REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

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

PETITION NO. 9 OF 2014

-BETWEEN-

ANAMI SILVERSE LISAMULA .....APPELLANT

-AND-

1. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

2. DAVID LENARUM, RETURNING OFFICER, SHINYALU CONSTITUENCY } **.....RESPONDENTS**

3. JUSTUS GESITO MUGALI M'MBAYA

(Appeal from the Judgement and Order of the Court of Appeal of Kenya sitting at Kisumu (Onyango Otieno, Kiage and Murgor, JJA) delivered on 11th April, 2014 in Kisumu Civil Appeal No. 51 of 2013)

JUDGEMENT

A. INTRODUCTION

[1] This matter emanates from the results declared for the National Assembly Membership elections for Shinyalu Constituency, conducted on 4th March, 2013. The appellant, the 3rd respondent and five others were candidates in that election. The 2nd respondent declared the appellant, Anami Silverse Lisamula, as the winning candidate after garnering 125,563 votes out of the total 260,481

of the total votes cast. The results were gazetted on 13th March, 2013 and the appellant was sworn in on 28th March, 2013 as the Member of the National Assembly for Shinyalu Constituency.

B. BACKGROUND

(i) Proceedings in the High Court

[2] The 3rd respondent challenged the declared results, vide *Election Petition No. 6 of 2013,* in the High Court at Kakamega. The petition was grounded on allegations that:

(i) the election was not conducted in accordance with Articles 81 and 86 of the Constitution;

(ii) the 1st respondent failed to conduct an election that met the requirements of Articles 81, 83 and 88 of the Constitution as a result of which the appellant herein was not validly elected Member of the National Assembly for Shinyalu constituency;

(iii) the 1st and 2nd respondents were bound to adhere to Article 10 of the Constitution, and were bound by the Bill of Rights; they were bound to respect, uphold and defend the political rights of the 3rd respondent herein and of his supporters enshrined in Article 38 of the Constitution;

(iv) the 1st and 2nd respondents failed to properly count, tally and verify the results of the election, hence breaching Article 38 of the Constitution;

(v) the election was vitiated by gross and widespread irregularities and malpractices which fundamentally impugned the validity of the declared results;

(vi) the 1st respondent, with calculated precision and by design, adopted a procedure, policy and an attitude that would ensure that the electronic voter-registration, identification and results-transmission during the election, would fail; hence, it could not hold a free and fair election.

[3] He sought the following orders*:*

(a) The 1st and 2nd respondents were in breach of their constitutional obligations under Articles 10, 81(e), 86, 88 and 101 and under Sections 59, 60, 61, 62, 74, 79 and 82 of the Elections (General) Regulations, 2012.

(b) The 1st and 2nd respondents were guilty of election offences under the Elections Act.

(c) A declaration that the election result showing the appellant herein as the winner in the election, was invalid.

(d) The appellant herein was disqualified from presenting himself as an election candidate due to contravention of the provisions of Section 65 of the Elections Act.

(e) A declaration that the 3rd respondent herein duly won, and was elected as Member of the National Assembly for Shinyalu Constituency.

(f) In the alternative, an order that there be fresh elections for Member of the National Assembly for Shinyalu Constituency.

(g) The costs of the petition be borne by the appellant, 1st and 2nd respondents.

[4] The trial court (*E.K. Ogola J*) delivered its judgement on 4th October, 2013, holding that *it would not be proper to nullify the election due to minor electoral errors and anomalies and in the light of the evidence adduced before it*. The Court issued orders in the following terms:

(i) The appellant herein was validly elected as Member of the National Assembly for Shinyalu Constituency, in a free and fair election.

(ii) The petition was dismissed in its entirety, with costs to the appellant and 1st and 2nd respondents herein.

(iii) The costs of the petition not to exceed Ksh.2 million, out of which the costs to the appellant herein were not to exceed Ksh.1 million, and the costs to the 1st and 2nd respondents not to exceed Ksh.1 million.

(iv) A certificate of determination be issued to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly as provided for under Section 86(1) of the Elections Act.

(ii) Proceedings in the Court of Appeal

[5] The 3rd respondent was dissatisfied with the Judgement of the High Court and filed an appeal at the Court of Appeal at Kisumu, on 4th November, 2013. He premised his appeal on 29 grounds, which the Court of Appeal summarized into the following:

(i) the incident, perpetrators, and effect of violence in the Shinyalu Constituency elections;

(ii) the extent and effect of election offences and/or malpractices;

(iii) the manipulation or misleading of illiterate voters;

(iv) the learned Judge's evaluation of the evidence on record, and the inferences made on witness testimony;

(v) the learned Judge's reliance on a unilateral reconciliation, instead of ordering scrutiny, recount or tallying of votes; and

(vi) the effect of the admitted errors or irregularities.

[6] The Court of Appeal then delineated the following three issues as the central ones in this cause:

(i) the violence witnessed in Shinyalu Constituency, its extent and legal effect;

(ii) the errors, irregularities, malpractices alleged, and whether they affected the result;

(iii) the legal correctness of reliance on a unilateral reconciliation of votes during the hearing, in lieu of the requested scrutiny and recount.

[7] After hearing the representations of counsel considering the submissions filed, and evaluating the authorities tendered, the Court of Appeal delivered its Judgement on 11th April, 2014 setting aside the Judgement of the High Court. The appellate Court thus held:

> ***"The election in question did not conform to the high standards of probity and integrity set out in the Constitution. That non- conformity and non-compliance with the law***

doubtless affected the result of the election. The co-existence of non-compliance effect [sic] on the result must lead to such election being declared void, and we so declare. The judgment of the High Court dated and delivered on 4th October 2013 is accordingly set aside in its entirety. It is substituted by an order that the 3rd Respondent was not validly elected as the member of the National Assembly for Shinyalu Constituency in the election held on 4th day of March 2013. A certificate of this determination is hereby issued to the 1st respondent pursuant to section 86(1) of the Elections Act.

We order that the 3rd respondent shall pay the appellant's costs of this appeal and of the petition at the High Court."

(iii) Proceedings in the Supreme Court

[8] The appellant being dissatisfied with the decision of the Court of Appeal, filed a further appeal before us on 16th April, 2014, together with a Notice of Motion application under certificate of urgency.

[9] The application sought orders for stay of execution of the Judgement and decree of the Court of Appeal, pending hearing and determination of the appeal. The application was heard and this Court, in a Ruling delivered on 3rd June, 2014 granted orders of stay of execution of the Judgement and decree of the Court of Appeal, pending hearing and determination of the appeal.

[10] In the petition, the appellant raised the grounds of appeal (in summary) that the learned Judges of Appeal:

(i) exceeded their jurisdiction under Articles 87(1) and 164(3) of the Constitution, by contravening the provisions of Section 85A of the Elections Act which limits the Court of Appeal to questions of law only;

(ii) exhibited bias against the appellant, contrary to Articles 25(c), 27(1) and 50(1) of the Constitution, by relying on the evidence of the 3rd respondent's witnesses' affidavits without referring to the responses of those witnesses during cross-examination, or to the testimonies of the appellant's witnesses-thereby denying the appellant the right to a fair hearing;

(iii) erred by entertaining the appeal made on behalf of the 3rd respondent, without giving the appellant an opportunity to respond-hence contravening Article 159(2) of the Constitution;

(iv) relieved the 3rd respondent of his legal burden of proof, to the disadvantage of the appellant, by determining questions of fact without evidence-thus abdicating their constitutional responsibility;

(v) erred in law by censuring high-voter turnout, contrary to the spirit of the Constitution expressed in Article 88(4)-thus contravening Article 159(2)(e);

(vi) erred by penalizing the appellant by way of their order for costs, for matters which were solely within the control of the 1st and 2nd respondents;

(vii) erred by disregarding a nolle prosequi issued by the Director of Public Prosecutions;

(viii) contravened Article 163(7) of the Constitution, by ignoring precedents set by the Supreme Court;

(ix) erred by finding that incidents of violence would attract the principle of res ipsa loquitur, and lead to the automatic nullification of an election under Article 81(e)(ii) of the Constitution, regardless of their nature, causation, extent, context, or effect on the polling process; and

(x) conducted proceedings that were a nullity, since counsel for the 3rd respondent did not have a valid practicing certificate at the time he argued the appeal.

[11] The appeal was canvassed before the full bench of this Court on the 10th of June, 2014, the appellant being represented by learned counsel, Mr. Lubulellah and Mr. Mutubwa; the 1st and 2nd respondents by learned counsel, Mr. Mukele, and 3rd respondent, by learned Senior Counsel, Dr. Khaminwa.

C. SUBMISSIONS

(i) Appellant's Submissions

[12] At the onset, the appellant raised two grounds he called critical and opined that if decided in favour of the appellant *in limine,* they will dispose of the entire appeal without the necessity of addressing the other grounds of the appeal.

(a) Lack of jurisdiction?

[13] Firstly, it was argued that neither the High Court nor the Court of Appeal had jurisdiction to hear and determine this matter, as it was filed in contravention of the Constitution. Learned counsel, Mr. Lubulellah cited the

case of ***Hassan Ali Joho & Another v. Suleiman Ali Shahbal & 2 Others****, Supreme Court Petition No. 10 of 2013,* in urging that a petition filed in contravention of the Constitution cannot confer jurisdiction upon a Court.

[14] He submitted that the **Joho** decision has the additional constitutional and jurisdictional importance in its pronouncement that Article 87 (2) of the Constitution applies to the filing of election petitions in a mandatory sense: that election petitions have to be filed within *28 days* after the declaration of election results by the Independent Electoral and Boundaries Commission (IEBC). Counsel submitted that previously, such petitions had proceeded on the basis of Section 76(1) of the Elections Act: that the *28 days* began from the date of publication of the results. However, with the **Joho** decision, which is binding upon all Courts, petitions are to be filed within 28 days of the declaration of results.

[15] Counsel submitted that the petition was filed on 9th April, 2014 which was 7 days out of time. He referred to the Record of Appeal (page 28) showing the petitioner himself averring that he filed his petition on 9th April, 2014. The appellant also cited the case **of *Mary Wambui Munene v. Peter Gichuki King'ara and 2 Others****, Supreme Court Petition No. 7 of 2014,* to buttress his submission that the law has since been settled, and a petition filed in contravention of the timelines set in Article 87(2) of the Constitution is null, and the Court has no jurisdiction to hear and determine the same.

[16] Counsel referred to Articles 2(4) and 3(1) of the Constitution, urging that all persons have to respect, uphold and defend the Constitution. Article 2(4) provides:

> ***"Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid".***

Article 3(1) provides:

> ***"Every person has an obligation to respect, uphold and defend this Constitution".***

[17] Against that background, learned counsel submitted that this petition has no legitimate basis, whether before the High Court, Court of Appeal or this Court. He urged that the petition be dismissed.

[18] As to whether this issue was raised at the High Court and/or the Court of Appeal, counsel submitted that an issue of jurisdiction can be raised at any time, in any manner, and indeed, even by the Court itself - provided only that where the Court raises it *suo motu*, parties are to be accorded an opportunity to be heard. He invoked comparative jurisprudence in support this point: the Nigerian Supreme Court case, ***All Progressive Grand Alliance (APGA) v. Senator Christiana N.D. Anyanwu & 2 other*** *LER [2014] SC. 20/2013*.

[19] The Nigerian Court, in that case, remarked that the issue of jurisdiction is so fundamental to adjudication, that it can be raised at any time, and in any manner, even for the first time on appeal, or even *viva voce*. And the appellant's counsel, in the instant matter, submitted that there was no need for him to file pleadings where an issue of jurisdiction is being raised.

[20] It was the appellant's argument that on this sole ground, this Court should make a finding that there was *no jurisdiction for any Court in Kenya,* to have heard this matter.

(b) Legal representation by an unqualified person?

[21] Secondly, learned counsel urged that legal representation by an unqualified person renders the proceedings in question a nullity, for compromising the constitutional principle of fair hearing, and the rule of law.

[22] Counsel submitted that the proceedings before the Court of Appeal were a nullity, for want of proper legal representation, as the 3rd respondent's learned counsel, Dr. John Mugalasinga Khaminwa, did not have a valid practising certificate at the time he filed the 3rd respondent's written submissions, and argued the appeal before the appellate.

[23] It was contended that as at 14th April, 2014 learned counsel, Dr. Khaminwa did not have a practising certificate. Counsel for the appellant filed a supplementary supporting affidavit, dated 6th June, 2014 in which the Registrar of this Court averred that the Chief Registrar of the Judiciary had confirmed, that Dr. Khaminwa took out a practising certificate on 17th April, 2014. Counsel noted that this appeal in the Supreme Court was filed on *16th April, 2014.*

[24] Counsel submitted that under the Advocates Act (Cap 16, Laws of Kenya), acts of an advocate without a valid practising certificate are not valid in law. He urged that lack of a practising certificate should not be overlooked as being not a *constitutional matter*, as this Court ought to pay regard to statutes made by Parliament, pursuant to the Constitution. He contested the argument that failure

to take out a practising certificate was curable, once this requirement is fulfilled. He submitted that validity of the annual practising certificate takes effect from its date of issue.

[25] The appellant urged that this was not an inconsequential matter, expressing an apprehension that if this Court were to allow Dr. Khaminwa to practise without a practicing certificate, then no one else will take out a practising certificate then no practitioner will be inclined to take out a practicing certificate. This would occasion disarray in the vital profession of advocates.

[26] Counsel cited a number of cases in support of his submission*:* ***Lukas Njuguna S. Karobia v. Consolidated Bank*** *(2005) eKLR*—for the proposition that acts of an advocate who has no valid practising certificate are incompetent, and liable to be struck out. In ***National Bank of Kenya Ltd v. Ayah*** *[2009] KLR 762,* the Court of Appeal held:

> ***"[It] was public policy that Courts should not aid in the perpetuation of illegalities. A failure to invalidate an act by an unqualified Advocate was likely to provide an incentive to repeat the illegal Act; the interests of the innocent party should not be swept under the carpet in appropriate cases…. The innocent party has remedies against the guilty party to which he may have recourse."***

[27] Consequently, counsel urged that the innocent party has a remedy against an advocate whose acts, undertaken without a practising certificate, are invalidated. Counsel also cited ***Obura v. Koome****, (2001) KLR*, and ***Ombogo v. Standard Chartered Bank*** *(2000) 2 EA 481,* urging that it is in the public

interest that acts of an unqualified "advocate" should be held to be a nullity, and an offence, in the terms of Section 34 of the Advocates Act.

[28] On this ground alone, counsel urged that this Court should declare that the 3rd respondent's legal agent's acts and representation, to have been invalid and consequently allow this appeal.

[29] Learned counsel urged this Court to allow the appeal on the first two grounds, but submitted that, were the Court to still entertain the merits of the case, the appeal should still be allowed. And he proceeded to make submissions on the issues of merit.

(c) Other grounds of appeal

[30] Counsel submitted that this Court has recently pronounced itself upon certain concepts bearing certainty, and which would resolve most of the issues herein: in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others****, Petition No. 2B of 2014. On that basis learned counsel submitted as follows.*

a) The appellate Court exceeded its jurisdiction under Articles 87(1) and 164(3) of the Constitution, by contravening the provisions of Section 85A of the Elections Act.

[31] Counsel cited ***Samuel Kamau Macharia v. Kenya Commercial Bank*** *Ltd [2012] eKLR [Supreme Court of Kenya Application No. 2 of 2012] for the proposition* that a Court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Counsel submitted that in this regard, Section

3(7) of the Appellate Jurisdiction Act (Cap 9) clothes the Court of Appeal with jurisdiction:

> ***"to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law".***

Section 3(3) of the Appellate Jurisdiction Act further defines he appellate Court's jurisdiction:

> ***"In hearing an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court".***

[32] It was submitted that *the law applicable to election petitions before the High Court is to be found in the Constitution, the Elections Act, 2011 and the Regulations made under it.* And the law which provides for appeals from the High Court *in an election petition* is *Section 85A of the Elections Act*, which limits that appeal to *matters of law only*.

[33] Counsel contended that the learned Judges of the Appeal appeared to have laid out the law correctly, as to which matters are of *fact* and which are matters of *law*. However, they then, in apparent mis-direction, proceeded to craft and open the ground for the avoidance of unambiguous jurisdictional limitation of Section 85A of the Elections Act. They embarked upon an evaluation of the evidence on record, it was submitted, in an apparent fault—finding inclination, designed to replace the trial Judge's findings on matters of fact; with their own conclusions on those matters of fact; and they justified their actions on the basis of alleged contraventions of law by the trial Judge. It was urged that the appellate Judges had questioned the correctness of the trial Judge's

determinations on matters of fact— which they lacked jurisdiction to do, under Section 85A of the Elections Act.

[34] The appellant submitted that the course of action by the appellate Court was in excess of jurisdiction, and was prejudicial to the appellant. It was urged that the appellate Court had ignored its own precedent, in ***Sumaria & Another v. Allied Industries Ltd*** *[2007] 2 KLR 1,* to the effect that even in ordinary civil appeals, the Court of Appeal could only interfere with the decision of the High Court on a finding of fact where: *it was based on no evidence; it was based on a misapprehension of the evidence; and the Judge was shown demonstrably to have acted on the wrong principles in reaching the finding he did.*

[35] It was contended that the learned Judges of Appeal treated the matter as if the same was an *ordinary civil appeal* to which the *Elections Act* does not apply. It was urged that such an approach undermined Section 85A of the Elections Act, because all errors of fact, would then amount to errors of law. Thus in effect, counsel urged, the appellate Court had defeated the clear intention of the legislature *to bring matters of fact to finality at the High Court*.

[36] Counsel submitted that the ***Munya case*** has defined what constitutes a "matter of fact" and a "matter of law" and that the Court of Appeal, by entertaining the appeal squarely on facts, substituted its findings on facts for those of the trial Court, thus cont ravening the law. By contravening Section 85A of the Elections Act, counsel urged the Court ignored the purpose and spirit of the Constitution. Learned counsel urged further, that the appellate Court had ignored the evidence of the appellant while admitting that of the 3rd respondent, without question. He submitted that the appellate Court had contradicted the

evidence on record, in justifying their decision to make a finding prejudicial to the appellant.

b) Articles 25(c), 27(1) and 50(1) of the Constitution [right to fair trial]: Bias against the appellant?

[37] The appellant submitted that the Judges of Appeal considered matters that were extraneous to the appeal before them, and exhibited open bias against him. He contended that the Judges had predetermined the appeal, and were now merely seeking the faintest shred of vindication.

[38] On the basis of the evidence before him, the trial Judge had found that the appellant was not at the scene of the attack in issue. However, the appellate Court held that the trial Judge had erred in making this finding **of fact**, and that the appellant was at the scene of the crime of damage to a vehicle. Learned counsel urged that it was the trial Court that saw and heard the witnesses, regarding the attack and the damage caused; and that the appellate Court had no basis for the re-calibrating that evidence and arriving at a new conclusion.

[39] Counsel further submitted that the learned Judges of Appeal had considered matters with no supporting evidence on record, when they remarked that:

> ***"Every five years reason and amity seem to depart and orgy or hooliganism, arson, assault, intimidation, displacement and murder rule in a short season of madness..."***

[40] Counsel urged that there was nothing to show that the situation prevailing in Shinyalu Constituency had been as grave as was portrayed by the appellate Court; Section 160 of the Evidence Act (Cap. 80 Laws of Kenya), indicate matters in respect of which the Court may take judicial notice, and the Court's observation did not relate to such.

[41] It was urged, as a sign of bias, that the appellate Court Judges had closed their minds to the submissions made by the appellant and the 1st and 2nd respondents: and that this led to a contrived evaluation of the evidence on record, relying on the evidence adduced for the 3rd respondent (petitioner), while disregarding the evidence for the appellant and the 1st and 2nd respondents. The Court of Appeal had ignored the proceedings taken at the scene of violence by the trial Court, yet it dismissed the trial Court's findings on the relevant issues.

[42] It was urged, that the learned Judges of Appeal had breached the constitutional principle of judicial impartiality, by assuming that the appellant was at the scene of crime or was involved in the attack, without any evidence that he directed or ordered the attack.

[43] Learned counsel submitted that the issue of scrutiny had not been a ground of appeal, yet the Judges of the Appeal raised it *suo motu,* and that this was a clear manifestation of bias: for a party cannot plead one case, but prove another.

[44] Counsel invoked the Court of Appeal decision, ***Mahira Housing Co. Ltd v. Mama Ngina Kenyatta & Another (Suing As Trustees of Waunyomu Ngeke Rach)*** *[2008] KLR 31*, in support of the proposition that where a witness has a direct interest in the outcome of a case it is incumbent

upon those calling that witness, to call other evidence to confirm the testimony given. Counsel submitted that the said Court of Appeal decision had been presided over by Mr. Justice Onyango Otieno, who also presided over this matter at the Court of Appeal; but that the later bench disregarded the precedent in the **Mahira Housing case** in respect of the evidence of one Mr. Shijenje (PW1) — a party with special interest in the case. Counsel also sought to persuade this Court to refer to the Supreme Court of India's case, ***D. Venkata Reddy v. R. Sultan & Others*** *[1976] AIR 1599,* in which it was held that allegations of corrupt practices (like electoral violence), being in the nature of a quasi-criminal charge, must be proved beyond reasonable doubt.

[45] With regard to standard of proof, learned counsel submitted that this Court, in the **Raila case,** had stated that the primary onus rests on the petitioner, and that the respondent need not say anything unless a prima facie case is made out against him. It was contended that, the Court of Appeal quite to the contrary, perceived as evidence the rumours that the 3rd respondent had died and on that basis, an election was nullified.

[46] Counsel urged that much as all violence in elections is censurable, not every incident of violence must lead to the annulment of an election; and that the case in hand was one of people fighting along the road, and not in a polling station. In view of the fact that violence is a criminal offence, to be pursued on its own, counsel submitted that the Court of Appeal fell into error, in its opinion that:

> ***"From the Record, it would seem that the electioneering period in Shinyalu was marked by episodic and sporadic cases of violence."***

[47] It was submitted, that appellate Court was wrongly persuaded to believe, as a matter of fact, that there had been widespread violence in Shinyalu during the election; such was an error of fact and law on the Court's part, as its conclusion had been reached in the absence of evidence, and/or in contradiction of the evidence on record. Counsel submitted that the evidence on record indicated that polling was peaceful; and elections opened and closed in all polling stations without incident. This is evidence, it was urged, which the learned Judges either ignored, or avoided.

[48] It was also submitted that the Court of Appeal fell into error by denigrating high voter turn-out contrary to the electoral spirit acclaimed in Article 88(4) of the Constitution. Consequently, counsel urged, the Court failed to protect and promote the purpose and principles of the Constitution, contrary to the obligation prescribed in Article 159(1).

[49] Lastly the appellant urged that the appellate Court had erred, in disregarding a *nolle prosequi* instrument issued by the Director of Public Prosecution (DPP), and that the DPP is a constitutional office under Article 157, with the mandate to terminate any charges against the appellant or anyone else. Counsel contested the basis of the Court's stand, urging that the Court had made factual findings with regard to elements which were the subject matter of a *nolle prosequi, thus holding* the appellant culpable, while ignoring the DPP's decision.

[50] Counsel submitted that the appellate Court erred in penalising the appellant in costs for matters which were solely within the control and mandate of the 1st and 2nd respondents as managers and supervisors of elections, and prayed that the appeal be allowed with costs.

(ii) The 1st and 2nd Respondents' Case

[51] Learned counsel for the 2nd and 3rd respondents, Mr. Mukele supported the appeal and sought to adopt the appellant's submissions. He filed written submissions on 9th June, 2014, articulating his responses to eight issues for determination.

(a) Submissions on the question of jurisdiction: Submissions

[52] On the question whether the Court of Appeal had the jurisdiction to hear and determine the appeal, in view of the provisions of Article 87 of the Constitution, and section 77(1) of the Elections Act, it was submitted that the petition was filed contrary to Article 87(2). Counsel submitted that the election results, the subject of the petition in this matter, were declared on the *5th March, 2013* and the petition filed on the *9th April 2013—well outside* 28 day period provided for by Article 87(2) of the Constitution.

[53] Counsel referred this Court to the ***Joho*** and ***Mary Wambui cases,*** and urged that petitions filed contrary to Article 87(1) of the Constitution were a nullity. Counsel urged that in the **Mary Wambui** case, this Court affirmed its finding in the **Joho** case. The 1st respondent, by contrast, had urged that: he *had filed the petition on the strength of a law that had been enacted by Parliament; and the issue of nullity of the initial petition had not been raised by any of the parties in the Court of Appeal, and consequently could not be raised in the Supreme Court as a jurisdictional point.*

[54] Counsel urged that this Court, in the ***Mary Wambui*** Case, underlined the need for certainty, predictability and uniformity in the application of the law. Counsel urged that such a position be maintained by this apex Court.

Counsel also cited ***Paul Posh Aborwa v. the Independent Electoral and Boundaries Commission and Two Others***, which was cited by this Supreme Court in the **Mary Wambui Case** when we held:

> ***"The result of the forgoing 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."***

[55] Counsel urged that this appeal be struck out, as being a nullity for having been filed outside constitutional timelines.

(b) The Practising Certificate and the conduct of cases in Court

[56] As regards the 3rd respondent's advocate's failure to take out a valid practising certificate at the time of arguing the appeal before the appellate Court, it was submitted that it rendered the proceedings a nullity, and in violation of the rights of the appellant, and the 1st and 2nd respondents, under the provisions of Article 50(1) of the Constitution. Counsel referred to Sections 2, 9, 21 31 and 34 of the Advocates Act Chapter 16 Laws of Kenya. Section 9 provides:

> ***"Subject to this Act, no person shall be qualified to act as an advocate unless–***
>
> ***(a) he has been admitted as an advocate;***
> ***(b) his name is for the time being on the roll ; and***
> ***(c) he has in force a practising certificate;***

And for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60 (4)".

Section 21 thus provides:

"The Registrar shall issue in accordance with, but subject to, this part and any rules made under this Act certificates authorizing the advocates named therein to practice as advocates".

And Section 31 provides:

"(1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.

"(2) Any person who contravenes subsection (1) shall—

(a) be deemed to be in contempt of the court in which he so acts or which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and

(b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and

(c) in addition, be guilty of an offence".

[57] In light of the above provisions of the Advocates Act, it was submitted that the 3rd respondent's advocate was in contempt of Court, and had committed a crime, in prosecuting the electoral-dispute proceedings. Such a state of affairs, it was urged, constituted a breach of the appellant's right to a fair hearing, as protected in Article 50 (1) of the Constitution. Counsel submitted further, that lack of a practising certificate by 3rd respondent's counsel was a breach of procedural fairness and, as such, a breach of the appellant's right to fair hearing, which right is protected under Article 50 (1) of the Constitution.

[58] Counsel urged the Court to find that the proceedings conduct by the 3rd respondent's advocate were a nullity, and that the 3rd respondent, as an individual, has a remedy against the advocate. Counsel submitted that if such proceedings are allowed to stand, no advocate will in future, consider himself or herself obligated to hold a take out a practising certificate. Counsel urged the Court to find that this to be a larger issue touching on the entire legal fraternity, and bearing upon public policy and the interest.

[59] Counsel relied upon the case of ***National Bank of Kenya v. Wilson Ndolo Ayah*** *Civil Appeal Number 119 of 2002* in which the Court of Appeal held that allowing acts by an unqualified advocate to stand would perpetuate an illegality, and that the innocent party has remedies against the guilty party. Also cited was the Ugandan case of ***Professor Syed Huq v.Vslamic University of Uganda,*** *Uganda Civil Appeal Number 47 of 1995,* in which the Supreme Court of Uganda held that:

> ***"On the law and the authorities I have referred to, the position appears to be:***

1. ***That an advocate is not entitled to practise without a valid practising certificate.***

2. ***That an advocate whose practising certificate has expired may practise as an advocate in the months of January and February but if he does so he will not recover any costs through the courts for any work done during that period. The documents signed or filed by such an advocate in such a period are valid.***

3. ***That an advocate who practises without a valid practising certificate after February in any year commits an offence and is liable to both criminal and disciplinary proceedings. The documents prepared and filed by such an advocate whose practice is illegal, are invalid and of no legal effect on the principles that courts will not condone or perpetuate illegalities."***

[60] To support the submission that the Court of Appeal proceedings should be declared a nullity, Counsel cited the **Mary Wambui decision** in which the ***Macfoy v United Africa Co. Ltd (1961) 3 All E.R*** was quoted as follows:

> **"If an act is void, then it is law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad, you cannot put something on nothing and expect it to stay there it will collapse."**

(d) The merits of the appeal: Submissions

[61] Counsel submitted that the Court of Appeal had exceeded its jurisdiction, by delving into matters of fact as opposed to matters of law, in contravention of the Constitution, and Section 85 A of the Elections Act. It was submitted that despite the Court of Appeal properly, appreciating its jurisdiction under Section 85A of the Elections Act, which limited it to matters of law only, the Court exceeded this jurisdiction, by delving into matters of fact, founding its determination on the following matters:

> *the violence witnessed in Shinyalu Constituency, its extent and legal effect;*
>
> *the errors, irregularities, and malpractices alleged, and whether they affected the results; and*
> *the legal correctness of the learned Judge's reliance on a unilateral reconciliation of votes cast during the hearing, in lieu of the requested scrutiny and recount.*

[62] Counsel cited examples of delving into issues of fact, by the appellate Court: the evaluation of the evidence relating to RW-4 (Alexander Alukwe) and RW-5 (Hillary Shimenga) (at pages 7 and 8 of the judgement); the alleged attack on the appellant's sons while returning from a funeral meeting (at page 8 of the judgement); the violence that occurred on the night of the 3rd and 4th March, 2013 (at pages 8 to 14 of the judgement); the conclusion that the attackers were riding in two vehicles one of which was readily traceable to the 3rd respondent's campaign; the application of the doctrine of *res ipsa loquitur* (plain fact: "the thing speaks for itself"). Counsel urged that this doctrine is not applicable where facts are disputed.

[63] Learned counsel submitted that this Court, in the ***Munya*** Case, had comprehensively and interpreted the provisions of Section 85A of the Elections Act (paragraph 82) as follows:

> ***"Flowing from the guiding principles it follows that a petition which requires the appellate Court to re-examine the probative value of evidence tendered at the trial court or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses ought not to be admitted. We believe that this principles strike a balance between the need for an appellate court to proceed from a position of deference to the trial judge and the trial record on one hand and the trial judge's commitment to the highest standards of knowledge, technical competence and probity in electoral dispute adjudication, or the other hand."***

[64] Also cited were the cases of ***Republic v. Malabanan G.R*** *No. 169067, October 632 SCRA 338, 345* citing the case of ***Leancio v. De Vera G.R.*** *No. 176842, 546 SCRA 180,184* and ***New Rural Bank of Guimba v. Femina S. Abad and Rafael Susan*** *G.R No. 161818 (2008)* all quoted and referred to in the **Munya** Case.

[65] Counsel submitted that the appellate Court had exhibited bias in relying solely on the evidence of the 3rd respondent and his witnesses, while disregarding the cross-examination of the said witnesses, and also disregarding the testimony of the appellant's witnesses. Counsel cited instances in which, in his perception, the Court of Appeal exhibited bias by failing to consider the evidence of the 2nd respondent. He cited the case of Mukumu Boarding Primary School polling station, in respect of which the Court of Appeal failed to evaluate

and assess the evidence of the appellant, and the 1st and 2nd respondents, on the issue of the agents of the 3rd respondent being denied access and also failed to consider the evidence of RW1 and PW7 in relation to Mukumu Girls Boarding School polling station.

[66] It was counsel's submission that the appellate Court evaluated, and made findings in respect of the allegations of violence on the basis of evidence of PW1, PW4 and PW5, without evaluating and assessing the evidence of the appellant, the 1st and 2nd respondents and their witnesses, and without considering the visit to the scene of the alleged violence by the trial Court.

[67] Counsel urged that the Court of Appeal failed to consider the cross-examination, and the evidence of 1st and 2nd respondents in respect of the ownership and value of the Range Rover motor vehicle that was the subject of the violence. Mr. Mukele argued that by finding that PW4 had an important role in controlling the said motor vehicle, when there was no evidence to that effect, the appellate Court exhibited bias, which rested upon error in the application of the doctrine of *res ipsa loquitur*.

[68] Learned counsel urged that the Judges of Appeal failed to evaluate evidence relating to pleadings, and the testimony of witness called by parties, but had faulted in faulting the decision of the Election Court to dismiss the application for scrutiny. Counsel submitted that the issue of scrutiny was not raised by the parties, and did not form part of the appeal; he urged the Court to look at the Memorandum of Appeal filed in the Court of Appeal. It was his submission that the Court of Appeal raised this issue on its own motion, and made a finding upon it, in favour of another party— and that this was a signal of bias.

[69] Counsel submitted that the Court of Appeal erred by deprecating high voter turnout, contrary to the spirit of Article 88(4) of the Constitution— and thereby failed to protect and promote the purpose of principles of Constitution, contrary to the provisions of Article 159(2). It was submitted that the Constitution envisages a first-past-the-post system, and that in order for an election to be annulled on ground of voter turn-out, one is obliged to show how such turn-out affected or compromised the result. He cited the **Munya Case,** in which this Court observed that an election is not to be annulled except on cogent and ascertained factual premises, and not without a clear demonstration of how the final statistical outcome had been compromised.

[70] It was submitted that the appellant had failed to demonstrate how the Court of Appeal erred in penalising him in costs, for matters which were solely within the control of the 1st and 2nd respondent, as the managers and supervisors of elections. Counsel relied on Section 84 of the Elections Act which thus provides:

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

[71] As to whether the learned Judges of Appeal erred by disregarding a *nolle prosequi* issued by the DPP, in accordance with his mandate under Article 157 of the Constitution, counsel contended that the learned Judges of the Court of Appeal neither evaluated nor considered the issue of violence in the Judgement, and no findings were made on the same, the Court only making the remark:

> **"It would seem that an attempt was made at a later date to enter a *nolle prosequi* in favour of the 3rd respondent but the appellant's counsel has vehemently asserted that the said**

attempt is of no legal effect for non-compliance with the requirements of Article 157 of the Constitution."

[72] Counsel submitted that the learned Judges of Appeal contravened Article 163(7) of the Constitution, by overlooking precedents set by the Supreme Court. It was his submission that the Court of Appeal erred in failing to apply the principle on burden of proof and standard of proof, as set down in the ***Raila*** Case. It was urged that the Court of Appeal, in attempting to evaluate evidence, failed to address itself to the standard of proof required, in proving allegations of violence in particular, and in proving election petitions in general. In conclusion, Counsel urged the Court to allow the appeal as prayed.

(iii) 3rd Respondent's Submissions

(a) The practicing certificate, and he conduct of proceedings in Court

[73] Learned Senior Counsel Dr, Khaminwa urged that we adopt a broader approach in determining the issues raised. He submitted that he has in his lifetime, engaged in no occupation except practicing law; and in these circumstances, this Court should determine whether the call for an annual practising certificate was justified. He called upon the Court to apply the principle of proportionality, and consider whether the practising certificate should be taken out periodically, for instance, after five years. In counsel's general opinion, the requirement for the annual certificate offends the Constitution.

[74] Counsel contended that the letter from the Chief Registrar of the Judiciary confirming when he took out his practising certificate was not admissible, as he

had not been given a chance to cross-examine the CRJ. He argued that the letter, dated 4th of June, 2014 should have been presented to the High Court or Court of Appeal so that he can cross-examine upon it.

[75] Counsel, submitted that his legal practice have he protection of he Constitution, even though the Constitution contained no specific reference to professional bodies and heir safeguards. He invoked the comparative experience, citing Article 22 of the Constitution of the Republic of South Africa, 1996 which provides:

> ***"Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law'.***

And he cited Article 12 of the Basic Law of the Federal Republic of Germany, which provides:

> ***"11. Occupational freedom. - All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law".***

[76] Learned counsel, invoked no specific law, but raised general principle: that an innocent party should not be made to suffer. He cited the case of ***Kajwang' v. Law Society of Kenya, (2002) 1 KLR,*** where it was held *inter alia* that: t*here is no specific legislation declaring proceedings conducted by an unqualified advocate null and void; in the absence of legislation, common law applies; proceedings are not invalidated merely by reason of the advocate of one of the parties being unqualified; the client cannot be made to*

suffer for the mistake of the advocate; the object of the penalties for practising without a licence, is to punish the unqualified advocate, and not the litigant.

[77] Senior Counsel, Dr. Khaminwa submitted that the issue was being raised for the first time at the Supreme Court: it was not raised in the High Court nor in the Court of Appeal. He submitted that under Article 163(4) of the Constitution, one has no direct access to the Supreme Court. Hence, by directly lodging the question before the Supreme Court, this Court is being denied the benefit of the reasoning of the lower Superior Courts. Counsel sought to distinguish the **Mary Wambui Case**, where an issue raised at the Supreme Court for the first time determined the matter. Counsel argued that the **Mary Wambui Case** is not an applicable precedent, as it was specific to that time, and was decided the material that was on what was before the Court.

[78] Counsel submitted that there was no prejudice suffered by any party. He sought to take refuge in the Judgement of the Court of Appeal, now under appeal, to urge that the learned Judges of Appeal had acknowledged his experience, competence and industry when they opined, *"we have read the written submissions of able Counsel".*

[79] Dr. Khaminwa cited the Ugandan Supreme Court cases, ***Prof. Syed Huq v. The Islamic university in Uganda,*** *Civil Appeal No. 1995,* where Chief Justice Wambuzi remarked that there is a grace period for taking out a practising certificate, when the year ends: a few months, before one gets ones new practising certificate, This, counsel urged, was a reasonable consideration, which this Court should adopt.

[80] Lastly, counsel asked for a broad interpretation of this concept, on the basis that the law was still developing, and in certain jurisdictions, even non-lawyers were being accorded audience in the Courts, and indeed, even law students were being allowed to handle certain small-scale matters. *Counsel did not, however, present to the Court any evidence or material, in support of such a case, whether scholarly or judicial.* Counsel argued that *amici* are non-advocates, who possess legal knowledge in some special areas of the law, and have audience in courts. He wondered why in Kenya, a teacher of law at the university can be allowed to serve as a Judge, or as Attorney-General, yet he or she cannot appear in Court unless he or she has a practising certificate. This in learned counsel's opinion is discriminatory.

[81] Counsel contended that, given his vast experience in law, it would be illogical for him to be called unqualified, yet he has been awarded an honorary doctoral degree by an international University, in recognition of his work; and the professional body charged with regulating the legal profession, the Law Society of Kenya, has recently placed his name on the Honours list.

(b) Was the appeal time-barred, at the time of lodgment?

[82] The Constitution, in Article 87(2), provide for timely filing of election petitions, within 28 days after the declaration of election results by the Independent Electoral and Boundaries Commission (IEBC). Counsel argued that IEBC was a body corporate, and not the chairperson, and or an individual. Hence, it is for that agency to make the results-declaration in the official Gazette; and that if it was intended that the Returning Officer was the one to make the declaration, the Constitution should have indicated so.

[83] Counsel contended that in this case, there were four (4) set of results, and what the Returning Officer was announcing was just one set; this argument has been set out by the 3rd respondent in his written submission at (page 25), thus arguing:

> *"We submit that there was uncertainty in the results as announced by the 1st and 2nd respondents which is sufficient to impair the validity and declaration of the results as announced by the 1st and 2nd respondents.*
>
> *...*
>
> *We submit that there exist two sets of results in Form 36 both emanating from the 1st and 2nd respondents. In the same Form the Petitioner has been credited with two final results: 14,251 and 14, 061. The 3rd respondent has also been credited with two final results: 15,109 and 15, 102."*

[84] Consequently, it was his submission that the official results could only be known upon the publication of the official Grazette. Hence, the petition was filed within time after the gazettement of the results.

(c) Other grounds of appeal: Submissions

[85] As regards the merits of the appeal, counsel sought to rely on the written submissions filed on the 6th June, 2014, and the bundle of authorities on record. From the onset, counsel urged this Court to take note of the several High Court and Court of Appeal decisions on situations of violence, and to also take into consideration the post-election violence of 2007. Learned Senior Counsel submitted that the Court of Appeal decision was sound, and the Supreme Court should subsume it in further orders conveying the message that "political violence was no longer tolerated in our electoral process".

[86] As to whether the Court of Appeal exceeded its jurisdiction, counsel submitted that Section 85A of the Elections Act was "inconsistent with the Constitution" in so far as it purports to limit the jurisdiction of the Court of Appeal in appeals from the High Court, in election petitions, *to matters of law* only. This limitation, counsel urged, was contrary to the "right to a fair election", envisaged in Article 38 of the Constitution, and the general principles of the electoral system signaled in Article 81. It was the 3rd respondent's submission that electoral disputes before a court hearing an election petition, should be resolved in a fair hearing by considering both matters of fact and law, as the electoral process is both a legal and factual process.

[87] With regard to the allegation of bias on the part of the Court of Appeal, it was the 3rd respondent's submission that the mere mention of bare evidence from appellant's affidavit, would not give a cogent basis for a claim of bias. To portray his perception of bias, learned counsel resorted to the words of Lord Denning, MR in the English case ***Metropolitan Properties Co (FGC) Ltd v.s Lannon & Others*** *[1969] 1 QB 577*:

> **"That being the position as I see it, when the courts in this country are faced with such proceedings as these, [i.e. proceedings for the disqualification of a judge] it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. <u>The test is objective and the facts constituting bias must be specifically alleged and established</u>. It is my view that where any such allegation is made, the Court must carefully scrutinize the affidavits on either side, <u>remembering that when some litigants lose their</u>**

cases before a Court or quasi-judicial tribunal, they are unable or unwilling to see the correctness of the verdict and are to attribute that verdict to a bias in the mind of the judge, magistrate or tribunal."

[88] He also cited ***The President of the Republic and Two Others v. South African Rugby Football and Three Others, Case CCT 16/98*** which dealt with the test of bias: *"the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case... An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for [a recusal] application."*

[89] Hence, it was submitted that the appellant was given a fair hearing, and a reasonable opportunity to file his pleadings and make both written and oral submissions. It was urged that the appellant's counsel did not raise any issue of bias before the superior Courts, and that the allegations now being raised are of a general nature, lack specificity, and are not precisely pleaded.

[90] Dr. Khaminwa submitted that there had no reprobation ion of high voter turn-out, as alleged by the appellant. He submitted that despite high voter turn-out, the will of the people can only be expressed in elections guided by the principles and provisions of Article 38(2) of the Constitution. He contended that the Court of Appeal can interfere on matters of fact, where there is a misapprehension of fact, by a High Court Judge who has made erroneous inferences, and drew wrong conclusions of fact.

[91] Counsel cited the Indian Supreme Court case, ***Kalyan Kumar Gogoi v. Ashutosh Agnihotri & Another, Civil Appeal No. 4820 of 2007,*** that Court considered a claim that change of a polling station had resulted in low voter turn-out:

> ***"... all the voters do not always go to the polls. Voting in India is not compulsory, and therefore, no minimum percentage of voters has been prescribed either for treating an election in a constituency as valid or for securing the return of the candidate at the election. The voters may not turn up in large numbers to cast their votes for variety of reasons such as agitation going on in the State concerned on national and/or regional issues or because of boycott call given by some of the recognized State Parties, in the wake of certain political developments in the state or because of disruptive activities of some extremist elements etc. It is common knowledge that voting and abstention from voting as also the pattern of voting, depend upon complex and variety of factors, which may defy reasoning and logic."***

[92] Learned counsel submitted that the will of the people is given effect by conducting elections guided the principles and provisions of Article 38(2) of the Constitution.

[93] As regards the contention by the appellant, that the appellate Court erred in penalizing the appellant in costs, for matters which were solely within the control of 1st and 2nd respondents, it was submitted that this is an admission by the appellant that there were indeed irregularities and/or errors in the results,

and it is merely being suggested that such errors "are ascribable to the 1st and 2nd respondents' conduct of the Election pursuant to their mandate under Article 88 of the Constitution", so, they, fell into grave error by ultimately condemning the petitioner to pay costs.

[94] On scrutiny, it was submitted that the 1st and 2nd respondents introduced the evidence that resulted in the 3rd respondent applying for scrutiny, and so it cannot now be claimed that the 3rd respondent had no basis for the application, or that the said application was improper. Counsel invoked he Nigerian case, Dr**.** ***John Oluka Olukayode Fayemi v. Olesegun Adebayo Oni & The Independent National Electoral Commission Others,*** *Nigeria Court of Appeal No. Ca/II/Ep/Gov/25/2008*, in which the following passage appears:

> ***"When the evidence of a witness supports the case of his opponents against whom he purports to give evidence, the opponent can take advantage of the evidence to strengthen his case."***

[95] It was submitted that the argument against scrutiny by the appellant was properly dealt with by the appellate Court, which rightfully held: "*that learned judge's rejection of the same and placing reliance on unilateral reconciliations by the Returning Officer constituted a reversible error of law and so we hold".*

[96] Counsel urged the Court of Appeal decision was based on the effect of violence witnessed in Shinyalu Constituency, its extent, and legal the effect. It was submitted that the appelate Court erred by disregarding a *nolle prosequi,* cannot be sustained; for the Court considered the issue of the appellant's involvement in the violence that gripped the constituency on the eve of the

election, and appraised the decision of the High Court Judge, as based on the facts presented. Counsel submitted that the appellate court found the trial Judge to have been wrong —and so it rectified the error.

[97] In conclusion, learned counsel urged this Court to make a finding that the Judgement and order of the Court of Appeal being appealed against herein ,correctly concluded that the elections conducted in Shinyalu "did not meet the threshold pronounced in Article 81(e)(ii) and (v) of the Constitution" and so, it was urged, this Court dismisses the appeal with costs.

(iv) Appellant's Reply

[98] Learned counsel, Mr. Lubulellah, submitted that the appellant did not condone violence, and was not at the scene of the violence; and so, the Court should not, in the name of curtailing violence, punish an innocent party who has not been shown to have participated violence.

[99] With regard to the submission (in relation to IEBC under Article 87 (2) of the Constitution) that IEBC was a body corporate, counsel submitted that IEBC was a constitutional body, and the Returning Officer is its employee— hence his actions are the actions of the IEBC. He submitted that counsel for the 3rd respondent had was attempted to take the Court back to the position to its decision in **Joho,** yet the law is now settled and it is not for re-opening, as there has been change of circumstances warranting such a move.

[100] The appellant contested the claim that there were four sets of results in the election; he wondered just which result the 3rd respondent (the petitioner in

the High Court) had challenged. And his answer was, the results of 5th March, 2013. These are the results that this Court has to consider.

[101] With regard to Dr. Khaminwa submissions on lack of a valid practising certificate, Mr. Lubulellah while acknowledging Dr. Khaminwa's contribution to the profession, urged that the law as it stands, applied to both senior and junior counsel, and is not intended to differentiate in favour of individuals. Section 30 of the Advocates Act, gave a grace period of January to February, but even this had not been adhered to in this case.

[102] n the issue of cross-examining the Chief Registrar, counsel submitted that Senior Counsell, Dr. Khaminwa, had obtained leave to file further documents, but he chose not to file an Learned counsel urged that there was no was no need to call the CRJ in person, as she had responded by a letter in her official capacity.

[103] Finally counsel sought to distinguish the **Kajwang' Case,** submitting that it was no longer good law, and that it was a High Court decision of 2002; an that, thereafter, the Court of Appeal has re-stated the law, in the **Ndolo Ayah Case**.

(v) Issues for Determination

[104] Two specific issues were argued upfront, and are to be considered in the first place, as then may dispose of the other questions. These are:

(a) whether the petition at the High Court was filed out of time, and whether the proceedings at the High Court and the Court of Appeal were a nullity ***ab initio*** *for being in contravention of Article 87(1) of the Constitution.*

(b) whether the proceedings at the Court of Appeal were a nullity for being conducted by an 'advocate' without a valid practising certificate.

D. ANALYSIS AND DETERMINATION

(i) ***Whether the petition at the High Court failed to meet the timeline stipulated in Article 87(2) of the Constitution, thus being*** *void ab initio.*

[105] It is common ground by all the parties, fortified by the record in this appeal, that the results of the election contest for the Shinyalu Constituency National Assembly seat were declared by the 2nd respondent, **Daniel Lenarum, the Returning Officer,** on **5th March, 2013**. The Petition challenging these results was filed on **9th April, 2013** in the High Court. This was *35 days* after the date of the declaration of the results.

[106] The constitutional principle of timely disposal of election petitions is found in Article 87(2) of the Constitution, which provides:

> ***"Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission."***

[107] Article 87(1) of the Constitution decrees that Parliament was to enact legislation to ensure timely settlement of election disputes. On this basis, the Elections Act, 2011 was passed, bearing Section 76(1) (a), which provided that such a contest should be lodged within 28 days of the gazettement of the results. There arose an apparent discord in the constitutional provision and the statutory provision. This discord was brought before this Court for settlement.

[108] This Court then pronounced itself on the meaning of "declaration of results", in the case of ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & Two Others***, *Supreme Court Petition No. 10 of 2013*; [2014] eKLR. In that case, the sole issue for determination was *whether Section 76(1)(a) of the Elections Act was unconstitutional, for being inconsistent with Article 87(2) of the Constitution.* Determining that the declaration of results is done by the officials of the electoral body, through the various Forms prescribed by the Elections Act, and that Section 76(1)(a) was a nullity, this Court held that the "declaration of results" occurs in three stages: at the *polling station,* when the Presiding Officer completes the *Form 35*, at the *Constituency tallying centre* ,where the Returning Officer for the constituency completes the *Form 36;* and at the *County tallying centre* where the County Returning Officer completes the certificate in *Form 38.*

[109] The Court further held (at paragraph 65) that:

> ***"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. <u>Based on the principle of efficiency and expediency, therefore, the time within which a party can</u>***

challenge the outcome of the election starts to run upon this final discharge of duty by the returning officer"(emphasis supplied).

[110] With regard to declaration of results, this Court held (at paragraph 72) that:

> *"[T]he 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" [emphasis supplied].*

[111] This finding by the Court means that the period of 28 days, within which a person challenging the validity of declared results is required to file a petition before the High Court, *starts to run from the day the Returning Officer issues the winning candidate with the certificate in Form 38, but not from the day the results are published in the Kenya Gazette.*

[112] It should be noted that in the **Joho Case**, the sole issue before this Court was the *determination of the constitutionality or otherwise of section 76(1) (a) of the Elections Act.* Hence, once the Court made its declaration, its task was complete; and any question of applicability would abide the passage of time. The Court of Appeal very well reflected this position when it determined an appeal in ***Suleiman Said Shahbal v. The Independent Electoral and Boundaries Commission and Three Others,*** *Civil Appeal No. 42 of 2013,* thus*:*

"The judgement of the Supreme Court, however, did not address the issue of competence or otherwise of this appeal, because the Supreme Court advisedly and deliberately, in our view, restricted itself to the issue before it which was the interpretation of the Constitution, as mandated by Article 163(4)(a) of the Constitution."

[113] The Court of Appeal was called upon to apply the principle in **Joho,** in the main petition before it in ***Suleiman Said Shahbal v. The Independent Electoral and Boundaries Commission and Three Others,*** *Civil Appeal No. 42 of 2013*. The appellate Court dismissed that petition in the following terms:

"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 preeminence of the Constitution in the hierarchy of legal norms…"

"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."

[114] With this pronouncement, the Court of Appeal had set the tone on the applicability of the declaration of Section 76(1)(a) of the Elections Act as being unconstitutional. This decision was later cited with approval by the Supreme Court.

[115] Subsequently, and before the same question presented itself before the Supreme Court, another decision of the Court of Appeal was made in ***Paul Posh Aborwa v. Independent Electoral and Boundaries Commission and Two Others,*** *Civil Appeal No. 52 of 2013*. The Court of Appeal held, *inter alia,* as follows:

"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"*** [emphasis supplied].

[116] No sooner had the Court of appeal delivered these two decisions, than the Supreme Court was called upon to make a statement on the state of the law. This was in ***Mary Wambui Munene v. Independent Electoral and Boundaries Commission & Two Others,*** Petition No. 7 of 2014. This Court was called upon to apply its decision in the ***Joho*** Case, in relation to the declaration of election results, and the point in time at which the period of 28 days, for lodging an election petition, starts running. In the ***Mary Wambui*** Case, the petition at the High Court was filed *outside the 28 days prescribed by the Constitution*

from the date of the issuance of the certificate in Form 38, though within 28 days of the gazettement, as contemplated by the now-annulled Section 76(1)(a) of the Elections Act.

[117] In arriving at its decision, the Supreme Court cited with approval the two decisions of the Court of Appeal: the ***Suleiman Said*** Case, and ***Paul Posh Aborwa*** Case. The Supreme Court went further to cite it earlier decision in ***Jasbir Singh Rai and Three Others v. The Estate of Tarlochan Singh Rai and Four Others, Petition No. 4 of 2012,*** asserting the importance of certainty in law, thus (paragraph 42):

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

[118] In the ***Mary Wambui*** Case, this Court observed that time, in the electoral process, was a vital element set by the Constitution, thus pronouncing itself (paragraphs 88 and 89):

> *"[88] For the purposes of this case, we apply the precedent in* ***Joho,*** *taking into account that the issue in question involves imperatives of timelines demanded by the Constitution, in settling electoral disputes which involve accuracy, efficiency and exactitude, limiting any other considerations, in the exercise of our discretion.*

> *"[89] … 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."***

[119] Hence, in the ***Wambui*** Case this Court concurred with the Court of Appeal on how the declaration of the unconstitutionality of section 76(1) (a) of the Elections Act should be applied. In taking a common position, the two superior Courts had set a steady jurisprudential foundation on this question.

[120] This Court is not about to depart from this pragmatic perception, which endeavours to sustain a right recognised under the operative state of the law. We are of the opinion that such a pragmatic perception, once reflected in judicial interpretation, is to be regarded as a building-block of our jurisprudence under the new constitutional dispensation.

[121] It is clear to us that the main issue this Court was called upon to determine in the ***Mary Wambui*** Case, is the one we are now asked to determine, which is *whether the petition filed in the High Court outside the 28 days prescribed by Article 87(2) of the Constitution is a nullity*. We find that the decision in the ***Joho*** Case directly applies in the instant matter and so does the jurisprudence in the ***Mary Wambui*** Case.

[122] We note that this matter was live (already pending) in our Courts, while we were deciding the ***Mary Wambui*** Case, in which we thus held (at paragraph 90):

"We are aware that several constitutional processes have been concluded, and others ensued as a result of the directions of the Courts while handling electoral disputes following the 2013 General Elections. It is our position that, in either of these scenarios, and as a matter of finality of Court processes, parties cannot reopen concluded causes of action. A relevant case in this regard is *A v. The Governor of Arbour Hill Prison* **[2006] IESC 45, [2006] 4 IR 88, (at paragraph 36) where Murray CJ, stated as follows:**

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

[123] The instant matter was pending in the Court of Appeal, and thus, the finality clause does not apply; the matter falls for determination squarely on the precedent set in the ***Mary Wambui*** Case. Just as in the ***Jasbir Rai*** Case, this

Court has recently affirmed the need for *certainty in the interpretation and application of constitutional provisions*. That principle should be upheld in the application of judicial precedents. The learned Chief Justice in his concurring opinion, in *the* ***Gatirau Peter Munya*** Case***,*** *Petition No. 2B of 2014*, thus observed (paragraph 233):

> "*Ultimately, therefore*, ***this Court as the custodian of the norm of the Constitution has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of the various interpretative frameworks duly authorized. The overall objective of the interpretive theory, in the terms of the Supreme Court Act, is to "facilitate the social, economic and political growth" of Kenya"*** [emphasis supplied].

[124] On the basis of the foregoing considerations, we find that the petition in the High Court, which was filed 35 days after the date of final declaration of results by the Returning Officer, fell outside the 28 days prescribed by the Constitution; and thus, all the proceedings ensuing from such declaration of results, at the High Court and the Court of Appeal, were a nullity. Neither of the two Courts had the jurisdiction to hear and determine questions founded upon such election results.

[125] Further, having found that these proceedings were a nullity, we hold that we have no jurisdiction. This Court cannot entertain a matter that is null and void *ab initio* as a court of law cannot legitimately consider an issue in which it has already declared that it has no jurisdiction. We have severally cited the dictum of Nyarangi, JA in the ***Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*** [1989] KLR 1 that jurisdiction is everything and

where a court of law holds it has no jurisdiction, it should down its tools. In the ***Mary Wambui* case** that was the legitimate route that this Court took once it found that the proceedings were a nullity and it had no jurisdiction. Such a pragmatic approach cannot be departed from in this matter.

[126] Consequently this Court's pen rests.

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

[127] I have read the Judgement of the Court, and agree with the final Orders derived after careful deliberation upon the issues crystallized for determination. In this concurring opinion, I wish to ponder on the different trajectories within which the Supreme Court fulfils its constitutional mandate to develop a robust jurisprudence, as dictated by Article 259 of the Constitution, and Section 3 of the Supreme Court Act, 2011. The said constitutional and statutory provisions, apart from their mandate-conferring effect, are the basis of popular aspiration and expectation, focused upon the Judiciary in general, and the Supreme Court in particular. In this respect, I wish to expound on the issue: *whether the jurisdiction of the Supreme Court under Article 163(4)(a) of the Constitution is intertwined with that of the High Court and the Court of Appeal under* ***Articles 87(1) and (2)*** *and* ***105*** *of the Constitution, and* ***Section 85A*** *of the Elections Act, 2011.*

[128] The jurisdiction of the Supreme Court to hear and determine election appeals was set out by the Court in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji and Two Others****,* Civil Application No. 5 of 2014. In that case, the Court evaluated the essential attributes of the electoral question, which convey such question to this Court under the concept of "constitutional

interpretation and application" [*Art. 163)(4)(a)*]. In the case of election appeals, the Court isolated Articles 81(e) and 86 of the Constitution as the operative ones, in locating the electoral dispute within the Supreme Court's broader constitutional mandate. The Court (at paragraph 7) thus held:

> **"**We note that, right from the High Court, the *central issue* revolving around the petition against the applicant's election was: *whether this election was conducted in accordance with the principles of the Constitution*. The operative principles in question, in our view, were the provisions of *Articles 81 (e) and 86 of the Constitution*. Although the issues, as later formulated by the Court of Appeal, narrowed down to the specifics of irregularity, scrutiny and recount of the vote, *the central theme* of the *application of Articles 81 and 86 to the dispute,* was never lost. Throughout its analysis and assessment of the evidence on record, in determining the integrity of this particular election, the Court of Appeal was applying the provisions of *Articles 81 and 86 of the Constitution*……." [emphasis added].

[129] The jurisdiction of the High Court to resolve electoral disputes is to be found in Article 105, read together with Article 87(2) of the Constitution. These two Articles give certain *time* prerequisites, linked to the High Court's status as an "Election Court". In addition, Section 85A of the Elections Act grants the Court of Appeal jurisdiction to hear and determine election appeals, but on the basis of *issues of law* only. This provision also gives certain time-signals to the Court of Appeal, as a Court sitting on "election appeals". The jurisdiction of the Supreme Court, however, as elaborated in Article 163(4)(a) and (b) [and as clarified by the Court in the ***Munya*** case], is *distinct from that of the High Court and the Court of Appeal.* While the High Court and the Court of Appeal

are both guided by time and scope, the role of the Supreme Court is broader, resting upon the *interpretation and application of the Constitution,* as well as the settling of *issues of general public importance.*

[130] Article 163(4)(a) of the Constitution grants this Court the *broad* jurisdiction to hear and determine *appeals as of right,* in any case involving the *interpretation or application of the Constitution.* Article 163(4)(b), on the other hand, allows the Court to hear and determine appeals upon the certification that a matter of *general public importance* is involved. In the ***Munya*** case (at paragraph 79), the Court also underscored its mandate, in the terms of the Supreme Court Act, 2011, *"to assert the supremacy of the Constitution"* [Section 3(a)]; and to *"provide authoritative and impartial interpretation of the Constitution"* [Section 3(b)]. Thus, *the Supreme Court's jurisdiction is distinct from that of the High Court, and from that of the Court of Appeal.*

[131] The guiding principles attendant on the exercise of a Court's jurisdiction are laid out in Article 159(2) of the Constitution. Article 159(2)(b) and (e) bear principles directly incorporated into the constitutional or statutory provisions, granting a Court the power to resolve electoral disputes: *justice shall not be delayed* [the element of time being critical]; and *the purpose and principles of this Constitution shall be protected and promoted* [connoting the special responsibility borne by a Court, in addressing itself to questions of constitutional controversy].

[132] As I pointed out in my concurring opinion in ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai and 4 Others,*** Sup. Ct. Petition No 4 of 2012 (at paragraph 130 and 131):

> "While remarking the foregoing considerations, I would like it to be clear that the Supreme Court, *being in the exalted position of an apex Court, has the right, nay, the obligation, to develop jurisprudence touching on issues of general public interest, as well as those that touch on the interpretation of the Constitution*. ***This right cannot be curtailed by anyone.***
>
> I am aware that my views, as expressed herein, have had the benefit of hindsight; *but this Court should not hesitate, in the interest of developing an indigenous jurisprudence, to pave further paths that will advance the rule of law*. This could easily be accomplished by taking certain minimal actions that fall within our constitutional and legislative mandate……." [emphasis added].

[133] The election Court is a Court anchored upon the dictates of *time,* with its mandate, by the provisions of *Article 105* of the Constitution, limited to *six months* after the filing of the election petition. Therefore, even where this Court has declared that the election Court lacked the jurisdiction to hear and determine a matter, *the special nature of the Supreme Court under Article 163(4)(a) of the Constitution ordains that its mandate to settle legal issues of constitutional controversy, remains alive*. The modalities of this charge, which is exercised in final form by this Court, are guided by Article 259(1) of the Constitution, which directs that the Constitution shall be *interpreted in a manner that promotes its purposes, values and principles* [Art. 159(1)(a)]; *advances the rule of law, and the human rights and fundamental freedoms in the bill of rights* [Art. 159(1)(b)]; and *permits the development of the law* [Art. 159(1)(c)]. Therefore, to curtail the authority of the Supreme Court to address itself to *legal* issues of *constitutional relevance,* would be to negate the very essence of its establishment as a final Court. We note, however, and as has

already been held, that this Court's special mandate is to be discharged judiciously. In ***Peter Ngoge v. Francis Ole Kaparo & 5 Others,*** Sup. Ct. Petition No. 2 of 2012 [2012] eKLR, this Court held that:

> *"In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, 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 the further input of the Supreme Court."*

[134] The Supreme Court, as the guardian of the Constitution, and the final arbiter on constitutional interpretation, has the task of safeguarding the juridical integrity of this charter, and its continued effectiveness. In ascertaining that a lower Court had the jurisdiction to address itself to a matter coming up before itself, different questions arise, including those of the legal and historical context. In the case of ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & Two Others***, Sup. Ct. Petition No. 10 of 2013; [2014] eKLR, this Court had (at paragraph 52) thus held:

> *"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).”

[135] As elaborated by my brother Judge, Prof. Ojwang in his book, ***Ascendant Judiciary in East Africa*** (Nairobi: Strathmore University Press, 2013), at page 53: *“the Constitution of Kenya, 2010 is the basis of a new dispensation which represents well-based hopes for an experience of democratic governance. The Constitution proclaims* ***overriding values****, to guide the conduct of government which, itself, is lodged in distinct institutional structures designed to assure restraints; underlines the voice of the people in general, and the objects of public welfare, as the foundation of democracy; defines and safeguards in detail the rights and liberties of the individual;* ***establishes an enlarged judiciary entrusted with clear mandates of interpretation of the Constitution and the law****, under conditions of independence and impartiality….”* Therefore, the peculiar nature of the Constitution of Kenya, 2010 informs the peculiarity of the Judiciary in the new dispensation, and more so, that of the Supreme Court. The Constitution progressively broadens the arena of litigation in this country, and the Supreme Court must remain steadfast in its duty to address itself to issues that may properly come before it. The jurisprudence to be developed by the Supreme Court of Kenya may bear differences from that of other jurisdictions in the world, because of the special terms of this country’s charter, which expresses the people’s will, and embodies their mutual agreement. *While most jurisdictions would command a Court to relieve itself of duty by making a prompt finding on jurisdiction, Kenya’s Constitution directs the Supreme Court to take no rest, until all unsettled issues of its interpretation and application are resolved.*

[136] As observed by Justice Stephen Breyer of the United States Supreme Court in his book, ***Active Liberty*** (Vintage Books, 2005) (at page 5): "*Courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts."*Therefore, in ensuring that the standards of procedural fairness, and the values elaborated under Article 10 of the Constitution are safeguarded, the special nature of the Supreme Court, and the exceptional burdens of constitutional adjudication reposed in it, require this Court to delve into issues of constitutional controversy, even where the issue at hand is one of determining its own jurisdiction. However, *in certain cases,* ***such as the instant one****, the legal issues arising for determination may already have been exhausted, in finalized cases, by the Court. In such instances, this Court may elect not to go into such issues, because the constitutional and legal controversies in question have already been settled.*

[137] The special nature of the Supreme Court has been succinctly elaborated by Harry H. Wellington in his book, ***Interpreting the Constitution*** (Universal Law Publishing Co. 2008) (at page 144). The Supreme Court adjudicates disputes, but it is the *regulatory effect of its adjudication* that is the Court's *raison d'etre*. This Court's highest duty to interpret the Constitution, as demanded by the Constitution itself, must be taken as a mechanism to crystallize the law, and set the Republic, through the Constitution, on the path of maturation. Justice Cardozo in his book, ***The Nature of the Judicial Process*** (Universal Law Publishing Co., 2011) (at page 14), elaborates the attendant features to interpretation. He recognizes that "*codes and statutes do not render the Judge superfluous, nor his work perfunctory and mechanical"*. Rather, *interpretation means that there are* ***doubts*** *and* ***ambiguities*** *to be cleared. There are* ***hardships*** *and* ***wrongs*** *to be mitigated, if not avoided.* Interpretation, and especially one undertaken by a Court in its appellate form, and steered towards constitutional application and interpretation, is not just a

search for meaning. It is an exercise requisite to completing the anchoring pillars of constitutional governance. This Court, therefore, in appropriate cases, ought to rise to the occasion. A question whether a particular Court had the jurisdiction to determine an issue coming up before it, crystallizes in the Supreme Court's jurisdiction under Article 163(4) (a) and/or (b). The Supreme Court is, thus, required to delve into issues of *application or interpretation of the Constitution* and, indeed, also those *of general pubic importance*. Therefore, the Supreme Court cannot close its mind to the evaluation of even a single provision of the law or the Constitution. As elaborated by the Chief Justice in his concurring opinion in the case of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & Two Others,*** S.C. Petition No. 2B of 2014 (paragraph 230), quoting the eminent retired Chief Justice of Israel, Aharon Barak, "…one who interprets a single clause of the constitution interprets the entire constitution" [Aharon Barak, ***The Judge in a Democracy*** (Princeton: Princeton University Press, 2006), at page 308].

[138] My duty as a Justice of the Supreme Court dictates that I pay fidelity to the Court's obligation, and more particularly, remain constantly aware of the Court's special place in our country's legal setting. For the purpose of attuning the law to the demands of a robust Constitution, such as ours, I am the bearer of the duty to elaborate to the lower Courts, to the litigants, and to the citizens in general, the essence and the rationale of the Court's decision in this matter. In this case, unlike in certain cases of similar preliminary detail, *the issues arising have been previously settled, and no questions of pure, or novel legal and constitutional significance, remain unresolved*. In these circumstances, I am obliged to endorse the final Orders, as framed by the Court.

F. THE CONCURRING OPINION OF OJWANG, SCJ

[139] The details, and the primary reasoning conveying the Court's Judgment are common ground, and I concur in the same, just as I do also in the outcome, on the facts of the particular case.

[140] I need, however, to develop an aspect of the Judgment in respect of which I am more in agreement with the concurring opinion of the learned Deputy Chief Justice and Vice-President of the Court, Lady Justice K.H. Rawal. This concerns the treatment of the vital question of *jurisdiction,* as a background to the Orders proposed in this case.

[141] Although the subject of jurisdiction has recurred in the Supreme Court's decisions since its inauguration in 2011, it has been considered essentially on a case-by-case basis, without an occasion to rationalise it in its broader scope, as it touches on the *different levels of Courts in this country*.

[142] The Supreme Court decisions referred to in the Judgment, the main ones of which are ***Hassan Ali Joho and Another v. Suleiman Said Shahbal and Two Others,*** Sup. Ct. Petition No. 10 of 2013; and ***Mary Wambui Munene v. Independent Electoral and Boundaries Commission and Two Others***, Sup. Ct. Petition No. 7 of 2014, had sought valid solutions to *particular legal contests*, but had availed no opportunity to examine closely the *general question of jurisdiction in Kenya's Courts, and especially, as regards the Supreme Court.*

[143] It is an evident blockage to the judicial horizon, in this Judgment, that the outcome has adhered to the path set by the quarter-century-old decision of the Court of Appeal, ***Owners of Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd*** [1989] KLR 1. The conventional wisdom of that case, which is expressed in Mr. Justice Nyarangi's allegory, that "jurisdiction is everything", and that a Court lacking jurisdiction "must down its tools", will, as I perceive it, retain validity for most categories of Kenya's Courts. But this will not be the case for the new apex Court, *the Supreme Court*, established under Article 163 of the Constitution of Kenya, 2010.

[144] The Supreme Court of Kenya is the very centrepiece of the novelty of the governance set-up of the new constitutional dispensation. The political and constitutional stature of the Court runs in tandem with a *generic conferment of jurisdiction,* a scenario that is fundamentally alien to the closed-in outlook of earlier politico-legal structures, as depicted in the ***Motor Vessel "Lillian S"*** case.

[145] Article 163(3) of the Constitution thus provides:

> ***"The Supreme Court shall have –***
>
> ***(a) exclusive original jurisdiction to hear and determine disputes relating to…elections to the office of President…; and***
>
> ***(b) subject to clause (4) and (5), appellate jurisdiction to hear and determine appeals from –***
>
> ***(i) the Court of Appeal; and***
>
> ***(ii) any other court or tribunal as prescribed by national legislation."***

[146] Article 163(4) specifies the categories of matters falling within the appellate jurisdiction of the Supreme Court:

> ***"Appeals shall lie from the Court of appeal to the Supreme Court –***
>
> ***(a) as of right in any case involving the interpretation or application of this Constitution; and***
>
> ***(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved...."***

[147] From the foregoing provisions, the *inherently enlarged competence* of the Supreme Court is at once apparent – an element *not shared with any of the lower Courts*. "Interpretation and application of the Constitution", subject only to objective and rational judgment in proper context, is an inherently *open-ended phenomenon;* much like the determination that a particular question falls within the category of "*matters of general public importance",* and therefore falling to the jurisdiction of the Supreme Court.

[148] That this Supreme Court is the bearer of a wider jurisdiction than would have been contemplated at the time of ***"Lillian S,"*** is manifest from the terms of Article 163(6):

> ***"The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government."***

[149] The Constitution, thus, reposes special trust in this Supreme Court, to apply its internal procedures, and its modalities of reasoning, to evaluate essentially political questions of public governance, and to render a legitimate opinion that guides the operations of the State, and its plurality of agencies.

[150] It is my perception that this Supreme Court has a larger profile than that which had been attributed to Courts of the past, by the Court of Appeal's decision in ***"Lillian S".***

[151] By Article 163(8), the Constitution empowers the Supreme Court to "*make rules for the exercise of its jurisdiction";* and by Article 163(9), Parliament is empowered to *"make further provision for the operation of the Supreme Court."* By the latter provision, the Supreme Court Act, 2011 (Act No. 7 of 2011) has been enacted, and it consecrates the Supreme Court as the *formal custodian of the interpretive process of the Constitution* itself. By the unlimited scope of such a remit, it is clear that the Supreme Court's latitude, in the course of hearing any case or determining any question, or examining "matters arising" – whether these be *constitutional,* or bearing upon the *public interest* – is of a profound nature.

[152] Such a perspective of the special mandate of this Supreme Court, which clearly overshadows the ***"Lillian S"*** – constraints, has been lucidly remarked by Mutunga, CJ & President of the Court, in ***Re The Speaker of the Senate & Another v. Attorney-General & Four Others,*** Sup. Ct. Advisory Opinion No. 2 of 2013 (paragraph 156):

> ***"Each matter that comes [up] before the Court must be seized upon as an opportunity to provide high-yielding interpretive***

guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents….[Constitution-making] does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitutions borne out of long-drawn compromises, such as ours, tend to create."

[153] The *comparative lesson* demonstrates, indeed, that Supreme Courts conventionally have an *enlarged role in the legal process* – and this is a phenomenon for recognition *in Kenya as well*. So far-reaching is the Supreme Court's role, that its decisions enjoy reverence, whether one refers to them as *rationes decidendi*, or *obiter dicta*. Witness to this is borne by Canada's Provincial Court of Alberta decision in ***R v. Macleod***, 2001 ABPC 7 (paragraph 41):

"In my view, the law is that any** obiter dicta **comments of the Supreme Court should be accorded deference unless there are any compelling reasons not to do so….The practical reasons for preferring the remarks of the Supreme Court are self-evident: (1) the Supreme Court is the highest Court in Canada; (2) the Supreme Court always gives great deference to judgments from their own court."

[154] Quite on those same lines, Chief Justice Marshall of the U.S.A., in ***Cohens v. Virginia,*** 19 U.S. 264 (1821), long ago thus said, of this very special agency of the Judiciary:

"It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction

if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty."

[155] It is my task to demonstrate, in this concurring opinion, that this Supreme Court is not to sidestep meritorious occasions for a decision, by invoking obsolescent concepts: for the Supreme Court is the *fundamental plank of the constitutional order*, bearing the mandate to "develop the law to the extent that it does not give effect to a right or fundamental freedom", and to "adopt the interpretation that most favours the enforcement of a right or fundamental freedom" [The Constitution of Kenya, 2010, Article 20(3)].

[156] Thus, in a typical case of dispute resolution, such as the one before us, it would not be right in principle for this Court to proceed on the footing that "A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." This Court has a special role in the constitutional function of dispute settlement; and it stands not on the same platform as the other Courts of the land.

[157] My concurrence in the outcome approved by the majority is subject to the principles set out above.

G. ORDERS

[158] As a result of the foregoing conclusion, the upshot is that this Court lacks the necessary jurisdictional legitimacy to consider and determine the other issues raised in the Petition of Appeal. Consequently, we make the following Orders:

1. **The Petition of Appeal dated 16th April, 2014 is hereby allowed.**

2. **The determinations made by both the High Court and the Court of Appeal are hereby annulled.**

3. **The Certificate issued by the Court of Appeal in Kisumu Civil Appeal No. 51 of 2013 is hereby declared a nullity and is quashed.**

4. **The status of the National Assembly seat for Shinyalu Constituency reverts to the *status quo ante*, as declared by the Independent Electoral and Boundaries Commission on 5th March, 2013.**

5. **The parties shall bear their own costs at the High Court, Court of Appeal and the Supreme Court, respectively**

6. **These Orders shall forthwith, be served upon the Speaker of the National Assembly.**

DATED and **DELIVERED** at **NAIROBI** this 16th day of July, **2014.**

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

.....

N.S. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA