrinsically issues importing the obligation to interpret or apply the Constitution – and consequently, issues falling squarely within the Supreme Court's mandate under Article 163(4)(a), as well as within the juridical mandate of the Court as prescribed in Article 259(1)(c) of the Constitution, and in Section 3(c) of the Supreme Court Act, 2011 (Act No. 7 of 2011)."

[32] The subject matter of this dispute has gone through the entire chain of Courts, each time evolving and generating new issues, while retaining the subject-matter of the dispute. At the Court of Appeal, the main issue was whether the appeal was competent in light of this Court's declaration of invalidity of Section 76(1)(a) of the Elections Act, in the ***Joho*** case. The main issue in the instant appeal is whether the Court of Appeal in *Civil Appeal No. 42 of 2013,* erred when it decided that the declaration of invalidity of Section 76(1)(a) of the Elections Act (by this Court) applied retrospectively. The question points to this Court's exercise of its mandate under Article 163 of the Constitution; to the Court of Appeal's mandate under Article 164; and relates to the interpretation of Article 2(4) of the Constitution. *Prima facie*, it meets the threshold of Article 163(4)(a) of the Constitution.

[33] The "costs" issue is linked to the merits of the Court of Appeal's Order on the retrospectivity question. Should the Appellate Court's Order be sustained? Unlike in the ***Joho*** case, the issue of costs was canvassed as a composite element in the contest to the entire Judgment of the Court of Appeal. Consequently, our determination of the main issue may have an impact upon the issue of costs, and the proposed de-linking of the two items is not feasible.

(b) The Retrospectivity Principle – as applied by the Appellate Court

[34] The jurisdiction of the Court of Appeal to hear the election appeal was challenged in a preliminary objection filed by the 3rd and 4th respondents, supported by the 1st and 2nd respondents, following this Court's decision in the ***Joho*** case. The objection was contested by the appellant who argued that when a statute or a provision had been nullified, the annulment could only apply prospectively, on account of a presumption of legality for previous situations. He urged that the issue as to validity was already the subject of a Supreme Court

decision, and therefore could not be adjudicated upon by the Court of Appeal, as it was *res judicata*. The Court of Appeal held that the only issue concluded by the Supreme Court, with finality, was the *constitutionality of Section 76(1)(a) of the Elections Act;* and on that account, the Appellate Court could not re-open it. The Court of Appeal confined itself to one issue: *whether there was a competent appeal before it, to be heard on the merits.*

[35] Before the Court of Appeal, the appellant herein raised the issue as to the time-span of application of this Court's annulment of Section 76(1)(a) of the Elections Act – and thus, it was in all respects proper for that Court to determine it. It was common cause among counsel that the Supreme Court's decision in the ***Joho*** case had not pronounced itself on the time-span attached to the annulment of Section 76(1)(a) of the Elections Act. This position is acknowledged in ***Mary Wambui*** (paragraph 84) as follows:

> *"In **Joho**, this Court had been silent on the effect of its declaration of invalidity of a statute and therefore unequivocal about the invalidity of any action emanating from Section 76(1)(a) of the Elections Act."*

[36] The Court of Appeal was, thus, well within its mandate to apply our decision in ***Joho*** to the appeal before it. As a result of that application, however, the appellant still avers that the declaration of invalidity ought to have applied prospectively, and not retrospectively as held by the Court of Appeal. This is an issue to be resolved, in the instant matter.

[37] The time-span effect of a declaration of invalidity of statute may be perceived in the context of the Court of Appeal's decision in the case of ***Paul Posh Aborwa v. Independent Election & Boundaries Commission & 2***

Others Civil Appeal No. 52 of 2013; [2014] eKLR, and the affirmation of that Court's position in the ***Mary Wambui*** case. This Court's position was thus stated, in the ***Mary Wambui*** case (paragraph 80), concurring with the Appellate Court:

> *"Based on this Court's decision in* ***Joho****, the Court of Appeal in* ***Suleiman Said Shahbal v. The Independent Electoral and Boundaries Commission and 3 others, Civil Appeal No. 42 of 2013****, dismissing the appeal, held that:*
>
> > ***'We do not believe that it would be promoting the purpose of the Constitution, or advancing its principle and values or contributing to good governance to ignore Article 2(4) and hold, on the facts of this case, that a statute that is blatantly violative of the Constitution can form the foundation of valid legal claims. At a time when the Constitution of Kenya is still in its early years of interpretation, the idea that statutory enactments contrary to the Constitution can claim even fleeting validity should not be countenanced, let alone entertained. Holding otherwise would be contributing to the erosion of the supremacy and pre-eminence of the Constitution in the hierarchy of legal norms.'…."***

[38] The Court of Appeal, in the same case, further held that:

"We are alive to the fact that when Section 76(1) (a) of the Elections Act, 2011 was enacted, Article 87(2) of the Constitution was already in operation. Giving that statutory provision legal effect from the date of its enactment, would, in a sense be tantamount to holding that from the date it came into operation until it was declared unconstitutional on 4th February, 2014, that provision of the statute overrode the clear provisions of Article 87(2) of the Constitution. We are not convinced."

[39] We further record our perception in the ***Mary Wambui*** case as follows:

*"We take judicial notice that the principle in the **Joho case** has been relied upon by the Court of Appeal in the case of **Paul Posh Aborwa v. Independent Electoral and Boundaries Commission and 2 Others, Civil Appeal No. 52 of 2013,** in a judgement dated 2nd May 2013 in which the Court held:*

'The result of the foregoing is that we uphold the preliminary objection and determine that we have no jurisdiction to hear and determine the appeal, emanating as it does from the proceedings that are a nullity by reason of having been instituted outside of the time limit set out under Article 87(2) of the Constitution of Kenya, 2010.'

[40] We proceeded in the same case (paragraphs 87 and 89) to make our determination as follows:

> *"...this Court is not precluded from considering the application of the principles of* ***retroactivity or proactivity on a case-by-case basis.*** *As such, in the instant matter, the issue of invalidity of Section 76(1)(a) of the Elections Act is bound to the issue of time. Time, as a principle, is comprehensively addressed through the attribute of accuracy, and emphasised by Article 87(1) of the Constitution, as well as other provisions of the law. Time, in principle and applicability, is a vital element in the electoral process set by the Constitution. This Court's decision in* ***Joho*** *was guided by this consideration.*
>
> *"From the analysis above, and from a review of the principles in the* ***Joho*** *case as regards the settlement of electoral disputes, we are convinced that for the benefit of certainty and consistency,* ***the declaration of invalidity must apply from the date of commencement of the Elections Act, i.e. 2nd December 2011"*** [emphasis supplied].

[41] The foregoing *ratio* was later adopted and affirmed in several decisions of this Court (See ***Anami Silverse Lisamula v IEBC & 2 Others,*** Sup Ct. Petition No. 9 of 2014; [2014] eKLR; ***George Mike Wanjohi v. Steven Kariuki & 2 Others,*** Sup Ct. Petition No. 2A of 2014; [2014] eKLR; and the ***Aramat*** case). In those decisions, we held that the proceedings at the High Court and the Court of Appeal having been premised upon the annulled Section 76(1)(a) of the Elections Act, and the election petitions having been brought outside the time-limits prescribed by Article 87(2) of the Constitution, were a nullity. This Court, in the circumstances, affirms that the declaration of invalidity of Section

76(1)(a) of the Elections Act, applies retrospectively in this case, as in the case of ***Mary Wambui,*** because the Elections Act was an essential derivative of the Constitution, enacted after the promulgation of the Constitution, and was meant to set out guidelines for the proper and effective conduct of elections, and necessarily incorporated the element of time and timelines.

[42] The lesson of comparative jurisprudence is that, while a declaration of nullity for inconsistency with the Constitution annuls statute law, it does not necessarily entail that all acts previously done are invalidated. In general, laws have a prospective outlook; and prior to annulling-declarations, situations otherwise entirely legitimate may have come to pass, and differing rights may have accrued that have acquired entrenched foundations. This gives justification for a case-by-case approach to time-span effect, in relation to nullification of statute law. In this regard, the Court has a scope for discretion, including: the suspension of invalidity; and the application of "prospective annulment". Such recourses, however, are for sparing, and most judicious application – in view of the overriding principle of the supremacy of the Constitution, as it stands.

[43] Such an unrestricted scope in the exercise of the interpretive mandate is not to be seen, as urged by learned counsel for the appellant, as an encroachment on the legislative authority of Parliament emanating from Article 94 of the Constitution. The guiding principle on this point has, in fact, been set out in an earlier decision of this Court, ***In Re the Speaker of the Senate & Another v. Attorney General & 4 Others***, Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR, in the following terms (paragraph 54):

> ***"The context and terms of the new Constitution, this Court believes, vests in us the mandate when called upon, to***

consider and pronounce ourselves upon the legality and propriety of all constitutional processes and functions of State organs. The effect, as we perceive it, is that the Supreme Court's jurisdiction includes resolving any question touching on the mode of discharge of the legislative mandate."

[44] In a more focussed appraisal of "retroactivity," this Court in ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and 2 Others,*** Sup Ct. Civil Application No. 2 of 2011; [2012] eKLR, thus stated (at paragraph 62):

"Applying these legal principles to the matter before us, it is clear that what is in question is not the seeming retroactive elements (if any) of Section 15(1) of the Supreme Court Act, but whether Article 163 (4)(b) of the Constitution was intended to confer appellate jurisdiction upon the Supreme Court the exercise of which would have retrospective effect upon the vested rights of individuals. At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its

provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately accrued before the commencement of the Constitution."

[45] The appellant urged that the Judiciary had to steer clear of the mandate-sphere of Parliament, and that the retrospective application of a nullity declaration amounted to usurpation of the legislative mandate as provided for in Article 94 of the Constitution.

[46] In ***Re Senate,*** this Court had occasion to pronounce itself on such basic issues of separation of powers (paragraphs 61, 62), as follows:

"It emerges that Kenya's legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that the Constitution vests the legislative authority of the Republic in Parliament. Such authority is derived from the people. This position is embodied in Article 94(1) thereof. The said Article also imposes upon Parliament the duty to protect the Constitution and to promote the democratic governance of the Republic. Article 93(2)

provides that the national Assembly and the Senate shall perform their respective functions in accordance with the Constitution. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of the Constitution. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of the Constitution. It cannot operate besides or outside the four corners of the Constitution. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.

"However, where a question arises as to the interpretation of the Constitution, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the

supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering this Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act."

[47] In South Africa, unlike in Kenya, the Constitution sets out guidelines for the Courts, as regards declarations of invalidity. Section 172 (1) states that:

"When deciding a constitutional matter within its power, a court –

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including –

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[48] The South African Constitutional Court, in ***Sias Moise v. Greater Germiston Transitional Local Council*** (CCT 54/00) [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) (4 July 2001) held that the Constitution assumes full retrospective effect, when a statute is invalidated, and that the Court which declares such invalidation is empowered to limit its retrospective effect. The Court further held (paragraph 4) as follows:

"If a statute enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms…"

[49] In the case of ***Mvumvu and Others v. Minister of Transport and Another*** (CCT 67/10) [2011] ZACC 1; 2011 (2) SA 473 (CC) ; 2011 (5) BCLR 488 (CC) (17 January 2011), the South African Constitutional Court arrived at the decision that a declaration of invalidity be suspended for 18 months as from the date of the Order to enable Parliament to cure the defect in the law. The Court on that occasion, considered the date upon which the retrospective effect of a declaration of invalidity could take place (paragraph 44), as follows:

"Ordinarily an order of constitutional invalidity has a retrospective effect unless its operation is suspended. In terms of the doctrine of objective constitutional invalidity, unless ordered otherwise by the court the invalidity operates retrospectively to the date on which the Constitution came into force. ***But if the legislation in question was enacted after that date, as was the present Act, the retrospective operation of invalidity goes back to the date on which the legislation came into force.*** *The consequence of this for present purposes is that the applicants would be entitled to full compensation as if the cap never came into existence"* [emphasis supplied].

[50] In Canada, Section 52(1) of the Constitution Act, 1982, which is similar to Article 2(4) of the Constitution of Kenya, provides for the supremacy of the Constitution, and ordains that any law inconsistent with the provisions of the Constitution has no force or effect. In ***Canada (Attorney-General) v. Hislop***, [2007] 1 S.C.R. 429, 2007 SCC 10, the Supreme Court considered the retroactive operation of a declaration of invalidity, and held that subject to Section 52(1):

"....When a court issues a declaration of invalidity, it declares that, henceforth, the unconstitutional law cannot be enforced. The nullification of a law is thus prospective. ***However, s. 52(1) may also operate retroactively so far as the parties are concerned, reaching into the past to annul the effects of the unconstitutional law...."***

"...On this view, s. 52(1) remedies are deemed to be fully retroactive because the legislature never had the authority

to enact an unconstitutional law. *In the words of Professor Hogg, a declaration of constitutional invalidity* ***"involves the nullification of the law from the outset"*** *If the law was invalid from the outset, then any government action taken pursuant to that law is also invalid, and consequently, those affected by it have a right to redress which reaches back into the past."*

[51] Similarly in ***Miron v. Trudel,*** [1995] 2 SCR 418, 1995 CanLII 97 (SCC) the Canadian Supreme Court dealt with a standard automobile policy which failed to include benefits to unmarried common law spouses. The issue before the Court was whether the Court should retroactively "read-in" a more inclusive definition of "spouse" under Section 24 of the Charter. The Court held that Section 52(1) may operate retroactively so far as the parties are concerned, reading into the past, to annul the effects of the un-constitutional law. *McLachlin J* held that this was an "exceptional circumstance" where the remedy of retroactively reading-in would apply.

[52] In another Canadian Supreme Court case, ***Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v Laseur,*** [2003] 2 SCR 504, 2003 SCC 54 (CanLII), Section 52(1) of the Constitution Act, 1982 was considered, in relation to the effects of the declaration of invalidity of a legislative provision; the Court held (paragraph 28) as follows:

"*The invalidity of a legislative provision inconsistent with the* ***Charter*** *does not arise from the fact of its being declared unconstitutional by a court, but from the operation of* ***s. 52(1). Thus, in principle, such a provision is invalid from the***

moment it is enacted, *and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects. In that sense, by virtue of* ***s. 52(1),*** *the question of constitutional validity inheres in every legislative enactment. Courts may not apply invalid laws, and the same obligation applies to every level and branch of government, including the administrative organs of the state"* (emphasis supplied.)

[53] In the case of Kenya, the High Court bears the primary responsibility for determining whether any law is inconsistent with or in contravention of the Constitution. This discretion also vests in the Court of Appeal as well as the Supreme Court. In the ***Joho*** and ***Mary Wambui*** cases, this Court considered the impugned statutory provision in light of the entire scheme of the Constitution, before making the declaration of invalidity and, further in the ***Mary Wambui*** case, before deciding upon the retrospective application of that declaration. This is the appropriate approach, in our view, as regards the instant case.

[54] In the ***Joho*** case, we considered an application dated 29th April, 2013 challenging the validity of Section 76(1)(a) of the Elections Act. Upon a sustained consideration of the Constitution and the relevant law, in the context of the submissions of counsel, we held that the provisions of Section 76(1)(a) of the Elections Act were inconsistent with the terms of Article 87(1) of the Constitution, and were invalid to the extent of that inconsistency. The election petition at the High Court was premised upon the provisions of Section 76(1)(a), and was filed outside the time prescribed by Article 87(1) of the Constitution – and was to that extent, invalid.

(b) Costs

[55] Section 21(2) of the Supreme Court Act grants this Court the discretion to make any ancillary or interlocutory Orders, including any Orders as to costs, as it thinks fit to grant. The appellant urged this Court to review the Court of Appeal's Order of costs in light of the emerging trend in the award of costs, in matters closely linked in substance and outcome. Despite the line of cases of declaration of nullity as regards electoral matters filed outside the time-frame prescribed by Article 87(1) of the Constitution, and in view especially of the precedent in the ***Joho*** case, the appellant remained adamant in canvassing all appellate mechanisms, though being aware of the possible cost implications. This Court is not satisfied that a compelling case has been made out to vary the Court of Appeal's Orders as to costs.

F. ORDERS

[56] The analysis of the case as presented before this Court has inclined us to make requisite Orders as follows:

(a) The Petition of Appeal dated 3rd June, 2014 is hereby disallowed.

(b) The Judgment and consequential Orders of the Court of Appeal, dated 23rd April, 2014 are hereby upheld.

(c) The appellant shall bear the costs of the appeal before this Court.

DATED and **DELIVERED** at **NAIROBI** this 19TH day of 2014.

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K.H. RAWAL
DEPUTY CHIEF JUSTICE/ DEPUTY PRESIDENT
OF THE SUPREME COURT

.....	.....
P.K. TUNOI	**M.K. IBRAHIM**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
J.B. OJWANG	**S. C. WANJALA**
JUSTICE OF THE SUPREME COURT	**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