REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

CIVIL APPLICATION NO. 8 OF 2014

(Coram: Rawal, DCJ & Ibrahim, SCJ)

BETWEEN

HON. LEMANKEN ARAMAT.....APPLICANT

AND

HARUN MEITAMEI LEMPANKA.....1ST RESPONDENT

ISAAC RUTO.....2ND RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC).....3RD RESPONDENT

(*Application for stay of execution of the judgment of the Court of Appeal sitting at Nairobi (Waki, Musinga & Gatembu, JJA) dated 28th March, 2014 in Nairobi Civil Appeal No. 276 of 2013*)

RULING

I. BACKGROUND

[1] The Applicant, Lemanken Aramat filed a Notice of Motion application dated 3rd April, 2014 and a supporting affidavit thereto seeking a stay of execution of the judgment and orders of the Court of Appeal in Civil Appeal No. 276 of 2013 delivered on 28th day of March, 2014.

[2] The factual background of this application emanates from the General Elections of 4th March, 2013. The Applicant and nine others were candidates for the seat of the Member of National Assembly for Narok East Constituency. After counting and tallying of votes, the Applicant was declared the winner having

garnered 5,615 votes against the 1st Respondent's 5,174 votes, hence the winning margin was 441 votes. Aggrieved by this declaration of the Applicant as the winner 1st Respondent filed a petition in the High Court at Nakuru Election on 10th April, 2013 challenging that election.

[3] In the petition before the High Court the 1st Respondent sought various reliefs *inter alia*: an order for scrutiny and recount of the votes cast in all the 69 polling stations in Narok East Constituency. The High Court heard the petition and delivered its judgment on 5th September, 2013 dismissing the petition with costs to the applicant and the 2nd and 3rd respondents.

[4] The 1st Respondent was dissatisfied with the High Court judgment and moved the Court of Appeal by way of an appeal. The Court of Appeal rendered its decision on 28th March, 2014 allowing the appeal and made the following orders:

> ***a. The judgment and decree dated 5th September, 2013 are hereby set aside and substituted with an order for recount of all the votes cast in all the 69 polling stations in Narok East Constituency for election of the area member of Parliament.***
>
> ***b. The recount shall be carried out in the High Court of Kenya at Nakuru where the petition had been filed. The exercise shall be supervised by the Court's Deputy Registrar and the results thereof shall be forwarded to any judge in that station, except Emukule, J. for declaration in terms of Section 80 (4) of the Elections Act.***
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> ***c. To facilitate the recount as ordered hereinabove, the third respondent (IEBC) is hereby ordered to deliver all the ballot boxes for election of member of Parliament for Narok East Constituency in the 2013 general elections to the High Court of Kenya at Nakuru within ten (10) days from the date hereof.***
>
> ***d. Subject to determination of the winner following the recount of votes as ordered, as between the appellant and the 1st respondent, the costs of the election petition in the High Court, which shall not exceed Kshs.1,500,000/=, shall be paid by the loser to the winner and to the 1st and 2nd respondents jointly.***

e. The costs of this appeal are capped at Kshs.300, 000/= and shall be paid to the appellant by the respondents.

[5] It is these orders that has prompted the Applicant to seek intervention of this Court by filing Petition No. 5 of 2014 on 3rd April, 2014. Pending the hearing of the appeal, the applicant filed on the same date this application under a Certificate of Urgency seeking interlocutory orders staying execution of judgment and orders of the Court of Appeal.

[6] The application was heard ex-parte on 3rd April, 2014 by Ibrahim, SCJ who certified it urgent and granted interim orders staying any execution of the impugned judgment and orders of the Court of Appeal. These orders were again extended on 29th April, 2014.

[7] By way of a Notice of Preliminary Objection dated 8th April, 2014 the 1st respondent expressed an intention to challenge the application on the following basis:

i. This Court has no jurisdiction under Article 163(4)(a) to hear and determine the Notice of Motion dated 3rd April, 2014.

ii. The Applicant has no right to appeal under Article 163(4)(a) of the Constitution to appeal against the Judgment of the Court of Appeal dated and delivered on 28th march, 2014.

iii. The Application dated 3rd April, 2014 offends and seeks to circumvent Articles 81 and 86 of the Constitution making it a gross abuse of the court process.

[8]During the hearing of the Notice of Motion, we directed that the Preliminary Objection be heard within the application as a response to the application.

II. SUBMISSIONS OF PARTIES

i. Applicant's submissions

[9]Senior Counsel Prof. Ojienda for the applicant made submissions before this Court asserting that the Court has jurisdiction to determine the instant appeal under Article 163(4) (a) of the Constitution. He referred to the pleadings before the Court which he stated raise issues of constitutional interpretation and application. Learned Counsel pointed out that from the High Court and the Court of Appeal the Appellant's cause of action all along rested and expressed propositions and reference to the Constitution.

[10] He stated that the application has satisfied three grounds for stay as set out in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others** *Sup. Ct. Petition No. 2 of 2014* (**Munya** case), that is: the appeal raises arguable issues; will be rendered nugatory if stay is not granted and it is in the public interest for stay to be granted.

[11]As to whether this case raises an arguable appeal, Counsel argued that by remitting the appeal to the High Court in Nakuru for a recount of the votes, the Court of Appeal acted in disregard of the Constitution by empowering the High Court to undertake a recount after the expiry of the six months period prescribed by section 85A of the Elections Act, 2011. It was further submitted that by ordering a recount of the votes cast for the post of member of the National Assembly for Narok East Constituency, the Court of Appeal wrongly interpreted and misapplied the provisions of Article 105(1) and 2 of the Constitution as well as Article 159(2) (e) of the Constitution of Kenya by purporting to extend the jurisdiction of the High Court beyond the prescribed time limit.

[12]He also advanced an argument that the Court of Appeal erred in its interpretation of Article 87(1) and Section 85A of the Elections Act 2011 when, instead of determining the appeal, the court delegated the said duty to the High Court at Nakuru which in essence was *functus officio* upon delivery of the judgment on 5th September 2013. This referral by the Court of Appeal, Counsel contended, is in disregard of rule 6 of Elections (Parliamentary and County Elections) Petition Rules, 2013 (**Election Petition Rules**) for purporting to confer the status and powers of an Election Court to 'any judge' in Nakuru apart

from the trial judge, a mandate that only the Honourable Chief Justice can discharge under the Act.

Rule 6 of Election Petition Rules gives the Chief Justice power to constitute an Election Court and designate a Judge in consultation with the principal judge for expeditious disposal of election petitions.

[13]It was Counsel's view that since the constitutional period within which the High Court could legally handle electoral disputes had expired, the High Court's jurisdiction over this dispute had been extinguished. Counsel cited the Nigerian Supreme Court decision of **Senator John Akpanudoedehe and 2 others v Godwil Obot Akpabio and 3** *others S.C 154 of 2012* which held that once the set constitutional timeframe has lapsed courts lose jurisdiction and the matter is extinguished.

[14] Counsel stressed that a scenario has been created whereby there exists contradictory precedents by the Court of Appeal on the issue of scrutiny and recount in the sense that while the Court of Appeal in **Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others [2014]** *Nyeri Civil Appeal No. 31 of 2013* found that it cannot order scrutiny, however in this case the Court of Appeal has wrongly ordered for a re-count. It was submitted that in essence scrutiny and recount are issues of fact that cannot be cited by an appellate Court as a basis for nullifying an election.

[15]It was further submitted that the Court of Appeal disregarded Section 85A of the Elections Act by remitting a matter to the High Court through a procedure not provided by law, and hence an interpretation of Article 105 of the Constitution *vis a vis* Section 85A and rules 32 and 33 of the Elections Petition Rules needs to be clarified by this Court. He further added that the appeal would present an opportunity for this Court to analyze compliance with electoral laws in Kenya. It was urged that the Judgment of the Court of Appeal must not be left unchallenged as it introduced new law to the effect that a recount as opposed to scrutiny is an automatic right and a party moving the court seeking a recount

need not establish a basis for the same. It was argued that essentially this interpretation is tantamount to judicial legislation.

[16] As to whether the appeal would be rendered nugatory should stay orders not be granted, Counsel touched on the possible scenario that if the recount is conducted as ordered, results are announced and the applicant loses then the appeal would be of no consequence notwithstanding a blatant violation of Section 80(4) and Article 105 of the Constitution by the Court of Appeal.

[17]On the issue of public interest Counsel submitted this case represents a matter of great public importance and interest as it will set settle law on elections and process. As he concluded, counsel asserted that the preliminary objection raised by the 1st Respondent was of no consequence since the High Court and Court of Appeal applied and interpreted the Constitution in determining the issue in dispute.

ii. 1st Respondent's Submissions.

[18]Mr. Mungai counsel for the 1st Respondent opposed the application by way of a Replying Affidavit and a Notice of Preliminary Objection dated 8th April, 2014. The preliminary objection challenged jurisdictional propriety of the appeal.

[19]Counsel for the 1st Respondent Mr. Kibe Mungai advanced the argument that the ratio in **Munya** case does not represent good law, it negates the clear provisions of the Constitution of Kenya with a probable resultant effect of devastating jurisprudence of this court.

[20]He elaborated by submitting that the **Munya** case is a *locus classicus* of how this Court has usurped the legislative role of Parliament surpassing the exhaustive powers conferred by the Constitution. It was his view that going by the interpretation in **Munya**, the Court wrongly arrogated itself jurisdiction in electoral matters opening a third mechanism for approaching the Court beyond article 163(4)(a) and (b). Additionally, he urged that the Attorney General ought

to be enjoined in these proceedings to defend the laws of the Republic that are being challenged.

[21]It was his view that the justification for having a Supreme Court as the final court in the land was to interpret the Constitution of Kenya with fidelity, as provided under Section 3 of the **Supreme Court Act, 2011** in a departure from the past where the Court of Appeal would by its decisions change the text of the Constitution. According to Counsel, the **Munya** decision represents a lack of fidelity to the Constitution and creates 'a bypass' to litigants to access the Court.

[22] Counsel further underscored that Articles 38, 81 and 105 of the Constitution generally envelops all electoral claims, and when those articles feature in a judgment it does not imply that the provisions were interpreted or applied. Since the provisions apply to all election cases, to permit arguments that they apply more in one election matter as opposed to others would be wrong. He stated that there is nothing special in the articles since they are a general guide and reference to the provisions which is standard practice in Election Courts.

[23]Counsel contradicted the applicant's proposition that the Court of Appeal decision interpreted any provision of the Constitution and responded that basically what was in issue was interpretation of rules 32 and 33 of the Elections Petition Rules concerning right to recount and scrutiny of votes, and which the Court of Appeal gave proper effect in the context of electoral system in Kenya. He contended that even if the Court of Appeal was wrong *per se* such does not confer a right to the Applicant to move the Supreme Court directly in view of the fact that under Article 163(4)(a) there is no such right of appeal if the constitutional issues being raised at the Supreme Court were never raised at the trial court or the Court of Appeal.

[24]It was also suggested that the appropriate provision under which the Applicant ought to have moved this Court is Article 163(4)(b) of the Constitution which obliges the Applicant first to seek leave at the Court of Appeal. Counsel

further submitted that under Article 163(4)(a) this Court can exercise jurisdiction but in order to do so the interpretation and application of the Constitution must have emanated from the High Court through an appellate chain of events. He mentioned the case of **Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others** *Sup. Ct. Petition No. 10 of 2013* where an appeal on the constitutionality of Section 76(1) of the Elections Act had ascended to this Court from the High Court.

[25] To buttress his contention that this Court is divested of jurisdiction in this matter, it was argued that whereas issues of interpretation of the Constitution may arise legitimately in an election petition, in this case the issues presented before us were never in issue before the trial court or the Court of Appeal; that the language of the Constitution is clear that this Court can entertain appeals from the Court of Appeal. Indicating the distinctions between the **Joho** case and **Munya** decision, Counsel was emphatic that in **Joho** a constitutional issue arose in a manner contemplated by the Constitution quite apart from **Munya** where there was no constitutional issue in the High Court or Court of Appeal. For this reason, the appeal is unmerited and the matter is not one that can arise under Article 163(4) (a).

[26] It was further urged that this appeal is premature, and no determination has yet been made by the Court of Appeal. It was his view that any declaration would be after the recount exercise, thereafter should the Applicant be dissatisfied with the outcome he can still move the Court on appeal since it is at that point that the judgement of the Court of Appeal would have crystalized. For this reason, he accused the applicant for seeking to circumvent the imperatives of Articles 81 and 86 of the Constitution.

[27] Mr. Mungai submitted that there is indeed no arguable appeal in this matter which he argued is a regular cause that in no way requires the Court to make any interpretations other than issue specific orders. He also argued that any question on interpretation of the Constitution ought to have been explored

before the Court of Appeal. For this omission there is nothing to be rendered nugatory.

[28]On public interest considerations as a ground upon which stay may be granted it was counsel's opinion that the Attorney General who is the chief custodian of public interest has not been made party to the proceedings. He stated that on the contrary it is the electorate who would be disenfranchised by a denial of a recount, a factor which outweighs the applicant's interest in the claim.

[29] It was Counsels submission that a recount of votes is a right entrenched under Article 38 of the Constitution and that the recount is simply a device by which a realization of that right can be attained.

[30] On whether the burden of proof was shifted Counsel contended that no burden was shifted and indeed the ballot boxes would be useful in determining the real winner in the elections.

[31] Counsel also addressed the Court on whether the High Court was *functus officio* and proceeded to state that the Constitution must be given a purposive interpretation and the fact that the Court of Appeal allowed 'any judge' to make a declaration of a winner after the recount was not fatal since the Honourable Chief Justice can under the rules gazette another judge to complete the exercise.

iii. 2nd and 3rd Respondents Submissions.

[32] Mr. Karanja, counsel for the 2nd and 3rd respondents in support of the application took the view that the matter before the Court had linkage to Article 105 of the Constitution was a live issue at the Court of Appeal. Thus the appeal herein indeed raises constitutional issues.

[33] Counsel supported the applicant's earlier stance that the Court of Appeal cannot refer a matter to the High Court to conduct a recount of the votes beyond the constitutionally permitted timeline. He was of the opinion that a recount is

not a right as it is not provided for under the Bill of Rights. Mr. Karanja also stated that this Court has jurisdiction to hear the instant matter.

[34] It was also his view that the Court of Appeal shifted the burden of proof to the respondents. He cited the dicta in the **Raila Odinga and 5 Others v. Independent Electoral Boundaries Commission and 3 Others** *Sup. Petition No. 5 of 2013* (**Raila Odinga** case) to the effect that there is a rebuttable presumption that elections were conducted properly in accordance with the law, and that it is incumbent upon a person challenging that presumption to present to court some material evidence in rebuttal.

[35]Counsel agreed that the appeal would be rendered nugatory if the orders sought are not granted, that this appeal may be reduced to an academic exercise if recount is allowed to proceed and that the stay orders would preserve public interest as the recount exercise would involve the use of logistical support that consume considerable public funds. He argued that the principles embodied in Article 10 of the Constitution ought to be taken into consideration in circumstances such as this.

C. ISSUES FOR DETERMINATION

[36] After listening to both Counsels who appeared in this matter and made submissions in support of the rival positions, we come to the conclusion that the following issues are necessary for the disposition of the Applicant's Notice of Motion dated 3rd April, 2014.

i. ***Whether the Court has jurisdiction to hear and determine the Application and to admit the appeal under article 163(4) (a).***
ii. ***Whether the Application raises sufficient grounds to warrant grant of interlocutory orders sought.***

D. ANALYSIS AND DETERMINATION

i. Jurisdiction to entertain the application and admit the appeal

[37] Counsel for the 1st respondent opposed the application stating that the Court has no jurisdiction under Article 163(4) (a) to entertain the Notice of Motion application for stay orders. On this point, Mr. Mungai expressed the view that the right to appeal under article 163(4) (a) is unobtainable in this matter as the appeal does not elicit any element of application or interpretation of the Constitution. His objection was that the constitutional provisions cited in the application were never in dispute or controversy and that the Court of Appeal was never called upon to adjudicate upon them.

[38] In the Applicant's Notice of Motion, written and oral submissions presented before us, they have taken a standpoint that the Court of Appeal interpreted and misapplied several constitutional provisions *to wit* Articles 25(c), 50 (1), 87(1), 105, 159(2)(e) and 163(7). These are the grounds upon which the application is based and submitted upon.

[39] It was also argued that the appeal does not lie from the Court of Appeal to this Court as of right. In Mr. Mungai's opinion, the proper limb under which this appeal should have been preferred to the Court is Article 163(4)(b) of the Constitution. Furthermore, even this purported leeway, according to Mr. Mungai, was still not freely available to the Applicant since he will have to satisfy the Court of Appeal that a matter of general public importance is involved before a certification is granted.

[40] While considering the 1st Respondent's objection to this court's jurisdiction for purposes of this application, we take guidance from the view expressed in **Munya** case at paragraph 69:

> ***"... where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application"***.

[41] Has the Applicant demonstrated that the Court of Appeal's reasoning in the determination of questions before it, put to proper context, took even a remote constitutional dimension or application? The 1st respondent's counsel was of opposite viewpoint to the effect that no constitutional interpretation or application was involved. He stated that the Court of Appeal only interpreted Rules 32 and 33 of the Election Petition Rules as regards recount and scrutiny, therefore the validity of that decision cannot be challenged under Article 163(4)(a). He asserted that there is nothing special about this election; that every electoral process entails application of constitutional principles and that the mere fact that Article 38, 81 and 105 featured in the body of the judgment doesn't necessarily give grounds for belief that constitutional interpretation or application was involved.

[42] We have taken it upon ourselves to peruse the record to ascertain whether any issues with constitutional dimension could have been considered during the determination of this matter at the High Court or Court of Appeal. We note that at paragraph 2.1 of the High Court judgment, the trial judge while assessing the petitioner's case noted that the claim by the petitioner '*was that the election for Narok East National Assembly seat was not conducted in accordance with the Elections Act, 2011, the Regulations made thereunder and the principles of electoral justice envisaged and set down under Article 38, 81 and 82 of the Constitution of Kenya, 2010*'. The judge further noted that the petitioner's action

rested on allegations of the 2nd and 3rd respondents' neglect or failure in their duties under Article 86 of the Constitution.

[43] Similarly, at paragraph 18 of the Court of Appeal's judgment, Musinga, JA while analyzing the fact of denial of recount by the trial judge noted that the Elections Act was a consequence of Article 105(2) which stipulates mandatory requirement of legislative timelines in electoral disputes. For this reason, the judge observed that the trial court was under a duty to adhere to constitutional timelines and to see to it that it makes its decision timeously. Again, our a perusal of that judgment reveals that the Court of Appeal was interpreting Sections 80(4) and 82 of the Elections Act and Rules 32 and 33 of the Election Petition Rules, being provisions meant to give effect to Articles 87(1) and 105 of the Constitution.

[44] In the **Munya** case it was held that while interpreting a single provision of the Elections Act cannot be equated to constitutional interpretation, every instance of interpretation of the Elections Act and the regulations pursuant thereto invariably implicate constitutional principles embodied in Articles 81 and 86 of the Constitution. The Court observed:

> ***"While we agree with Mr. Muthomi, regarding his contention that Section 87 of the Elections Act cannot be equated to a constitutional provision, we must hasten to add that the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution".***

[45] The 1st Respondent's objection to the appeal and the application on grounds that no constitutional issues were determined by the High Court and Court of Appeal must therefore fail. It is apparent, on a review of the record

placed before us that both the trial and appellate courts had before them electoral disputes raising concerns of compliance with constitutional principles. We find that the appellant has demonstrated that the Court's reasoning, and the conclusions which led to the determination of those issues, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application. Consequently we find that the appeal has basis and properly conceived under Article 163(4)(a) and is properly before this Court.

[46] Mr. Mungai also sought to convince us that the forum for resolving the questions in issue lie elsewhere as the matters presented in the instant appeal were never canvassed at the High Court or the Court of Appeal. It is evident the issues before us were subject of determination at the Election Court and Court of Appeal. We take the view that they have been procedurally elevated through the hierarchical process of adjudication in keeping with the principle laid out in ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another*** *SC Petition No. 3 of 2012* where Tunoi and Wanjala SCJJ stated as follows*:*

> "**Article 163 (4) (a)** ***must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court……Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application."***

[47]As we conclude on this issue of jurisdiction, we recall that Mr. Mungai objected to the application and the intended appeal for reasons that the appeal is informed by and founded on the **Munya** decision which he called into question and termed as bad law. The reason why Counsel repudiated the **Munya** principle is that by implication and effect, it has generated a third avenue for

exercise of this Court's jurisdiction in electoral matters surpassing the provisions of Article 163(4) (a) and (b) of the Constitution. He contended that by the **Munya** decision, this Court has imported an interpretation that lacks 'fidelity' to the Constitution. He urged us to depart from this decision.

[48] We agree that under Article 163 (7) of the Constitution, this Court may depart from its decisions on certain considerations which we set out in **Jasbir Singh Rai & others v Tarlochan Singh Rai & others** *Sup. Ct. Petition No. 4 of 2012***.** In this case, while giving meaning to Article 163(7) we took a principled position that the constitutional imperative to develop the law accords us the leverage of departure from our previous precedents in cases where such precedent may stand on the way of advancement of the law. This is what this Court stated**:**

> ***"[43] In principle therefore, it follows that this Court, as an apex Court, can indeed depart from its previous decision, for good cause, and after taking into account legal considerations of significant weight.***
>
> ***[44] Such a latitude for departure from precedent exists not only in principle, and from well-recorded common law experience, but also by virtue of the express provision of the Constitution".***

[49] We take due notice that **Munya** was a two judge bench decision of this Court which we as another coordinate bench has no power to review or vary. For that reason, whether merited or otherwise, Counsel's opposition to that decision can only be properly canvassed before an enlarged bench for review. We advise the 1st respondent that he is at liberty, if aggrieved, to make an application before this Court under Rule 20 (4) of the Supreme Court Rules and section 19 (4) of the Supreme Court Act, 2011 for review of the **Munya** decision.

ii. ***Whether stay may be granted in the instant application***

[50] In the **Munya** case this Court has set three grounds upon which orders for stay of execution may be granted. They are that:

> *(i) The Appeal or intended Appeal is arguable and not frivolous;*
> *(ii) Unless the order of stay sought is granted, the Appeal or intended Appeal, were it eventually to succeed, would be rendered nugatory; and*
> *(iii) That it is in the public interest that the order of stay be granted.*

a) Has an arguable appeal been made?

[51] What constitutes an arguable appeal under Article 163 (4) (a) has been succinctly defined in the case of **George Mike Wanjohi v Steven Kariuki & 2 Others** *Sup. Ct. Civil Application No. 6 of 2014* by Tunoi and Ibrahim SCJJ that:

> ***"...an arguable appeal, properly conceived within the meaning of Article 163(4) (a) must be one that elicits cognizable controversies that purely bear constitutional dimension and effect".***

[52] Based on the rival submissions and material presented before us, we have isolated several weighty questions which we think have constitutional dimensions and that on appeal will form the issues for determination before the Court. In effect the applicant's appeal raises the following constitutional questions:

i. *Whether under Rule 32 and 33 of The Elections (Parliamentary and County) Petition Rules, 2013 a recount of votes or scrutiny is a matter*

of right or a basis ought to be shown in an election petition ascertaining compliance with constitutional principles of electoral conduct envisaged in Article 81 and 86 of the Constitution.

ii. *Whether the Court of Appeal can confer electoral jurisdiction, status and powers of an Election Court to the High Court or any judge under Article 105 of the Constitution as read together with Section 85A of Elections Act.*

iii. *Where the High Court has pronounced a verdict on an election petition, can the Court of Appeal assign it further jurisdiction to conduct a recount as has been ordered?*

iv. *Whether the Court of Appeal properly interpreted and applied Articles 87(1) and 105 of the Constitution in remitting and making an order for a recount of votes by the High Court at Nakuru.*

v. *Whether stare decisis established by **Munya** case is bad law and thus ought to be departed from under Article 163 (7).*

vi. *Whether the Court of Appeal erred in shifting the burden of proof contrary to the **Raila Odinga** principle thus violating Article 163(7).*

[53] Having examined the totality of the particularized issues emerging from the filed petition and the application, we are convinced that the appeal raises cognizable and weighty constitutional questions. A case for an arguable appeal has been made.

b) Whether the appeal may be rendered nugatory if interim orders are not granted

[54] We are also of a view that the appeal may be rendered nugatory in the event that the recount process is not stayed and the appeal eventually succeeds. The particulars of the matter at hand are that the Court of Appeal made a specific order for recount of votes for Narok East Constituency subsequent to which the results are to be declared by any judge other than the trial judge in that court. The outcome of such a recount is at the centre of the appellant's

apprehension that an unconstitutional process has been sanctioned which if left to proceed may defeat the purpose of the whole appeal.

[55] We are persuaded that a recount of votes when this appeal is still being pursued before the Court is prejudicial to the applicant and the 2nd and 3rd respondents respectively in that their right to be heard shall have been curtailed once the recount determines the winner and a declaration is made subsequent thereto. In the likelihood of a certificate being issued to another party under Section 86(1) of the Act against a successful appeal, we may have to contend with a wry situation which the Constitution does not envisage. On this account, a need for preservation of the substratum of the appeal tilts in favour of the applicant.

c) Public Interest Consideration

[56] We now proceed to consider whether it is in the public interest to grant the orders for stay in this matter. This Court added this, in its recent decision of ***Munya's case*****,** as a third condition that must be met for stay orders to be granted and held that:

> ***"This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through the Constitution. This Court has already ruled that election petitions are both disputes in personam and disputes in rem. While an election petition manifestly involves the contestants at the poll, the voters always***

have a stake in the ultimate determination of the dispute, hence the public interest.

[57] On the basis of this ruling the matter before us is inevitably one involving a dispute *in rem*. The electorate in Narok East Constituency, predictably, have a stake in the ultimate determination of this matter. The electorate have a legitimate expectation that their validly elected representative shall be known through a proper legal process and law.

[58] The court in weighing the competing claims in ***Munya's case*** was attentive to public interest considerations and the constitutional imperative of good governance, and held as follows:

> ***"Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources."***

[59] Article 201 of the Constitution requires that public funds be utilized in a prudent and responsible way. The objective of prudent and responsible use of public funds in this context cannot permit a simultaneous continuation of the electoral and the judicial processes over the same matter that seeks to resolve the democratic choice of the people of Narok East.

[60] In view of the foregoing we find that the Applicant has made a proper case for grant of interlocutory orders pending the hearing and determination of the appeal. We therefore make the following orders.

E. ORDERS

(i) The applicant's Notice of Motion of 3rd April, 2014 is allowed.

(ii) The 1st Respondent's Notice of Preliminary Objection of 8th April, 2014 is disallowed.

(iii) A stay of execution of the Judgment and consequential Orders of the Court of Appeal sitting at Nairobi in Civil Appeal No. 276 of 2013 of 28th March 2014 be and is hereby stayed pending the hearing and determination of the appeal.

(iv) Costs shall be in the cause.

(v) The parties to appear before the Registrar on 16th May 2014 at 10.00 am with a view to making arrangements for the hearing and disposal of the appeal on a priority basis.

Orders accordingly.

DATED and DELIVERED at **NAIROBI** this **14th day of May, 2014.**

.....	.....
K.H RAWAL	**M.K IBRAHIM**
DEPUTY CHIEF JUSTICE AND VICE-PRESIDENT OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

LUCY NJORA
DEPUTY REGISTRAR
SUPREME COURT