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IN THE COURT OF APPEAL

AT MALINDI

(CORAM: GITHINJI, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 12 OF 2013

BETWEEN

1. HASSAN ALI JOHO

2. HAZEL EZABEL NYAMOKI OGUNDE ..... APPELLANTS

AND

1. SULEIMAN SAID SHAHBAL

2. INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION

3. MWADIME MWASHIGADI …..... RESPONDENTS

(Being an appeal from part of the ruling and order of the High Court of Kenya at Mombasa (Ochieng, J.) dated 23rd May, 2013

in

H.C. Election Petition No. 8 of 2013)

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JUDGMENT OF GITHINJI, J.A.

[1] The appellants are aggrieved by that part of the interlocutory Ruling of the High Court at Mombasa (***Ochieng, J.***) rejecting an application to strike out an election petition filed by the 1st respondent herein against them.

[2] It is expedient to set out the annotation of the dispute at the outset. The two appellants, the 1st respondent and five other candidates vied for the election for Mombasa County Governor in the Gubernatorial elections held on 4th March, 2013. Subsequently on 7th March, 2013, the Mombasa County Returning Officer announced the 1st and 2nd appellants duly elected Governor and Deputy Governor respectively. Thereafter 1st appellant was issued with a *"CERTIFICATE OF RESULTS OF GOVERNOR*

ELECTION, 2013" dated 6th March, 2013 in Form 38 which has the Logo of The Independent Electoral and Boundaries Commission (IEBC) certifying that the 1st appellant was elected as the Governor for Mombasa County.

[3] By Kenya Gazette Notice No. 3155 of 13th March, 2013 the Independent Electoral and Boundaries Commission (IEBC), the 2nd respondent herein published a "*Declaration of persons elected as Governor and Deputy Governors*" in which IEBC declared the persons elected as Governors and Deputy Governors in fourty seven counties in the elections held on 4th March, 2013 and who had complied with the provisions of the Election Act, 2011 and of the Constitution as listed in the schedule to the notice.

[4] On 10th April, 2013, the 1st respondent filed ***Election Petition No. 8 of 2013*** in the High Court Mombasa seeking various reliefs including a declaration that the 1st appellant was not validly elected as a Governor of Mombasa County due to various alleged electoral malpractices.

By a chamber summons dated 29th April, 2013 brought mainly under ***rule 17(1)(d)***(*erroneously referred as 17(d) in the application*) of The Elections (Parliamentary and County Elections) Petition Rules, 2013 which stipulates that the election court should deal with all interlocutory applications and decide on their expeditious disposal at the per-trial conference, the appellants sought an order to strike out the petition mainly on the ground that it was filed outside the 28 days (that is 34 days,) after the *declaration of the election results* by IEBC as prescribed by *Article 87(2)* of the Constitution. The petitioner contended that ***section 76(1)(a)*** of the Elections Act (Act) which provides that a petition to question the validity of an election should be filed within 28 days *after the date of publication of the results of the election in the Gazette* was inconsistent with *Article 87(2)* of the Constitution and void to the extent that it introduces the date of publication of election results in the Gazette as the date when the time for filing the petitions starts running.

[5] In a nutshell, the appellants through their counsel contended that neither *Article 87(2)* nor any other statutory provisions requires IEBC to publish election results in the Gazette; that in this case the result of the elections were declared by the County Returning Officer Mombasa on 6th March, 2013 and thus the last day for filing the petition was 4th March, 2013.

On his part, the 1st respondent contended in the grounds of opposition, among other things, that ***section 76(1)(a)*** of the Act was enacted by Parliament by virtue of *Article 87(1)* of the Constitution; that the Certificate issued to the 1st appellant on 6th March, 2013 was a Certificate of results of election and not a declaration of results of election and that the power of the Returning Officer is to announce election results while the power of IEBC under *Article 87(2)* is to formally and officially declare results; that ***section 76(1)(a)*** of the Act is not inconsistent with *Article 87(2)* and that the petition was filed 28 days after the declaration of persons elected as Governors was published in the Gazette.

[6] Although the IEBC and the Returning Officer did not file an answer to the application *Mr. Khagram*, the counsel who was representing both 2nd and 3rd respondents, and, who still represents them in this appeal, supported the application in the High Court and submitted, *inter alia* that, *section 76(1)(a)* of the Act which introduces the phrases, *publication in the Gazette*, is void as it contravenes *Article 87(2)*; that the declaration in the Gazette is not a declaration of election results but of winners and that the Kenya Gazette is not the instrument through which the result of elections are declared but rather it is through Form 35.

[7] The High Court considered the application and as I can gather from the judgment, in essence, held, in my own words, among other things, that:

> *(I) By regulation 4(1)(c) of the Act the duty to declare and announce election results is vested on the County Returning Officer.*

- ***Rule 4(1)(c)*** *is not inconsistent with Article 87(2) of the Constitution which vests the duty to*

declare results of the elections in the IEBC as the actions of a duly appointed Returning Officer are deemed to be the actions of the Commission unless such actions give rise to personal criminal culpability on the part of such officer.

- *As was held by this Court in John Michael Njenga Mututho v Jayne Njeri Wanjiku Kihara – Civil Appeal No. 102 of 2008 (Nakuru), an announcement of election results envisages the detailed result and not just the declaration of the person who won.*

- *To the extent that Gazette Notice No. 3155 did not contain the particulars of other candidates, the rejected votes, the total number of votes cast and the total number of registered voters, it did not constitute a declaration of results of the elections.*

- *If a declaration must be in a formal instrument, Forms 34, 35,36, 37 or 38 which have been duly signed by respective authorized Returning Officers are the formal instruments for declaration of election results.*

- *When **section 76(1)(a)** of the Elections Act imported the requirement of Gazettement into mechanism for timely settlement of electoral disputes, it exceeded the authority bestowed upon it by the Constitution.*

- *Unsuccessful candidate in the elections need not wait for the Commission to complete the results from any other electoral area, such as a constituency or county before he can file his petition.*

*(VIII) The petition herein was filed about 34 days after the County Returning Officer for Mombasa had declared the results for the election of the Governor and the fact that it may have been filed within 28 days of the gazettment of the the fact that **Hassan Ali Joho** was the elected Governor did not remedy the defects.*

[8] The High Court nevertheless declined to strike out the petition for two main reasons, namely, that the 1st respondent was not to blame as *section 76(1)(a)* of the Act was *prima facie* lawful until the court's decision and, secondly, that if the court struck out the petition and the Court of Appeal subsequently overturned its decision, the decision of the appellate Court would be futile as the 6 months stipulated by law for hearing and determination of an election petition would have lapsed.

Finally, the High Court recommended that the requirement for gazettement, should be removed from ***section 76(1)(a)*** of the Act and the wording of ***section 77(1)*** of the Act be used instead. The court observed that the alternative was to amend *Article 87(2)* by introducing therein the requirement for gazettement of the results as the mechanisms for declaration of election results.

[9] As I have already indicated, the appeal is against that part of the Ruling sustaining the petition notwithstanding the finding that it was filed outside the 28 days limitation period. The main grounds of appeal are that, the High Court erred in law in finding that *section 76(1)(a)* of the Act was *prima facie* lawful at the time of filing the petition and further in finding that an unconstitutional provision in an Act of Parliament (*section 76(1)(a)* of the Act) was lawful in its enactment until declared unlawful.

After both Mr Ahamednassir, learned Senior Counsel and ***Buti,*** learned counsel respectively had fully argued the appeal and after ***Mr Khagram***, learned counsel for the 2nd and 3rd respondents had also submitted in support of the appeal ***Mr Gikandi***, learned counsel for the 1st respondent in opposing the appeal indicated that he would contend that *section 76(1)(a)* of the Act was not, contrary to the finding of the High Court, inconsistent with *Article 87(2)*. Objections were raised to that approach in the absence of a cross-appeal. Ultimately, Mr Gikandi applied for leave to file a cross-appeal which application was opposed.

[10] However, the Court after considering the oral application allowed the 1st respondent to file a cross-appeal which was subsequently filed. By the cross- appeal, the 1st respondent avers, in essence, that, the High Court erred in law in finding that *section 76(1)(a)* contravenes *Article 87(2)* in that it exceeded the

authority bestowed upon Parliament by the Constitution and, further, in finding that Gazette Notice No.3155 did not constitute a declaration of election results. Both the appeal and the cross-appeal have been fully heard. Since the determination of the appeal will depend on the determination of the cross-appeal it is expedient and indeed logical that I should deal with the cross-appeal first.

[11] The starting point is to sketch-out the whole spectrum of the relevant laws relating to the management of elections.

Article 88(1) of the Constitution establishes the IEBC with the general responsibility of conducting referenda and elections. The IEBC is by virtue of *Article 253* a body corporate with perpetual succession and seal and is capable of suing and being sued. The IEBC is administered under the provisions of *Independent Electoral and Boundaries Commission Act of 2011*. By *Article 87(1),* Parliament is required to enact a legislation to establish mechanisms for timely settling of electoral disputes and by *Article 87(2) a* petition shall be filed *"within twenty eight days of the declaration of the election results by Independent Electoral and Boundaries Commission"*

[12] The Parliament has pursuant to *Article 87(1)* enacted the Elections Act No. 24 of 2011. By *section 39(1)* of the Act, IEBC "*is required to determine, declare and publish the results of an election immediately after close of the polling*." By *section 39(2)* of the Act, IEBC is authorized to announce provisional results before determining and declaring the final results of an election. By *section 76(1)(a)* of the Act, a petition to "question the validity of an election shall be filed within twenty eight days *after the date of publication of the results of the election in the gazette and served within 15 days of the presentation*. (emphasis added).

[13] Lastly, by *section 109(1)* of the Act, IEBC is authorized to make regulations for better carrying out the provisions of the Act including, as provided by *section 109(1)(bb),* to provide for mode of declaration of the result of an election. By *section 109(3)* and *(4)* a draft of the proposed regulations has to be approved by National Assembly and upon approval IEBC is required to publish the regulations in the Gazette.

Pursuant to *section 109,* IEBC made a subsidiary legislation, the Elections (General) Regulation 2012 (Reg.) for the conducting and supervision of elections.

[14] By *Reg. 3(1),* IEBC is required to appoint a returning officer for each constituency and publish the names in the Gazette.The responsibilities of the constituency Returning Officers are specified in Reg. 32 and his duties in the conduct of elections are specified in Reg. 83-86.

The IEBC is also required by *Reg. 4(1)* to appoint County Returning Officers whose names are also to be published in the Gazette.The role of the County Returning Officers in the electoral process are also stipulated in Reg. 87.Lastly, the IEBC is required to appoint a presiding officer to every polling station. His role relating to counting of votes and declaration of results are stipulated under Reg. 73-87.

[15] The respective counsel for the parties have made similar submissions relating to the cross-appeal as they made in the High Court. However, it is just that I should set out, albeit compendiously, the gist of the respective submissions. Mr Gikandi, learned counsel for the 1st respondent submitted that there was no evidence of declaration of election results by IEBC either in forms 34, 35, 36 or 38 on 6th March 2013; that Form 38 shows that the Returning Officer only announced the 1st appellant as the elected Governor, that by *Article 87(2)* and *section 39* of the Act, it is only *IEBC* as a body corporate and not a Returning officer which has power to make declarations; that by *Reg. 87(9)* and *87(10)* the tallied results announced by the Returning Officer are provisional, and, lastly, that, in election matters there must be a Gazette notice at the end of the electoral process.

Mr Balala learned counsel for the 2nd appellant submitted, *inter-alia,* that *Article 87(2)* has to be read together with *Article 86(c)* which requires the presiding Officer to announce the results promptly at each polling station; that the words *determine, declare* and *publish* in s*ection 39* of the Act have different meanings; that declaration of election results does not have to wait publication; that there is no prescribed

form for Gazette Notice; that the requirement for publication in the Gazette will result in a constitutional crisis; that a Gazette Notice is not a declaration of election results but a declaration of the winners and, lastly that, the words announce and declare bear the same meaning.

On his part ***Mr Ahmednassir*** contended that there was no dispute that election results were declared by the Returning Officer on 6th March 2013; that *section 76(1)(a)* of the Act is a complete deviation from the Constitution, is superfluous and serves no purpose in view of *section 77*, which is *pari materia* with *Article 87(2)*; that the words *determine, declare* and *publish* in section 39 have different meaning; that the word *determine* means tally; *declare* is an oral process and *publish* means publication in the newspaper or Kenya Gazette.

Lastly, Mr Khagram submitted that *declaration* does not occur at gazettment stage; that publication of results cannot be in a composite Gazettte Notice and that Forms 35 and 36 are the instruments through which the declaration of election results is made.

[16] The important and the threshold question raised in this appeal is whether the 28 days limitation period for filing an election petition starts running after the declaration of the election results by the IEBC as provided by *Article 87(2)* or after the publication of the election results in the Gazette as provided by *section 76(1)(a)* of the Act. This is a pure question of the construction of *Article 87(2), section 76(1)(a)* and all the other relevant law. It has been contended by the appellants and IEBCrelying on *Youaraj Rai vs Chander Bahadur Karki – Civil Appeal No. 8253,* and *8255, (2006)* a decision of the Supreme Court India, that the time starts running from the date on which a candidate is declared by the Returning Officer as elected. However, it is apparent from that case that the decision was arrived at after an extensive examination of the relevant statutory laws particularly the interpretation of *section 81* of the Indian Representation of the people Act, 1951. It has not been suggested that the Indian Act is in *pari materia* with the relevant provisions of the Constitution or sections of the Elections Act and the Regulations made there-under. Thus this is not an universal rule and correctly stated by Mr Gikandi the Court should be guided by the provisions of the relevant statutes. It has also been brought to our attention that the same issue has been considered by the High Court and that there is no unanimity of opinion amongst the Judges of the High Court. The Ruling of ***Majanja, J.*** in *High Court at Machakos, Election Petition No. 7 of 2013*. *Caroline Mweu Mwandiku vs Patrick Mweu Musimba and two others* delivered on 28th may 2013 after the Ruling, Ochieng J under appeal has been brought to our attention. In that case, Manjanja, J, held, in essence, that a declaration for purposes of *Article 87(2)* means Gazettement and the Gazette Notice must be deemed to be the declaration for purposes of computing time.

[17] The Ruling of ***Odunga, J.*** in *Gideon Mwangangi Wambua vs Independent Election and Boundaries Commission and two others High Court at Mombasa Election Petition No. 4 of 2013* consolidated with *Election Petition No. 9 of 2013* delivered on 23rd May 2013 – the same day the Ruling of Ochieng J, was delivered has also been brought to our attention. In that Ruling, Odunga, J., held, among other things, that, *section 76(1)(a)* was not unconstitutional as the insertion of gazettement in that section was meant to give certainty to reckoning of time. I will not say any more or consider the reasoning by each Judge in the two decisions because it is probable that the two rulings may be under appeal.

[18] The problematic words in this appeal *announce* and *declare* should be given their ordinary and natural meaning according to the context in which they are used unless the context shows that they should be used in technical sense. The two words are used in Part XIII of the Regulations relating to counting of votes and declarations of results.

By Reg.79, the presiding officer of a polling station and the candidates' agents are required after all counting of votes to *sign the declaration* in respect of the elections in Form 35 in case of National Assembly. County Women Representatives, Senators, County Governors and County Assembly elections and thereafter immediately announce the results of the voting. By *Reg. 82* the presiding officer is required to deliver the ballot boxes and the provisional results to the Returning Officer of the electoral area.

By *Reg. 83* the Returning Officer of the Constituency is required to tally the results without

recounting the ballots, *publicly* announce to persons present the total number of votes cast for each candidate in respect of each election, complete *inter alia*, Form 35 declaring the matters specified in R*eg. 83(1)(c),* sign the form and give a copy to the candidate or his agent and deliver thereafter to the IEBC among other things, the original Form 35 together with original Form 36 and 37.

By *Reg. 84* the election results are subject to a final tallying at a venue gazetted by IEBC and after the tallying the Returning Officer is required to *announce* the results cast for all the candidates for the National Assembly, County woman representative, senate, county assembly, county governor and issue a Certificate in form 38 showing the votes cast for each candidate.

By *Reg. 87(1),* the Constituency Returning Officers are required to forward to the County Returning Officers the Certificate in Form 38 who are in return required to *tally and announce the results,* issue elected persons with Certificate in Form 38 and finally submit all results to IEBC.

By *Reg. 87(4)(a)* IEBC is required, in case of elections other than the Presidential election, to *publish* a notice in the Gazette which may form part of the composite notice showing the *name or names of the persons elected.*

Lastly, by By *Reg. 87(9)* and *(10)* both the Returning Officer and the County Returning Officer respectively are required on completion of the tallying to submit the *provisional* results to IEBC.

The declaration in Form 35 reads:

- *We, the undersigned, being present when the results of the county were announced, do hereby declare that the results shown above are true and an accurate count of the ballots in ...*"

The declaration is required to be signed by the Presiding Officer, the Deputy Presiding Officer and the candidates or candidate's agents.

[19] It is clear from the above analysis that the presiding officer and Returning and County Returning Officers are only authorized to *announce* the election results and that the declarations that the presiding officers are required to make relate to the accuracy of the ballot and not to the winner of the election. Further, it is clear that the declaration in Form 35 and 38 which the Returning Officer is required to complete is preceded by a public *announcement* of the total number of votes cast for each candidate in respect of each election. It seems therefore the declaration in Form 35 and 36 is merely a return of or written record of the provisional election results and not a declaration of election results.

Lastly, it is clear that the word *announcement* contextually denotes an oral communication of election results and a *declaration* denotes a written record or, return embodied in a prescribed form. In my view the two words are not synonymous.

[20] The High Court relied on *John Mututho v Jayne Kihara C.A. Nakuru Civil Appeal No. 102 of 2008* as a basis for the finding that Gazette Notice No. 3155 of 13th March, 2013 did not constitute a declaration of the election results as it did not give a detailed result but merely a declaration of the election winners. In Mututho's case, the Court was dealing with an application to strike out the election petition on the grounds, *inter-alia*, that the result of the election was not stated in the petition nor given by the Returning Officer in contravention of ***Rule 4(1)*** of the National Assembly Election Petition Rules (*now repealed*). That rule is similar to *Rule 10(1)(c)* of the Elections (Parliamentary and County Elections) Petition Rules, 2013 made under the Elections Act. The Court held that an election result envisages a detailed result and not merely a declaration of who won.

With due respect, the learned Judge erred in adopting the decision relating to the contents of an election petition to interprete the meaning of declaration of election results for purposes of limitation period in *Article 87(2)* without an examination of the provisions of the current statutory provisions.

[21.] The phrase *election results* is defined in *section 2* of the Election Act as meaning the "d*eclared*

outcome of casting of votes by voters at an election." That definition does not import the requirement of detailed results required to be reflected in form 35 and 36. By *Reg. 87(4)(b),* the IEBC is required upon receipt of of the Certificates including Certificate in Form 38 to publish a notice in the Gazette showing the names of the person or persons elected.

Section 39(1) of the Act gives the IEBC power to declare and publish the results of an election either immediately or to announce provisional results. By *Reg. 87(9)* and *(10)* the elections results announced by Returning Officers are provisional.

Lastly, *Article 87(2)* gives IEBC the power to declare election results.

The Special Issue of Kenya Gazette dated 13th March 2013, contained declaration by IEBC of persons elected for various elective offices in respective Gazette Notices. In particular, by Gazette No.3155 issued pursuant to *section 37(1)* of the Elections Act, among other laws, IEBC, declared the 1st appellant together with 46 others elected as Governors for respective Counties.

The meaning of the words *publish* in *Article 87(2)* and *section 39(1)* of the Act presents no difficult. It denotes the dissemination or general circulation of election results through a medium easily accessible to the general public such as a news paper or Gazette.

[22.] From the above analysis, I have come to the conclusion that the Constitution vests the exclusive responsibility of declaring the elections results to IEBC and further that the intention of the legislature was to give Returning Officers power only to announce provisional elections results and forward them to IEBC for formal declaration and publication of the elected candidates. I also find that the election results to be declared pursuant to *Article 87(2)* are the names of all the elected persons as set out in various certificates issued in Form 37 or 38 and that the declarations made by the Commission in various Gazette Notices in the Special Issue of the Kenya Gazette published on 13th March, 2013 constitutes a valid declarations of election results.

[23.] The High Court found *section 76(1)(a)* of the Act to be inconsistent with *Article 87(2)* merely because it introduced the additional requirement that the publication of the election results should be in the Gazette.

I note that whereas *Article 87(a)* refers to declaration of election results *section 76(1)(a)* refers to publication of results of election. However, no issue was raised on the different wording perhaps because the declaration and publications in the Gazette occurs at the same time.

There is a rebuttable presumption of constitutionality of a statute and also a presumption that the legislature while enacting a statute is aware about other existing statutes. Thus a court in construing a statute *vis-a-vis* the Constitution should endevour to place a constitutional construction on any statute under challenge and should only find the impugned statute to be inconsistent with the Constitution only if it is not possible to construe the legislation in a manner consistent with the Constitution. The Elections Act which contains *section 76(1)(a)* was enacted by Parliament pursuant to the power given to it by *Article 87(1). Article 87(2)* required the elections results to be declared without prescribing the medium or mode of declaration. The Parliament by s*ection 76(1)(a)* specified the medium to be through the Gazette.

[24.] The Kenya Gazette is an official newspaper of the government in which official matters including official notices are published. The Gazette has evidentiary character. *Section 68* of the interpretation and General Provisions Act provides:-

> *"The production of a copy of the Gazette containing a written law or notice, or of copy of a written law or notice purporting to be printed by the Government Printer shall be* ***prima facie*** *evidence in all courts and for all purposes whatsoever of the due making and tenor of the written law or notice."*

Section 85 of the Evidence Act has identical provision.

The requirement of Gazettement of election results is not a novel or peculiar requirement. Indeed, the electoral law is replete with many instances where gazettement is required. For instance, names and details of boundaries of constituencies determined by IEBC are required to be gazatted (*Article 89(9)*; the initiation of elections have to be published in the Gazette. The appointment of Returning Officers, the electoral areas; the polling stations, the final tallying centres and symbols of political parties have all to be published in the Gazette.Further, as stated earlier *rule 87(4)(b)* requires that IEBC should publish a notice in the Gazette showing the name or names of the person or persons elected.

The elections are matters of great public importance and the requirement that the result of elections be declared or published in the Gazette does not derogate from the intendment of *section 76(1)(a)*. The requirement of Gazettement is required, among other things, to give the declared results a seal of certainity finality, and legality. Thus it is logical that the final result of elections after perhaps the most important national democratic process should be crowned by gazettement of election results.

I conclude therefore that the mere requirement of gazettement of election results by IEBC does not render section *76(1)(a)* inconsistent with Article *87(2).*

[25] For those reasons I would allow cross-appeal. That finding of course pre-empts the appeal.

However for avoidance of doubts I would like to clarify that, had the cross-appeal failed, I would have allowed the appeal and set aside the impugned orders of the High Court as the 28 days limitation period stipulated by the *Article 87(2)* and *76(1)(a)* of the Act are both constitutional and statutory and cannot be legally extended, waived or ignored as the High Court implicitly and essence purported to do. They are cast in stone.

As regards the costs of the appeal it is fitting that the costs of the cross-appeal, the appeal and the application in the High Court should follow the event.

In this case IEBC has not been wholly impartial. I has been partisan as it supported the appellant's application and the appeal. Indeed, IEBC quite paradoxically impugned its own action of the declaration of the election results by gazettement by contending, quite erroneously, that the gazettement is not a declaration of elections results. In that case, it is only just that the appellants and IEBC (2nd and 3rd respondents) should equally pay the cost to the 1st respondent.

As Makhandia and F. Sichale, JJ.A agree, the cross-appeal is allowed. The judgment of the High Court to the effect that *Section 76(1)(a),* of the Act is inconsistent with *Article 87(2)* of the Constitution is set aside. As a consequence, the application dated 29th April, 2013 seeking to strike out the petition is dismissed and the appeal are dismissed.

The cost of the cross-appeal, the dismissal of the application in the High Court and the costs of the appeal to be paid by the appellants and the Commission (2nd and 3rd respondents) equally. We do not give certificate for two counsel. The result of these finding is that the petition in the High Court shall proceed to hearing in the normal manner.

Dated and delivered at Mombasa this 25th day of July, 2013.

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRA

IN THE COURT OF APPEAL

AT MALINDI

(CORAM: GITHINJI, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO.12 OF 2013

BETWEEN

HASSAN ALI JOHO …..... 1ST APPELLANT

HAZEL EZABEL NYAMOKI OGUNDE …..... 2ND APPELLANT

AND

SULEIMAN SAID SHAHBAL …..... 1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION …..... 2ND RESPONDENT

MWADIME MWASHIGADI …..... 3RD RESPONDENT

(Being an appeal from the ruling and orders of the High Court of Kenya at Mombasa (Ochieng, J.) dated 23rd May 2013

in

Election Petition No.8 of 2013)

****

JUDGMENT OF ASIKE-MAKHANDIA, J.A.

On 4th March, 2013, Kenyans of all walks of life, but as registered voters trooped to polling stations to cast their votes and elect their new representatives under the new Constitution. It was an election like no other, since, for the very first time, they were being called upon to elect the President, Deputy President, Members of the National Assembly, Women Representatives to National Assembly, Senators, County Governors and Members of County Assembly all at the same time. No doubt therefore this was the most complex and unprecedented general elections in the history of the Republic of Kenya. This was all courtesy of the new constitutional dispensation ushered in by the 2010 Constitution.

Hassan Ali Joho "Joho" and ***Suleiman Said Shahbal***, "***Shahbal***", amongst others vied for the seat of Governor for the county of Mombasa in the said election. At the end of it all, ***Joho*** emerged victorious with 132,583 votes as opposed to ***Shahbal*** who came second with 94,905 votes. The Independent Electoral and Boundaries Commission ***"IEBC"*** subsequently published ***Joho's*** name in the Kenya Gazette of 13th March, 2013, "***the Gazette***" and declared ***Joho*** as duly elected Governor of Mombasa County with ***Hazel Ezabel Nyamoki Ogunde "Ogunde"*** as his deputy.

Shahbal was not happy with the results as announced by ***IEBC*** through its Returning Officer ***Mwadime Mwashigadi "Mwashigadi"*** and the subsequent declaration and gazettement thereof on 13th

March, 2013 of ***Joho*** and ***Ogunde*** as Governor and Deputy Governor elect respectively. He sought to challenge those results by way of an Election Petition which he filed in the High Court of Kenya at Mombasa on 10th April, 2013. In that Petition he complained that there were widespread electoral malpractices perpetrated by ***IEBC, Mwashigadi, Joho*** and ***Ogunde*** and therefore the results as declared did not reflect the democratic will of the voters of Mombasa County. Through the petition ***Shahbal*** intended to establish the validity and legality of what transpired prior to and during the voting, counting and tallying processes. The petition too would demonstrate and prove that a number of fundamental failures and contraventions of the Constitution, statutes as well as contraventions of the well settled universal and democratic electoral principles occurred or were permitted to occur. The gravemen of ***Shahbal's*** complaint was that there were no free or fair elections and that the purported results declared by ***IEBC*** and ***Mwashigadi*** were not accurate, verifiable or accountable. He therefore prayed for scrutiny, declaration that ***IEBC*** and ***Mwashigadi*** acted uncostitutionally and unlawfully in their conduct of the elections and together with ***Joho*** and ***Ogunde,*** they were guilty of election offences. As a consequence of the foregoing, he sought for a declaration that ***Joho*** and ***Ogunde*** were not validly declared elected as Governor and Deputy Governor of Mombasa County respectively. In their place, a declaration be made that ***Shahbal*** and his running mate, ***Emmanuel Kombe Nzai "Nzai"*** were so elected. In the alternative, an order that fresh elections be held in respect of the office of Governor, Mombasa County and ***Joho*** be barred from participating in the repeat elections, having been involved in electoral malpractices.

Upon the Petition being served on ***Joho*** and ***Ogunde,*** the duo reacted by filing a joint response. They contended from the outset that the petition was invalid as it was filed outside the mandatory constitutionally provided time-frame of 28 days from the date of the declaration of the election results by ***IEBC*** in terms of ***Article 87(2)*** of the Constitution. That the results of the elections held on 4th March, 2013 having been declared on 7th March, 2013 (sic) and the election petition having been presented on 10th April, 2013, a period of 34 days had lapsed from the date when the election results were declared thus the Petition was invalid. They contended further that by reasons of the above, the provisions of ***section 76(1)(a)*** of the Elections Act, 2011 which provides that a petition to question the validity of an election should be filed within 28 days after the date of publication of the results of the elections in the Gazette were unconstitutional in the face of the unambiguous and specific provisions of the ***Article 87(2)*** of the Constitution. As a consequence of the aforesaid matters, and by reason of the provisions of ***Article 2(4)*** of the Constitution, the aforesaid provisions of ***section 76(1)(a)*** of the Elections Act were void. Finally, they contended on this aspect of the matter that the Gazette was not a declaration of results of the elections but it was published, pursuant to the provisions of ***Regulation 87(4)(b)*** of the Elections (General), 2012 to show and not declare the names of persons elected. In the alternative, the duo contended that the elections were conducted in absolute, resolute and substantial compliance with the letter and principles set out and or implied in the Constitution and written laws relating thereto. Therefore the facts alleged by ***Shahbal*** do not and cannot vitiate the validity, integrity, credibility and or results of the elections.

On 13th May 2013, ***IEBC*** and ***Mwashigadi*** filed their joint response as well. In a nutshell, they contended that in matters of elections the will of the people must prevail and courts will understandably be extremely slow to set to naught the will of the people truly and freely exercised. That the Governor's election for Mombasa County saw ***Joho*** and ***Ogunde*** elected and thereafter on 6th March, 2013 declared duly elected as such. No lawful basis had been set out or any sufficient evidence laid before Court to warrant the setting aside of the results as announced or the subsequent declaration of ***Joho*** and ***Ogunde*** as the Governor and Deputy Governor respectively as the elections were free, fair and credible. ***IEBC*** and ***Mwashigadi*** claimed that they had been faithful stewards of the electoral process. With reference to the publication of ***Joho's*** name in the Gazette, 2013, they contended that it was not a declaration of results as envisaged by ***Article 87(2***) of the Constitution but was rather a declaration of the names of the persons duly elected for the relevant position. They went on to urge that by virtue of the Provisions of A***rticle 87(2)*** of the Constitution, the petition was time barred and consequently invalid and the court had no jurisdiction to hear and determine the dispute questioning the validity of the aforesaid elections. That the right bestowed by ***Article 87(2)*** of the Constitution was extinguished upon the expiry of 28 days from the date of declaration of results on 6th March, 2013.

To give effect to their contention that the election petition as filed was invalid on account of being

filed out of time and the unconstitutionality of ***section 76(1)(a)*** of the Elections Act *vis-a-vis* ***Article 87(2)*** of the Constitution, ***Joho*** and ***Ogunde*** took out a Chamber Summons Application dated 29th April, 2013. The application was expressed to be brought under ***Rule 23*** of the Constitution of Kenya (*Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms*) High Court Practice and Procedure Rules. In the said application, the duo sought the following declarations:-

> ***"(a)*** *The Provisions of section 76(1)(a) of the Elections Act, 2011,that require the filing of an election Petition to question the validity of an election, to be* ***"****filed within twenty eight days after the date of publication of the results of the election in the Gazette****"*** *are inconsistent with, and contravene the specific provisions of* ***Article 87(2)*** *of the Constitution.*
>
> ***(b)*** *By reason of the provisions of* ***Article 2(4)*** *of the Constitution,the provisions of* ***section 76(1)(a)*** *of The Elections Act aforesaid are to the extent of that inconsistency with the Constitution,* ***VOID.***

- *As a consequence of the matters stated in (a) and (b) above, and by reason of the further provisions of Article 2(4) of the Constitution, the Petition filed herein is invalid.*

> *(d) Consequently, this Court has no jurisdiction to entertain an invalid petition, and ought to strike it out, or alternatively, dismiss the same, with costs to the 3rd respondent."*

In summary, the grounds supporting the application were that; whereas ***Article 87(2)*** of the Constitution of Kenya, provides that:-

> *"(2) 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."*

However, ***section 76(1)(a)*** of the Elections Act provided that:-

> 76(1)(a)
>
> A Petition ...
>
> *"To question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the gazette..." (Emphasis added) which was a contradiction in terms.*

That there was no statutory provisions (substantive or subsidiary) that bestows upon the ***IEBC,*** or any other person, any obligation to publish election results of any election (other than a presidential election) held in Kenya in the Gazette. Accordingly, and in a nutshell the requirement in ***section 76(1)(a)*** of the Elections Act for the publication of the results in the *Gazette* is one that cannot and had not occurred in this election and which requirement is unknown in our election laws and thus its unconstitutionality. To them, the Gazette was not in any way declaring any election results, but was issued in compliance with the provisions of ***Regulation 87(4)(b)*** of the Elections (General) regulations. Therefore a Notice in the Kenya Gazette is not tantamount to, or an accronym for a declaration of results. To the extent that the provisions of the Elections (General) Regulations provide as aforesaid, a Gazette showing the names of persons elected cannot by any stretch of imagination, be equated to "***declaring the results of that election***." They argued that ***Shahbal*** had in his petition conceded that the results had been declared on 6th March, 2013. By reason of the foregoing the last day on which he should have filed the petition should have been on 4th April, 2013. However, he did so on 10th April, 2013 which was the 35th day from the date on which the election results were declared. That the Constitution of Kenya, and in particular ***Article 87(2)*** thereof which deals with electoral disputes, read together with ***Article 259(5)(a)*** which deals with computation of time relating to an event referred to in the Constitution, do not make reference to commencement and or running of time to be reckoned from the date after the publication of results in the Gazette for purposes of filing a petition. In the circumstances, any construction of this

provision that is anathema to, and outside the parameters set out in ***Article 259(a)*** will by reason of ***Article 2(4)*** thereof be void, and anything done pursuant thereto, invalid. The final ground advanced in support of the application was that it was never the intention of the framers of the present Constitution to reckon the computation of time from the date of Gazettement of results, for had that been the intention, then the same could have been specifically spelt out. Finally, ***Joho*** and ***Ogunde*** contended that by declaring the provisions of ***section 76(1)(a)*** unconstitutional did not result in a lacuna in the law relating to filing of petitions as ***section 77*** of the same Act takes care of such an eventuality.

Joho swore the affidavit in support of the application. However, he merely reiterated that he was declared the duly elected Governor of Mombasa County on 6th March 2013 and issued with a certificate to that effect. That on 13th March, 2013, ***IEBC*** published a notice in the Gazette showing among others, names of those persons who had been elected Governors in all the 47 counties and his name was among them.

In response to the application, ***Shahbal*** filed grounds of opposition and a replying affidavit. In his 13 point grounds of opposition, ***Shahbal*** took the position that the application was premature, vexatious and an abuse of the process of court, and was purely calculated to scuttle the hearing and speedy conclusion of the petition contrary to the overriding objective of the law, and that the provisions of ***Article 87(2)*** required that election results be declared before the High Court can assume jurisdiction to hear a petition challenging the election results, that the declaration of the results were not done by ***Mwashigadi*** but by ***IEBC*** in accordance with ***Article 87(2)*** which, in referring to ***IEBC*** must be read together with ***sections 75*** and ***76*** of the Elections Act and the election regulations made thereunder. That on 6th March, 2013 a certificate of results was issued by ***Mwashigadi*** and on 13th March, 2013 a declaration of persons elected as Governors was published by ***IEBC*** in the Kenya Gazette. In the premises the foregoing analogy clearly demonstrated that there is a difference between declaration and an announcement. And further that one cannot read the Constitution and interpret it while disregarding the Elections Act and the regulations. That the Constitution donated to Parliament power, under ***Article 87(1)*** to enact legislation with regard to election petitions, which Parliament had done by enacting the Elections Act. He contended further that the provision of the Constitution, the Elections Act and the elections regulations constitute the Elections Code, and therefore ***Joho*** and ***Ogunde*** cannot rely only on the Constitution and ignore the Elections Act and the regulations. As far as he was concerned, what ***Mwashgadi*** did was to announce the election results. The formal, official declaration could only be done by ***IEBC*** and not any other party. In any event the prayers sought in the application were untenable given that they sought to invalidate sections of the law which can only be done in or through a constitutional reference and not in an election petition. Finally, ***Shabhal*** maintained that there was no prejudice suffered by ***Joho*** and ***Ogunde.***

In a replying affidavit, ***Shahbal*** merely reiterated and elaborated on the foregoing grounds. Suffice to add where Pertinent, that according to ***Shahbal***, elections in Mombasa County were marred by numerous illegalities, irregularities and malpractices perpetrated by ***IEBC, Mwashigadi, Joho*** and ***Ogunde*** jointly and severally. That as a result ***Shahbal*** had notified ***IEBC*** of his intention to file an election petition against the aforestated breaches and towards this end he had severally requested ***IEBC*** for electoral documents used in the electoral process to no avail. It was not until 6th April 2013, a Saturday and at about 5 p.m. that he obtained the said documents after going to court and which was only four days from the expiry of the time limited for filing of the election petitions.

The application was canvassed ***inter-partes*** before ***Ochieng, J***. on 20th May, 2013 and in a reserved ruling delivered on 23rd May, 2013 he sustained the application and declared ***section 76(1)(a)*** of the Election Act unconstitutional but refused to strike out the petition. This is how the learned Judge of the superior court rendered himself on the issue:-

> *"In my understanding of the application before me, the applicants are not asserting that the petition was filed after more than 28 days lapsed, from the date the results were published in the Kenya Gazette. The contention is that even though the petition may have been filed within the period stipulated under section 76 of the Elections Act, it was nonetheless filed outside the period stipulated in the Constitution.*

In the attempt to provide flesh to the main-frame of the Constitution, Parliament mandated the commission to make regulations generally, for the better carrying out of the purposes and provisions of the Elections Act...

*In furtherance of that goal, the commission formulated "**The Elections (General) Regulations, 2012".***

Regulation 4(1) reads as follows:

"The Commission shall appoint county returning officers to be responsible for:-

(a) receiving nomination papers in respect of candidates nominated for the post of governor or County woman representative to the National Assembly and the Senate;

(b) tallying results from constituencies in the country for purposes of the election of the President, County governor, senator and Country Women representative to the National Assembly;

- *the declaration and announcement of results tallied under paragraph (b).*
- *such other functions as may be assigned by Commission."*

*Clearly, therefore the commission mandated the county returning officers to, inter-alia, **declare and announce** the results of elections.*

To my mind, that cannot be termed as a deviation from the provisions of article 87(2) of the Constitution, which stipulates that the declaration of results shall be by the Commission. If anything, the commission had simply made a provision for the mode of declaring the results of the elections.

The actions of a duly appointed returning officer are deemed to be the actions of the Commission, unless such actions give rise to personal criminal culpability on the part of such officer...

In relation to the dispute before me, Gazette Notice number 3155 declared that Hassan Ali Joho was the governor of the County of Mombasa, whilst his deputy was Hazel Ezabel Nyamoki Ogunde.

To the extent that the Gazette Notice did not contain the particulars of the other candidates; the rejected votes; the total votes cast; and the total number of registered voters, it fell short of constituting the declaration of results.

Therefore, even assuming that the Gazettement ought to be construed as the instrument through which the results of elections were declared, the Gazette Notice in issue did not declare the results.

Pursuant to Regulation 87 of The Elections (General) Regulations, 2012, the Chairperson of the Commission is only required to declare the candidate elected as the President. The rationale for that is that it is only the chairperson who would have received, from the County returning officers, the forms 38 which are a certificate of the votes cast for each presidential candidate, as tallied from results obtained from the constituency returning officers. ---

Regulation 87(4)(b) makes it clear that;

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

The gazette Notice Number 3155 is thus a notice showing the names of the persons elected as Governors and Deputy Governors, respectively. It does not constitute a declaration of the results.

If a declaration must be in a formal instrument, I find that the Forms containing the results of elections at every level, constitute such formal instruments. When the forms 34, 35, 36, 37 or 38 have been duly signed by the authorised returning officer, it becomes an instrument which cannot be challenged save through an election petition...

The Constitution did not impose the requirement for gazettement. It only talked of ***DECLARATION OF THE ELECTION RESULTS.***

In my considered view, when ***section 76*** *of the elections Act imported the requirement of Gazettement into the mechanism it created for timely settling electoral disputes, the said statute exceeded the authority bestowed upon it by the Constitution...*

The petition herein was filed about 34 days after the county returning officer for Mombasa had declared the results for the election of the governor. It may have been filed within 28 days of gazettement of the fact that Hassan Ali Joho was the elected governor, but that did not remedy the defect.

Should I therefore strike out, as being invalid?

I revert to Article 87(1) of the Constitution. It donated a power to the parliament to enact legislation which would establish mechanisms for timely settling of electoral disputes.

Parliament exercised its mandate, and section 76 of the Elections Act is a part of the results of parliament's work.

As at the time when the petitioner was instituting the petition herein, section 76 of the elections Act was an integral part of the law in force.

The said law was, ***prima facie****, lawful. Its legality had not been challenged. Therefore, when the petitioner filed his petition within 28 days of the gazettement by the Commission, he considered himself to be complying with the law. He did not err.*

If there be any error, it was committed by Parliament; not the petitioner.

As the petitioner complied with a law which was presumed to be lawful, at the time, it would be wrong, in my considered opinion, to punish him for the mistake of the Parliament.

By striking out a petition which was, ***prima facie*** *lawful at the time it was filed in court, this court would be purporting to impose this decision retroactively. It would be akin to punishing an accused person for an act which was committed by him before such act had been criminalised by the law...*

I therefore decline the applicants' invitation, to strike out the petition..."

In the end the learned Judge recommended that the requirement for gazettement be removed from s***ection 76(1)(a)*** of the Elections Act, and that the wording in ***section 77(1)*** be used instead. In the alternative he recommended that that ***Article 87(2)*** of the Constitution be amended by introducing the requirement for gazettement of results, as the mechanism for declaration.

Joho and ***Ogunde*** were not amused with the above determination. They immediately sought and were granted leave to appeal to this Court. The appeal was duly lodged on 27th May, 2013. Twelve grounds of appeal were advanced to wit:-

"1. The Learned Judge in the Superior Court having correctly

come to the conclusion that:

*"... When **section 76** of the **Elections Act** imported the requirement of Gazettement into the mechanism it created for timely settling of electoral disputes, the said statute exceeded authority bestowed upon it by the Constitution and was thus unconstitutional",*

he had no discretion in the matter than to proceed and enforce the

*unambiguous Provisions of **Article 2(4)** and declare the filing of*

the petition in issue as an act done in contravention of the

*Constitution and therefore **invalid**.*

- *The Learned Judge made a clear finding of fact that:*

"The Petition herein was filed about 34 days after the County returning Officer for Mombasa had declared the results of the governor." This was an act, in contravention of the Provisions of Article 87(2) of the Constitution and the Learned Judge in the Superior Court, erred in law by failing to give effect to the unambiguous Provisions of article 2(4) which where relevant mandatorily state that:

*"... **any act or omission in contravention of this Constitution is invalid**."*

- *The Honlourable Judge, failed to appreciate the effect of Article*

*2 (4) of the Constitution of Kenya that made any Act of parliament inconsistent with the Constitution to be void ab initio **AND** any act in contravention of the Constitution invalid.*

- *The Honourable Judge having made a finding that **section 76** was inconsistent with **Article 87(2)** of the **Constitution** could not purport to invalidate the said section from the date of the Ruling instead of the date of the enactment or action undertaken pursuant thereto.*

- *The Honourable Judge erred in law by declining to strike out the petition purportedly because it would be tantamount to retroactive application of the decision thus elevating an unconstitutional provision in an Act of Parliament over a Constitutional provision.*

- *The Honourable Judge erred in law by finding that an uncostitutional provision in an Act of parliament, i.e. **Section 76** of the **Elections Act**, was lawful on its enactment until declared unlawful.*

- *The Learned Judge in the Superior Court was wholly wrong and erred both in law and in fact, when he held and came to the conclusion that at the time of filing of the impugned Petition by the 1st Respondent, section 76 of The Elections Act was prima facie lawful.*

*(a) The Learned Judge in the Superior Court failed to give effect to the clear and unambiguous Provisions of **Article 2(4)** of **The Constitution** when he held as follows:*

"As the petitioner complied with the law which was presumed to be lawful at the time, it would be wrong … to punish him for the mistake of parliament.

By striking out a Petition which was prima facie lawful at the time it was filed in Court, this court would be purporting to impose this decision retroactively"

*(b) The Honourable Judge erred in law and fact by considering that a striking out of the Petition at the time of Ruling would be tantamount to retroactive application of the decision when **ALL** decisions of a court by necessity affect the parties for the acts or omissions they have already done or omitted to do.*

- *The Honourable Judge erred in law by holding that it was proper to excuse contravention of the Constitution where such contravention was through the mistake of the parties as to the understanding of the law or misreading of the Constitution.*

- *The learned Judge in the Superior Court was wholly wrong and erred both in law and in fact, when he further erroneously held and made the finding that when the 1st Respondent (Petitioner in the Superior Court) filed his Petition within 28 days of gazettement by the Commission … he did not err."*

- *By failing to strike out the petition filed by the 1st Respondent,the Learned Judge in the Superior Court effectively deprived the Appellants of their Constitutional Rights of equal protection and equal benefit of the law guaranteed in Article 27 of The Constitution of Kenya.*

- *The Honourable Judge erred in law and in fact by disregarding the evidence that the Petitioner actually knew or ought to have known that the computation of time for filing a Petition begun upon declaration and not publication and thus holding that the Petitioners mistake was attributable to Parliament and not the petitioner."*

When the appeal came before us for plenary hearing on 10th June, 2013, Mr ***Ahmednassir*** and ***Mr Buti***, ***Mr Gikandi*** and ***Mr Ndegwa, Mr Khagram*** and ***Mr Nyamodi***, learned counsels appeared for ***Joho, Ogunde, Shahbal, IEBC*** and ***Mwashigadi*** respectively.

Off the blocks first was ***Ahmednassir.*** He submitted that the people of Kenya drafted the current Constitution. It is a supreme and sacrosanct document which courts cannot ignore, and that was the message ingrained in ***Article 2*** of the Constitution. He submitted that the superior court having found that ***section 76(1)(a)*** of the Election Act contravened ***Article 87(2)*** of the Constitution, the superior court had no discretion but to strike out the petition. In his view, the Judge completely abdicated his constitutional mandate when, after finding that ***section 76(1)(a)*** was in contravention of the Constitution, that the Gazette fell short of constituting the declaration of results and that the Petition was filed 34 days out of time, he declined to strike out the Petition. In the process, the Judge failed to accord ***Joho*** and ***Ogunde*** equal protection before the law. Counsel further submitted that the Judge's failure to strike out the petition was an act of omission and therefore invalid. When a statute is invalid, it is incurably bad. For those propositions counsel relied on the cases of ***Benjamin Leonard Macfoy vs United Africa Company Limited (1962) AC 152***, ***Amicea v Romani & others (2001) LLR 3680 (CAK)*** and ***Samuel Momanyi vs Attorney General & Another (2002) eKLR***. Counsel further submitted that once the superior court found the statute to be unconstitutional, it ceased to have jurisdiction to preside over the petition. Accordingly, this Court must stop the superior court from continuing with the petition. Counsel, in all these relied on the decision in ***owners of motor vessel "Lillian" vs Caltex Oil (Kenya) Ltd (1989) KLR 1*** and ***Samuel Kamau Macharia vs Kenya Commercial Bank Limited (2012) eKLR.***

Taking over from ***Mr Ahmednassir, Mr Buti*** went on to submit that there was evidence that all along ***Shahbal*** knew that he ought to have filed his Petition within 28 days. Indeed even on 27th March, 2013, ***Mumbi, J.*** in ***Constitutional Petition No. 162 of 2013*** involving the same parties benevolently advised him what do do in the event that he wanted to file an election petition, which advise, ***Shahbal*** apparently failed to heed. Rather he came to Court 34 days late whilst well aware of the Statutory time limits. ***Joho*** and ***Ogunde*** should not be taken through the rigours of defending a petition that is invalid. Counsel further submitted, that the superior court Judge was bound to give effect to the provisions of the Constitution. As a parting shot, counsel submitted that the continued prosecution of the petition was itself a violation of ***Joho's*** and ***Ogunde's*** rights under the Constitution.

Supporting the appeal, ***Mr Khagram*** submitted that in doing so ***IEBC*** was not abdicating from its fiduciary duty to remain neutral. However as the matters raised in the appeal were of fundamental importance to the position and stature of the Constitution within the legal hierarchy, ***IEBC*** had to take a position. Having declared ***section 76(1)(a)*** unconstitutional, the learned judge was obligated to strike out the petition. That is the essence of ***Article 2*** of the Constitution. To counsel, the Judge misinterpreted the case of ***Senator John Akpanudoedehe & 2 others vs Godwill Obot Akpabio***, ***Supreme Court of Nigeria, Case No.154 of 2012*** in proceeding to hear the Petition. The judge had not addressed the flip-side of the argument and therefore erred in looking only at one side of the argument. The Judge tried to save the petition with a lingering doubt in mind, counsel thundered. Nobody had appealed against the decision holding that ***(1)(a)*** was unconstitutional. Counsel went on to submit that ***Article 2(4)*** of the Constitution was couched in mandatory terms and did not leave room for discretion. It will be a travesty of justice and indeed against public policy if this Court was to uphold the High Court decision to continue hearing the petition.

In response, ***Mr Gikandi***, urged us to confirm and uphold the ruling of the superior court so that the election petition is sustained. He submitted that the hearing of the Petition had commenced and indeed ***Shahbal*** had testified. Counsel accused ***Joho*** and ***Ogunde*** of blowing hot and cold at the same time. Whereas in the constitutional reference 162 of 2013 ***Joho*** and ***Ogunde*** claimed that the petition had been filed prematurely and in violation of ***section 76(1)(a)*** of the elections Act, in these proceedings they had shifted the goal posts somewhat and now claimed that the said section was invalid. ***Ngugi, J***. had in that petition found that time for purposes of filing election petitions started to run after the Gazettement of the results. Counsel submitted that too much time and capital had been spent arguing on the constitutionality of ***section 76(1)(a)*** of the Elections Act. Counsel posed the million dollar question as to whether really ***section 76(1)(a)*** of the Elections Act was inconsistent with ***Article 87(2)*** of the Constitution. At this juncture, ***Mr Gikandi*** was stopped in his tracks by ***Ahmednassir,*** who pointed out that in his opening remarks, ***Mr Gikandi*** had pleaded with the Court to uphold and sustain the superior court's ruling, and he could not now turn around and start questioning the ruling without a substantive appeal. ***Ahmednassir*** received support from ***Khagram*** on the position he had taken. Relying on ***rule 93(2)*** of this Court's rules, ***Mr Gikandi*** sought an adjournment of the hearing of this appeal briefly to enable him file a cross-appeal for the greater good of the Nation. There was no major opposition to the application by either of the parties to the appeal. Accordingly we allowed the application and granted ***Mr Gikandi*** a brief recess to enable him file a cross-appeal.

That cross-appeal was duly filed. The following grounds were advanced in support thereof:

"1. THAT in Article 87(1) of the Constitution of Kenya, 2010 Parliament was expressly mandated to enact the law that would set out the mechanisms for the timely settling of election disputes. Parliament is the Legislative arm, of the Government and represents the will of the people, particularly in enactment of laws.

- *THAT in enacting Elections Act, 2011, Parliament followed all the necessary procedures and the said law was duly assented to by the President on 27th August, 2011.The said law was prescribed to commence on 22nd December 2011.*

- *THAT the general elections that were carried out on 4th March,2013 were carried out under the Elections Act, 2011.Any attempt to water down the said law would have grave ramifications for the stability of the nation.*

- *THAT section 76 of the Elections Act, 2011 does not contradict any Article of the Constitution of Kenya. 2010 and indeed Article 259 as read with Article 10 of the Constitution of Kenya,2010 requires that the interpretation of the Constitution be broad so as to realize the objectives set out in Article 10. Had the Superior Court adopted that broad interpretation, it would have found that Section 76 of the elections Act, 2010 and Article 87 of the Constitution of Kenya, 2010 were in harmony and that there was no conflict between them.*

- *THAT the court failed to take into account that there exists a presumption in law that an*

Act of parliament is valid unless proved otherwise and in this instant case the Appellant and the 2nd and 3rd respondents did not rebut the said presumption and so section 76 of the elections Act, 2011 should not have been declared null and void.

- *THAT the Superior Court erred in having failed to order that the Attorney General be served with the application dated 29.04.2013 and further erred in having made adverse orders against the Attorney General while the Attorney General was not a party in the said proceedings.*

- *THAT the Superior Court erred in having failed to appreciate that while dealing with such a serious issue matter (sic) as the one that was before the Superior Court, the widest possible ventilation by all the interested parties should have been given effect which was not done."*

At the resumed hearing of the appeal on 25th June, 2013, ***Ogunde*** had instructed ***Mr Mohammed Balala,*** learned counsel to appear for her.

Mr Gikandi continued with his submissions from where he had left earlier. He invited us to look at the prayers in the application. Given the material presented in the superior court from evidential value, the application was rightly rejected. There were no declarations of results filed with regard to ***Joho*** and ***Ogunde*** either in terms of forms 34, 35, 36 or even 38. It was therefore untenable for them to contend that any declaration of results for Mombasa County seat were made on 6th March, 2013. Counsel submitted that the duo had presented a draconian application which was an antithesis of justice. They wanted the Petition to be struck out summarily. Counsel submitted that he who comes to court seeking such a drastic remedy must put before court cogent material for the court to act. Bearing in mind that what was presented before Court being a mere certificate and juxtaposed to the requirement contained in ***Article 87(2)*** of the Constitution the application was bound to fail. ***Joho*** and ***Ogunde*** never laid before court evidence of declaration of results by ***IEBC.*** In the absence of such evidence, the superior court at the evidential level could not allow the application. He urged this court to consider the material placed before the superior court and applying the evidential test decline to allow the application before the superior court.

Turning to the cross appeal, ***Gikandi*** submitted that ***Article 87(2)*** was in harmony and in tune with ***section 76(1)(a)*** of the Elections Act. The Constitution donated power to Parliament to enact a law that would establish a mechanism for timely resolution of electoral disputes. Pursuant to this power, the Elections Act was enacted. ***Article 87(2)*** categorically and expressly vests power to make a declaration in the hands of ***IEBC*** and not the officers on the ground. Counsel submitted that it cannot be possible for one to argue that ***IEBC*** duly created by the Constitution, has its own Act, has a corporate seal can be equated to a mere county Returning Officer. The declaration of results of elections in the premises can only be by ***IEBC.*** Elections are highly emotive affair. Tensions are normally high. It is for this reason that the framers of the Constitution were clear that such an important function could not be left in the hands of County Returning Officers. Counsel further submitted that if the law wanted to confer power upon the County Returning Officers to make a declaration so as to pass the test set out in ***Article 87***, the Constitution would have said so in the simplest of terms. The Constitution only talks of ***IEBC.*** Further, ***IEBC*** pursuant to power donated to it by ***section 109*** of the Elections Act, crafted Regulations. Regulation 4 deals with powers of ***IEBC*** to appoint County Returning Officers. Other regulations such as 84, 85, 86 and 87 and in particular 85, deal with persons who can be allowed in the tallying centre. It is not every Tom, Dick and Harry who can access such facility. When now ***Joho*** and ***Ogunde*** present an argument that the election results announced at such a venue will be the basis of an election petition, then the majority of the people interested in the results will never hear the declaration of results.

Regulation 87 talks of Returning Officer announcing results. That is his only duty. He is then authorised to issue a certificate. Thereafter he electronically transmits the provisional results to ***IEBC.*** Infact the Returning Officer only submits provisional results to ***IEBC*** as per ***Regulation 87(9)***. These are provisional results so that ***IEBC*** in pursuit of its powers under ***Article 87*** of the Constitution can declare the results. Further ***Regulation 87(4)(b)*** talks of publication of results by ***IEBC*** in the Kenya Gazette. Again ***section 39*** of the Elections Act provides that ***IEBC*** will determine, declare and publish the results. The three words are verbs. It is therefore a continuous process so that determination is made in the

polling station, the results are then forwarded to the county returning Officer who in turn transmits the same to ***IEBC*** for declaration. For all these propositions, counsel relied on the following authorities:- ***Constitution Petition No.162 of 2013*** (supra), ***Caroline Mwelu Mwandiku vs Patrick Mweu Musumba & 2 others (2013)*** and ***Election Petition Number 4 of 2013, Gideon Mwangangi Wambua vs IEBC & 2 others (UR).*** He also relied on the Ugandan case of ***Besigye vs Museveni (2008) EALR 80.***

Counsel further submitted that ***Article 259*** of the Constitution requires that interpretation given to an article must be one that enhances accountability, transparency and good governance. In this context, there must be a Gazette Notice by ***IEBC*** declaring the results. Anything short of this would be a recipe for chaos. Counsel urged this Court to give a broad interpretation to ***Article 87(2)*** of the Constitution and avoid technicalities so that the purpose for which this article and ***section 76(1)(a)*** of the Elections Act exist can be realised.

On his part, ***Mr Balala*** supported the reasoning and conclusions reached by ***Ochieng, J:*** He maintained that ***Article 87(2)*** of the Constitution and ***section 76(1)(a)*** of the Elections Act did not match. ***Shahbal*** had not demonstrated that the word "*declaration*" means publication of results. He claimed that ***Article 87(2)*** talks of the petition being filed within 28 days after declaration of election results by ***IEBC.*** Again ***Article 86(c)*** talks of the results from the polling stations being openly and accurately collated and promptly announced by the Returning Officer. Counsel submitted that these two articles must be read in conjunction. That declaration under the Constitution cannot have the same meaning as announcement. That position is buttressed by ***section 39(1)*** of the Elections Act. Thus it cannot be by stretch of any imagination that declaration of results can only be upon gazettment. ***IEBC*** had given powers to the Returning Officers in terms of ***Regulation 83(1)(c), 84*** and ***87*** to declare results. There are no regulations on gazettment of results. For all these submissions counsel referred us to two cases; ***John Michael Njenga Mututho vs Jayne Njeri Wanjiku Kihara & 2 other***s ***(2008)*** and ***eKLR, United States International University vs Attorney General (2012) eKLR.*** Counsel went on to submit that in drafting the Elections Act the drafters in faithful obedience to the Constitution, provided for ***section 76(1)(a)***. However, that section appeared in stark contrast with the Constitution. Counsel urged us to resort to common interpretation. A declaration must follow a certificate. Accordingly gazettement is not a declaration of results. The Gazette does not declare results since results are not about who was declared a winner but a declaration of detailed results. A Gazette under ***Regulation 87(4)(b)*** is merely intended to notify the public of the results. Otherwise the results are declared in form 36. Indeed the form is headed, *"declaration of Results"*. According to counsel, it is this form that gives rise to a cause of action. In any event the Gazette has no prescribed form. Counsel submitted that, ***IEBC*** Commissioners cannot be in all 47 counties or 290 constituencies. For that reason they delegate some of their duties such as declaration of results. To hold otherwise would be an absurdity. Thus the actions of the returning Officers are actions of ***IEBC.*** Concluding his submissions, counsel noted that where the Constitution has set the time-lines, it was not upto Parliament to create other measures to derogate from the law that created it. There must be fidelity to the Constitution. To sanction the filing of a petition outside the Constitutional time-lines is tantamount to the Court amending the Constitution which is not permissible. In support of this proposition counsel referred us to the case of ***Okunda and Another vs Republic (1970) I EA 453.***

In reply, ***Mr Ahmednassir*** submitted that ***Shahbal*** had only made one single reply to the appeal, that the appeal should fail on the evidential threshhold because the petition presented did not contain the results. However it was common ground in the superior court that a declaration of results was made on 6th March, 2013. Indeed ***Shahbal*** in his pleadings contended that the elections were held and that election results were declared on 6th March, 2013. This being the only issue raised against the appeal, it was a non-starter going by his own pleadings.

With regard to the cross-appeal, counsel submitted that it must fail since the submissions of ***Shahbal*** did not support most of the grounds in the cross-appeal and did not say how ***section 76(1)(a)*** is not in conflict with ***Article 87(2)*** of the Constitution. With regard to the fourth ground of the cross-appeal, counsel conceded that it raised a legal issue, however he countered it by submitting that since the promulgation of the Constitution ***Articles 10*** and ***259*** have become a refuge of every person who has no cause of action to mount a suit. He also conceded that when interpreting a bill of rights a liberal and purposive approach was desirable. However, he hastened to add that in this appeal, the court was not

interpreting a bill of rights. Rather it was interpreting a political question. On ground 5, counsel submitted that it talked of presumption of legality of a statute. However, the presumption was rebuttable and it was duly and properly rebutted in the superior court. Otherwise, ***section 76(1)(a)*** in his view was an afterthought. It is even superfluous and a surplus to the requirements. And that explains why it is in conflict with the Constitution. With regard to accusations that his client was blowing hot and cold, counsel denied the allegation. The case before ***Ngugi, J***. was a constitutional petition and not an election petition. He took the position in that petition that ***Shahbal*** had not shown as a loser in the elections, what human rights of his had been violated.

As for ***Mr Khagram***, he submitted that the crux of the matter was the meaning to be attached on the word "***declaration of results***" and at what stage such declaration occurred in the electoral process. In his view, it does not occur at the Gazettement stage. He also reiterated that it cannot be true that Gazettement and declaration is one and the same thing as argued by ***Shahbal***. For this submission counsel referred us to the case of ***Jaswat Singh vs Virender Singh GRS – Civil Appeal No.5332 of 1993*** (Supreme Court of India) and ***Electoral Commission NSW Australia – Guide on meaning of declaration of Elections***. Counsel went on to submit that ***Ochieng, J.*** identified forms 35 and 36 as instruments of declaring results. ***Shahbal*** cannot therefore argue that there was no declaration. If that was the case, then the Petition must fall on the basis that a petition can only be filed after declaration of results. In support of this submission, counsel referred us to the case of ***Kombo vs Attorney General (1995 – 98) IEA 168*** counsel further submitted that ***Ochieng, J***. having found that ***section 76(1)(a)*** was unconstitutional it was not open to other Judges of the superior court to hold otherwise. That the principle of concurrent jurisdiction cannot apply where a Judge has invalidated a statute. Finally, counsel submitted that the principle of fairness does not apply where a statute has been faulted. That concept is only available if the suit is alive. In this case the petition died by effluxion of time.

Replying to the submissions made against the cross-appeal, ***Mr Gikandi*** stated that on the evidential question, ***Shahbal*** found it necessary to incorporate a certificate of declaration of results, however no evidence of declaration was tendered before the superior court. The results were merely announced but not declared. He maintained that it was only the ***IEBC*** which had powers to declare the results. If such powers were to be given to Returning Officers, the framers of the Constitution would have said so emphatically. He submitted further that the authorities cited by ***Khagram*** did not define the word *"declaration."* The definitions are contained in our statutes. Returning officers are meant to make an announcement and ***IEBC*** to declare. On concurrent jurisdiction of the High Court, counsel submitted that Judge of the High Court enjoys concurrent jurisdiction with the other Judge of the same court. Thus ***Mr Khagram*** could not have been right in his submissions to the contrary. Finally, counsel pleaded with us to look at the greater good and allow the election petition to proceed to hearing on merit.

We have anxiously considered the grounds of appeal, cross-appeal, the record, the decision of the superior court, the submissions made before us and the law. No doubt the appeal and cross-appeal raise issues of national importance, in particular, the interpretation of the Statute *vis-a-vis* the Constitution. In our view the issues advanced in the appeal and cross-appeal can be collapsed into three broad grounds:-

> *"1. The superior court having found that **section 76(1)(a)** of the election Act contravenes **Article 87(2)** of the Constitution was it open to it not to strike out the petition but rather proceed with the hearing of the same.*

- *Is **section 76** of the Elections Act really inconsistent with **Article 87(2)** of the Constitution? and,*

- *What is declaration of results, when, where, and by whom is it made and consequently, when does time start running for purposes of filing Election Petitions?*

With regard to the first issue, the starting point must of necessity be ***Article 2(1)*** and ***(4)*** of the Constitution which is the supremacy clause. It provides ***inter-alia***:-

> *"(1.) This Constitution is the supreme law of the Republic and binds all persons and all State*

Organs at both levels of Government …

- *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."*

There is no doubt therefore that the Constitution is a supreme document and sacrosanct.

Further ***Article 10*** deals with National Values and Principles of Governance. In particular ***sub-article (2)(a)*** emphasizes patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people in matters of governance. In our case ,we are more concerned with the rule of law, democracy and matters of governance. We must honour the Constitution and be guided by all these dicta in our daily endeavours.

In the ruling the subject of this appeal, ***Ochieng, J***. made the following categorical and emphatic determinations :-

- *"That **section 76(1)(a)** of the Elections Act that require the filing of an Election Petition to question the validity of election, to be filed within 28 days after the date of publication of the results of the election in the gazette was inconsistent with and contravened the specific provisions of **Article 87(2)** of the Constitution.*

- *That to the extent that the Gazette Notice Number 3155 dated 13th March, 2013 did not contain the particulars of the other candidates the rejected votes, the total votes cast and the total number of registered voters, it fell short of constituting the declaration of results.*

- *Finally, that in contravention of the Constitution, the Petition had been filed late by about 34 days and was therefore invalid."*

Having so far found, did the learned Judge of the superior court have any other alternative but to strike out the Petition? We do not think so. The Judge had no discretion in the matter. In refusing to strike out the Petition, the learned Judge reasoned that:-

> *"... At the time when the petitioner was instituting the Petition herein, **section 76(1)(a)** of Elections Act was an integral part of the law in force. The said law was, **prima facie,** lawful. Its legality had not been challenged. Therefore when the petitioner filed his petition within 28 days of Gazettement by the Commission, he considered himself to be complying with the law. He did not err. If there be any error it was committed by Parliament; not the petitioner. As the petitioner complied with a law which was presumed to be lawful, at the time, it would be wrong, in my considered opinion to punish him for the mistake of the parliament. By striking out a Petition which was **prima facie** lawful at the time it was filed in court, this court would be purporting to impose this decision retroactively. It would be akin to punishing an accused person for an act which was committed by him before such act had been criminalised by the law. I therefore decline the applicant's invitation, to strike out the Petition ..."*

To our mind, once the Judge came to the conclusion that ***section 76(1)(a)*** of the Election Act upon which the petition had been hoisted was in conflict with the Constitution and the Petition had been filed outside the mandatory 28 days statutory period, he had no discretion whatsoever in the matter so as to move the Petition forward. He had no alternative but to down his tools by striking out the petition. To have allowed the petition to move forward despite his lingering doubts and trying to justify his decision with an analogy of criminal proceedings was most unfortunate and completely wrong. Clearly, the Judge abdicated his constitutional mandate. He had no discretion in the matter than to proceed and enforce the unambiguous provisions of ***Article 2(4)*** of the Constitution and declare the petition as filed invalid. Nor was there need for purposive approach in the interpretation of the Constitution. It would appear that the

Judge in bending backwards so much to protect ***Shahbal,*** he failed to appreciate that ***Joho*** and ***Ogunde*** too had rights which required similar protection. This is what is often referred to as equal protection before the law. In the premises the Judge failed to appreciate that ***Shahbal, Joho*** and ***Ogunde*** were all entitled to equal protection before the law. In matters of equal protection of the law, expediency has no place.

Once a statute is declared unconstitutional it ceases to exist. It is invalid and void. The Petition having been anchored on a statute, the court deemed unconstitutional, it became void and everything that came with it similarly became invalid and or void. As it were then, once something is void, it is incurably bad and no life can be breathed into it by whatever means. It is as dead as a dodo. No amount of legal sophistry can turn it around. The good Judge cannot then be heard to say that ***section 76(1)(a)*** of the Elections Act was lawful on its enactment until declared unlawful and that at the time of filing of the impugned Petition, ***section 76(1)(a)*** of the Elections Act was ***prima facie*** lawful. It mattered not that striking out of the petition at the time would have amounted to retroactive application of the decision. After all, decisions of court affect parties for their actions prior, during and after filing of suits. As stated in the case of ***Macfoy*** (supra):

> *"... If an act is void, then it is in 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"*

Of course there is a distinction between void and voidable. An act which is voidable is not void or a nullity. It is a mere irregularity which can be overlooked and or waived on the cost of prejudice and or justice of the case. In the premises, the court has a discretion whether to set it aside or not. Again as stated in ***Macfoy*** case;

> *"... But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside; and the court has a discretion whether to set aside or not. It will do so if justice demand it but not otherwise ..."*

In this case, with the declaration that ***section 76(1)(a)*** of the Elections Act was inconsistent with ***Article 87(2)*** of the Constitution and that the election Petition was filed outside the stipulated time, the whole substratum of the petition collapsed. The petition thereafter became void. By refusing to strike out the petition there and then, the Judge committed an act of omission rendering the proceedings invalid. There is no doubt at all that the superior court Judge attempted to breath life in an invalid proceedings. It is however the duty of courts at all times to uphold and protect the Constitution. In our view, there was absolutely no reason why the Judge could not strike out the petition having reached the above conclusions. The reasons advanced by the Judge in sustaining the Petition notwithstanding his findings cannot, with tremendous respect to the learned Judge, stand scrutiny. Once a statute is declared void, it matters not that a party acted in good faith and in compliance with the impugned statute or a section thereof. As much as the learned Judge was at pains to prolong the Petition and perhaps assuage the feelings of ***Shahbal,*** he was plainly wrong in not striking out the Petition.

The twin issues of ***section 76(1)(a)*** being unconstitutional and the filing of the Petition outside the statutory period are matters that go to jurisdiction of the election court. Once the court made the above findings it had no jurisdiction to entertain the petition any further. On matters of jurisdiction, the reasons advanced by the learned Judge to sustain the petition pale into shadows.

We are told that jurisdiction is everything. Without it a court has no business entertaining a matter and in the event that it has proceeded, the moment its attention is drawn on the question of jurisdiction it must down its tools. Where a court takes upon itself to exercise a jurisdiction which it does not, pretended or otherwise have, its decision amounts to nothing. In the case of "O*wners of motor vessel* ***"Lillian"*** (supra), this Court differently constituted delivered itself on the issue thus;

> *"... I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction ..."*

The Supreme Court too has had occasion to address the issue of jurisdiction. This is how it delivered itself in the case of ***Samuel Kamau Macharia*** (supra);

> *"... A court's jurisdiction flows from either the Constitution or Legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law … It goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings … where the Constitution exhaustively provides for jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation ..."*

This is exactly what the learned Judge was attempting to do in prolonging the petition after his findings.

In failing to strike out the Petition for want of legality, and trying to justify the decision on grounds that cannot stand legal scrutiny, the learned Judge was clearly embarking on an odious task that he had already been warned about. As it were, it is really an exercise in futility that may very well end up wasting valuable judicial time and the attendant costs or expenses. This Court has a constitutional duty to stop the superior court from going down the unconstitutional path and rein in the wastage.

We need not re-emphasise the fact that ***Article 2*** of the Constitution spells out in mandatory terms that the law which is inconsistent with it is invalid. As already stated, having reached those conclusions, the superior court Judge was obliged to strike out the petition. He had no reason at all to blame Parliament in a bid to save the Petition. That cannot do. Justice cuts both ways. If ***Shabhal*** misunderstood or misconstrued the Constitution and or the Elections Act, he has to live with the consequences and cannot be a beneficiary of a route crafted by the learned Judge that has no legal basis. It will therefore be a travesty of justice and against public policy if we were to uphold the position taken by superior court in refusing to strike out the Petition in the event that we agree with him on the second issue framed for determination in this appeal.

Finally, a careful reading of the reasoning of the Judge in perpetuating the petition leaves no doubt at all that he was at pains to be fair to ***Shahbal.*** In our view the principle of fairness is not available to ***Shahbal*** where a statute has been faulted. Fair hearing is only available if the suit is alive and kicking. But in this case having made those declarations, the Judge effectively pronounced the Petition as dead and buried. Consequently the principle of fairness would be inapplicable. Dealing with the same issue the Supreme Court of Nigeria in ***Senator John Akpanudoedehe*** (supra) had this to say:-

> *"... This submission is indeed a beautiful academic rendition and the point has to be made and forcefully too that a matter of fair hearing only applies where the suit is still alive not a dead one as in this case which death occurred by effluxion of time, the 180 days having been exhausted ..."*

The same situation obtained before the Judge of the superior court the difference only being the number of days. In our situation it is 28 days.

In the upshot it is our finding that the learned Judge of the superior court erred in allowing the petition to proceed to hearing even after he had determined that ***section 76(1)(a)*** of the Elections Act upon which it had been mounted was in conflict with ***Article 87(2)*** of the Constitution and therefore void to the extent of such conflict or inconsistency. He had also found that the petition had been filed out of time. On these two grounds, the only legal avenue available to the learned Judge was to strike out the Petition without any remorse or feeling of guilt and or unfairness.

We now turn to consider the second question for determination as framed to wit whether ***section 76(1)(a)*** of the Election Act is really inconsistent with ***Article 87(2)*** of the Constitution. We are aware that, that task demands us to deal with the issues involving the interpretation of the various provisions of the Constitution as well as the statute in question just as the trial Judge attempted to do. In that regard, it is important to remind ourselves some of the cardinal principles of constitutional interpretation that will guide in this task! Thereafter, we shall proceed to set down the position as advanced by various High Court Judges on the issue, and lastly give our position in respect to the same.

The starting point would be the Ugandan case of ***Ssemwogerere and others vs Attorney General (3) [2004] 2 EA 247,*** where the Supreme Court in Uganda held that the Court's jurisdiction to declare an Act of Parliament inconsistent with or in contravention of the Constitution goes with the one for interpretation of the Constitution and is unlimited since the constitutionality or otherwise of an Act of Parliament must be construed *vis-à-vis* the Constitution. And further that for the purpose of exercising that jurisdiction there can be no distinction between an Act passed to amend the Constitution or an Act passed for other purposes.

As regards the principles applicable in the construction of the Constitution we of-course have to revert to ***Article 259(1)*** of the Constitution which has set those principles. This Article provides;

> *259. (1) This Constitution shall be interpreted in a manner that –*
>
> *(a) promotes its purposes, values and principles;*
>
> *(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;*
>
> *(c) permits the development of the law; and*
>
> *(d) contributes to good governance.*

Sub-Article 3 of this Article provides that; every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and therefore …'

The High Court ***John Harun Mwau & 3 others vs Attorney General and 2 others, Petition No.65 of 2011,*** recognized these principles and added that while interpreting the Constitution, the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion. And that the Constitution must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism" and further that the entire Constitution has to be read as an integrated whole and so no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument. This is what has now notoriously been known as the harmonization principle.

These principles as set by the High Court were adopted by this Court, (constituted differently) in the case of ***Centre for Rights Education and Awareness and Another vs John Harum Mwau & 6 others, Civil Appeal No.74 of 82 of 2012.*** This Court stated *inter-alia*;

> *"Principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result-meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a*

construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution."

On determining how to understand and gather the spirit of the Constitution, the Indian case of ***Kashava Menon vs State of Mombay (1951) S.C.R. 228,*** espoused the same as follows;

"A court of law has to gather the spirit of the Constitution from the language of the constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the constitution does not support that view."

This reasoning has been adopted in the kenyan case of ***Republic vs Mann (1969) EA 357,*** where the court stated as follows:-

"We do not deny that in certain contexts a liberal interpretation of the constitution may be called for, but in one cardinal respect we are satisfied that a constitution is to be construed in the same way as any other legislative enactment, and that is where the words used are precise and un-ambiguous they are to be construed in their ordinary and natural sense. It is only where there is some in-precision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put upon the words."

Our Supreme Court has also enunciated the principle to be used in interpreting the Constitution. In its ***Advisory Opinion Application No.2 of 2012, In the Matter of the principle of Gender Representation in the National Assembly and the Senate***, stated that;

"We should state that the Supreme Court, as a custodian of the integrity of the Constitution as the country's charter of governance, is inclined to interprete the same holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystalize enforceable rights, are enabled to discharge their obligations, as a basis for sustaining the design and purpose of the Constitution."

The Supreme Court further stated that;

"Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, a norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm."

The question of setting forth the principles applicable in interpreting the Constitution has arisen in many other jurisdictions. The Supreme Court of the united States of America in the case of ***Smith Dakoila vs North Carolina 192 U.S. [1940] LED 448*** stated as follows in regard to the harmonization principle;

"It is an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument."

In ***R. v Drug Mart (1985) LRC 65;*** The Canadian Supreme Court held that while interpreting the Constitution, the court will always take a purposive interpretation of the Constitution as guided by the Constitution itself. In paragraph 116 of its ruling, the court stated:

"The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guaranteed; it was to be understood, in other words, in the light of the interests it was meant to protect … to recall the Charter was not enacted in a vacuum and must therefore … be placed in its proper linguistic, philosophic and historical contexts."

The justification for this purpose approach was exemplified by Lord Wilberforce speaking for their Lordships in ***Minister of Home Affairs (Bermulda) vs Fisher [1980] AC 319 (PC),*** where he said that the way to interprete a Constitution is to treat it not as if it were an Act of Parliament but as *'sui generis'*, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used. This reasoning was later upheld by the Australian High Court in ***Attorney General of the Commonwealth, ex relatione McKinley vs Commonwealth of Australia (1983) I ALL ER 1130.*** The same sentiments have been adopted by the South African Constitutional Court in the case of ***S. vs Zuma (CCT 5/94) (1995),*** where the court agreed with these principle set on these decisions and emphasized that in taking this purposiveness approach, regard must be paid to the legal history, traditions and usages of the country concerned.

The Privy Council in ***The Queen vs Druyg Mark Ltd (1996) LRC 332*** held that the court while interpreting the Constitution must consider the purpose and effect of an Act of parliament to determine its constitutionality.

In Namibia, the court in ***S. vs Acheson, 1991 (2) S.A. 805*** stated that the spirit of the Constitution lies at the core of all Constitutional interpretation. ***Mohammed A.J***. observed that:-

"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul,' the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion."

Subsequently, the Namibian Supreme Court, in ***Minister of Defence vs Mwandinghi, 1992(2) SA 355 (at p.362)*** stated that;

"*The Namibian Constitution must therefore be purposively interpreted, to avoid the 'austerity of tabulated legalism."*

Closer home, the Tanzanian Court of Appeal while considering the interpretation of the Constitution of the united Republic of Tanzania regarding a restriction on access to court, in the case of ***Ndanabo vs the Attorney General (2001) 2 EA 485***, had this to say:-

"*We propose ,,, to allude to general principles governing constitutional interpretation … These principles may, in the interest of brevity be stated as follows. First, the Constitution of the united Republic of Tanzania is a living instrument, having a should and consciousness of its own as reflected in the Preamble and Fundamental Objectives and Directive Principles of State Policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in time with the lofty purposes for which its makers framed it … Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner … restrictions on fundamental rights must be strictly construed*."

Finally, in the Ugandan case of ***Tinyefuza vs Attorney General Constitutional Appeal No.1 of 1997,*** the court held as follows:-

"The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony; rule of

completeness and exhaustiveness and the rule of paramountancy of the written Constitution.

Thus it was the duty of the learned Judge to interpret the provisions of ***Article 87(2)*** *vis-a-vis* ***section 76(1)(a)*** of the Constitution in a manner that does not amount to either amending or changing the Constitution. He ought to have been guided by the provisions of ***Article 259*** of the Constitution and adopted a purposive and generous approach that gives effect to the purpose, key values and principles underlying the provisions of the Constitution as provided in ***Article 10*** as well as the electoral laws bearing in mind the peculiar circumstances. He should have taken a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution. He too should also have given leverage to public interest and good order while conscious of our country's political realities and governance challenges. He too should have adopted the harmonisation doctrine. We believe these approaches would have been the best to give life to the provisions of the Constitution.

Having expressed ourselves as above, we must also consider it important to revisit the cardinal principles applicable while interpreting a statute. It is a well settled principle of law that the cardinal rule for the construction of statute is that it should be construed according to the intention expressed in the Act itself. See ***Craies on Statute Law 96th Edition) p.66.*** This was so held in the case ***Direct United States Cable Co. vs The Anglo-American telegraph Co., (1877) 2 A.C. 394*** where Lord Blackburn stated that:-

> *"The Tribunal that has to construe an Act of a legislature or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject-matter with respect to which they are used and the object in view."*

Similarly, in ***Barnes vs Jarvis n(1953) I W.L.R. 649,*** Lord Goddard C.J. Held that:

> *"where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature."*

At home, the above reasoning has been aptly captured in the case of ***El Mann (supra)*** that:

> *"If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in* such *a case best declare the intention of the law giver."*

As it can be seen, the rules applicable to the interpretation of a statute are basically the same as to the interpretation of the Constitution. And with that in mind, we now proceed to examine whether ***Ochieng J*** was right on the Constitutionality or otherwise of ***section 76(1)(a)*** of the elections Act. Before that, it is necessary to appreciate the interpretation accorded to the contentious section of the Elections Act by some of the Superior Court Judges. ***Mumbi, J***. in ***Ferdinand Ndung'u Waititu vs IEBC & 8 Others (2013) e KLR*** while facing the same challenge held that declaration of results as envisaged by ***Article 87(2)*** can only be done in a formal instrument and that instrument is the Gazette. This argument as proposed by ***Mumbi, J***. was later adopted by ***Mabeya, J***. in ***Josiah Taraiya Kipelian Ole Kores vs Dr.David ole Nkedienye & Others (2013) e KLR.*** Clearly, the learned Judges validated the inclusion of the requirement to publish in the Gazette notice as contained in ***section 76(1)(a)*** of the Elections Act thus essentially approving the contents of this section.

Odunga, J. in ***Gideon Mwangangi Wambua vs IEBC & 2 Others, (2013) e KLR,*** while called upon to examine the constitutionality of ***section 76(1)(a)*** of the Act *vis-a-vis* ***Article 87(2)*** of the Constitution held that the section was not unconstitutional since the insertion of the word 'gazette' at ***section 76(10(a)*** of the Election Act, meant to give certainty to reckoning of time for the purposes of filing election petitions to challenge the outcome of an election other than the one for the president. He found that s***ection 76(1)(a)*** was a mechanism by which Parliament fulfilled its mandate as enjoined by ***Article 87(1)*** of the Constitution and that, that section as so enacted was ambiguous and unclear. He however declined to find the section unconstitutional and instead directed the Attorney General to initiate the legislative process of amending the Elections Act 2011, with a view of providing reasonable

timeliness within which the gazettement under ***section 76(10(a)*** of the Election Act is to be undertaken.

Similarly, ***Majanja, J.*** in ***Caroline Mwelu Mwandiku vs Patrick Mweu Musimba & 2 others (2013) eKLR*** While faced with the task of defining the meaning of declaration in order to determine when time started running for the purposes of filing an election petition, held that ***section 76(1)(a)*** of the Election Act was not inconsistent with ***Article 87(2)*** of the Constitution and that; ***section 76(1)(a)*** was merely enacted to state that the twenty-eight day period begun to run from the time the results are published in the Gazette as opposed to the time they are announced by the returning officer.

Also, ***Lessit, J***. weighed in ***M'Njiria Petkar Shen Miriti vs Ragwa Samuel Mbae & 3 others, Meru Election Petition No.4 of 2013*** and held that the Gazette Notice must be deemed to be the declaration envisaged by ***Article 87(2)*** of the Constitution.

Lastly, ***Onyancha, J.*** in ***Bashir Haji Abdullahi vs Adan Mohamed Nooru & 3 others (2013) e KLR*** held that ***section 77(1)(a)*** of the Act was not inconsistent with ***Article 87(2)*** of the Constitution, as it gave meaning to ***Article 87(a)*** which in his view authorised only the ***IEBC*** and not returning officers to make the declarations of the election results. He held that what the Returning Officers announced at the Tallying Centre was basically provisional results subject for confirmation by the ***IEBC*** through the declaration in the gazette. He thus agreed with ***Mabeya, J***. and ***Majanja, J***. that time for the purposes of filing an election petition begun to run after the publication of the results in the Gazette.

As it can be seen from the foregoing, it would appear that ***Ochieng, J***. stands alone in finding that the declaration of election results is done by the Returning Officers at the tallying center and that ***section 76(1)(a)*** of the Act is inconsistent with ***Article 87(2)*** of the Constitution. There is nothing wrong though with a Judge taking a singular position. He could as well turn out to be right. He cannot therefore be crucified or vilified for the position he has taken. That is his right.

Having carefully considered the submissions made before us on the issue and the authorities, we are satisfied that the position taken by other superior Judges contrary to ***Ochieng, J's*** would appear to be the correct appreciation of the issue at hand. Why do we say so? Before we can give an answer, we shall endevour to look at various constitutional provisions as we are alive to the rule that a constitutional provision must not be interpreted in isolation with each other but must be read as a whole bearing in mind that no one particular provision destroys the other but each sustains the other in order to discern the meaning and object of those provision. See ***KIGULA AND Others vs Attorney General (2005) 1 EA 132.*** We will also consider the various provisions of the election Act and Regulations enacted thereafter in order to determine their purpose with a view of establishing if at all they give effect to the provisions of ***Article 87(2)***.

We must begin by reproducing verbatim the provision***s*** of ***Article 87*** of the Constitution which provides for the manner in which electoral disputes are to be resolved. It provides ***inter-alia***:-

> *"87.*
>
> *(1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.*
>
> - *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."*

Pursuant to the provisions of this Article, Parliament enacted the ***Elections Act***. ***Section 76(1)(a)*** thereof echoes the provisions of ***Article 87(2)*** of the Constitution which provides that a petition challenging the election results must be filed within twenty eight days after the results have been gazetted by the IEBC. This section states that:-

> *"76(1) A petition -*

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

Notably, these provisions are replicated under ***section 77(1)*** of the Elections Act, which states as follows:-

"A petition concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Commission."

It is this obligation requiring the publication of election results by the ***IEBC*** in the Gazette that the appellants take issue with and is being alleged to be in violation with ***Article 87(2)*** of the Constitution which requires the ***IEBC*** to declare the election results. It must be remembered that ***Article 87(1)*** of the Constitution mandates Parliament to enact legislation to govern the elections and pursuant to this mandate the ***Election Act,*** and other statutes such as the Political Parties Act, the ***IEBC*** Act were enacted to govern the elections. It thus follows clearly that the Constitution has donated power to Parliament to give effect to the Constitutional provisions on elections so as to provide the law to govern the timely settlement of electoral disputes. One of the cardinal principles of statutory interpretation as seen elsewhere above is the presumption that statutes enacted by Parliament are constitutional unless the contrary is proven. See ***Ndyanaba vs Attorney General [2001] 2 EA 485***.

A casual reading of ***Article 87(2)*** of the Constitution reveals that time begins to run after the declaration of the election results by the ***IEBC.*** The issue and the bone of contention in this appeal therefore is whether declaration for the purposes of computation of time begins to run after the returning officer who is an agent of ***IEBC*** appointed to oversee the election at the constituency level has announced the results of elections at the constituency tallying centre or after the publication in the gazette as envisaged by ***section 76(1)(a)*** of the Act. Can the argument that the returning officer at the tallying center determined and declared the relevant election results and that the role of the commission was merely to publish the same be true? We do not think so, and for reasons to be seen shortly.

A returning officer has been defined under ***section 2*** of the Elections Act as:

"A person appointed by the Commission for the purpose of conducting an election or referendum under the Act"

The role and function of a Returning Officer in the electoral process has been aptly captured under ***Regulation 3(3)*** of the Elections (General) Regulations which provide that:-

"3.

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

(2) ….....

- *The returning officer shall be responsible for -*

(a) conducting elections at the constituency level

(b) receiving nomination papers in respect of candidates nominated for the post of National Assembly and Ward representative;

- *<u>the tallying of results</u> from each polling station in the constituency;*

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

(e) the declaration of the results tallied under paragraph (c); and

(f) such other functions as may be assigned by the Commission."

Rule 4 of the Elections (Parliamentary and County Elections) Petition Rules, 2013, requires the appointment of County returning Officers whose mandate is *inter-alia* to tally results received from constituencies in the County for the election of among others the Office of the President, County Governor and the Senator and to make the final declaration of the tallied results by announcing the winner of the elections.

That is not the end of the matter. ***Section 39*** of the Elections Act has mandated the Commission to determine, declare and publish the results. This section provides as follows:-

"39.

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

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

- *The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed."*

At this point, the question is how are these results to be declared and by whom? To answer the first question, we shall first endeavour to understand the process leading to the declaration of the results.Regulation 83 of the general regulations made under the elections Act and whose marginal note reads '*Tallying and announcement of election results*' reads in part as follows;

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

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

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

- *complete Form 34 and 35 set out in the Schedule in which the returning officer shall declare, as the case may be, themselves;*

- *name of the respective electoral area;*
- *total number of registered voters;*
- *votes cast for each candidate or referendum side in each polling station;*
- *number of rejected votes for each candidate in each polling station;*
- *aggregate number of votes cast in the respective electoralarea; and*
- *aggregate number of rejected votes; and*
- *sign and date the form and -*
- *give to any candidate, or agent present a copy of the form; and*
- *deliver to the Commission the original of form 34 and 35 together with form 36 and Form 37 as the case may be.*

Further, ***Regulation 86*** states that ''*After the final tallying and announcement of results, the returning officer shall seal up in separate tamper proof envelopes …'* It is thus clear in our minds that under ***Regulation 83(1)(c)*** the role of the returning officer is limited to completing forms 34 and 35 which would state the election particulars in regard to the election in question. Can this be the declaration envisaged by ***Article 87(2)*** of the Constitution? But we do not think so.

As stated elsewhere above, the drafters of the Constitution intended that Parliament would have the sole responsibility of enacting legislation for enabling the timely settlement of electoral disputes. And it so enacted the Elections Act. Again, at this point we must state that this Court is bound to consider the purpose and the effect of which the impugned statute and those sections in question were enacted. ***Section 100*** of the Elections Act has mandated the Commission to provide the mode of declaration of the election result. Can form 34 and 36 be the mode of that declaration?

These forms are not and cannot be the formal instrument to be used by the Commission to declare the results of an election. These forms as we perceive them are meant to cure the mischief identified by this Court, (although a different bench) in ***John Michael Mututho vs Jayne Njeri Kihara, Civil Appeal No.102 of 2008*** where the Returning Officer had failed to declare the results and casually stated that, '*This man is ahead of Mrs by 100 votes'*. Under the National Assembly and Presidential Elections Act (now repealed) on the basis of which the Mututho Case (supra) was decided, there was no provision compelling the then Electoral Commission to furnish the court with details of the elections results and since election results formed the core of an election dispute and was tied to the prayers sought, this Court held that failure to state results was fatal thus rendering the petition incurably defective. In finding that this position would not apply in the current electoral laws, we are conscious that a court while interpreting the Constitution should be dynamic, progressive and flexible and be alive to the political values obtaining in the country so as to give them the widest benefit possible.

In our view, the ***Elections Act*** and ***section 76(1)(a)*** having been enacted were meant to give effect to the provisions of ***Article 87(2)*** of the Constitution by providing the manner in which declaration of the results is to be done by the Commission.The declaration envisaged by the Constitution at ***Article 87(2)*** in our view is a formal declaration which would not surely be contained in forms 34 and 35. ***Blacks Law Dictionary, 9th Edition at page 467*** has defined the word declaration as; *'a formal statement, proclamation or announcement especially one embodied in an instrument'*.

It is not in question that ***Article 87(2)*** of the Constitution has mandated the ***IEBC*** to declare election results. These election results are what is obtained at the end of an election period. An election period has been defined under ***section 2*** of the elections Act as;

> *"the period between the publication of a notice by the Commission for a presidential parliamentary or county election under* ***sections 14, 16, 17*** *and* ***19*** *and the gazettement of the election results"*.

It therefore follows that; ***section 2*** of the Act has given an indication on when time for filing of an election petition ought to be computed and that is, after the gazettement of the elections results. We say so because ***section 2*** of the Elections Act calls for no more than a literal, plain and simple meaning in construing the words used in determining when time starts running and is*; between the publication of a notice for the election … and* the g*azettement;* which would include the time up to the gazettement to mean that it would be ripe to file an election petition after gazettement. The next question then would be gazettement of what? This question in our view also needs a straightforward answer which is; gazettement of election results.

The obvious question thereafter is what are election results? Election results have been defined by the Election Act at ***section 2*** as; *'the declared outcome of the casting of voters by voters at an election.'*

Concise Oxford English Dictionary has defined the word outcome as *'a final product or end result'*. We therefore find that the manner for the declaration of the results is by publication in the gazette and such finding cannot be inconsistent with the Constitution as ***Ochieng, J***. held. The basis of our so holding is as

follows:-

Firstly, election results as we have stated above imply the final outcome of the election. We have thereafter defined outcome as the 'end result or product'. Surely, the end product or result must be that person who has won the election. We cannot attribute any other meaning to this word. Thus the gazette ought to declare the outcome of the election which is the person who emerged the winner in that election and not the scores garnered by each candidate. The scores as we have found above are to be found in forms 34 and 35 which forms are prepared by the Returning Officer. For one to challenge the outcome of an election. One has to wait for the election period to end which ends with gazettement of the outcome. It is only thereafter that one may file an election petition and the Chief Justice then constitutes the court that will determine that election petition as per Rule 6 of the Election Petitions Rules.

Secondly, it is the gazette notice which is the official publication of the government and it contains notices of new legislation, notices required to be published by law or policy as well as other announcements that are published for general public information. ***Article 260*** of the Constitution provides; '*Gazette means the Kenya gazette published by the authority of the national government, or a supplement to the Kenya Gazette'*.The probative and legal effect of the gazette have been recognised by ***section 60*** of the ***Evidence Act (Cap 80)*** which states that;

- *The courts shall take judicial notice of the following facts'*

- …
- …
- …
- …
- …
- *the accession to office, names, titles, functions and signatures of public officers, if the fact of their appointment is notified in the Gazette.'*

Clearly, the gazette is the medium of communication between the government and its citizens. A declaration or notice as contained in the Gazette is to the whole world and gives notice to the general public. It can also be seen from the provisions of section 60 of the Evidence Act, that the gazette has the full force of the law. How else would the citizens who are not at a tallying center get to know the persons so elected to office if the declaration was to be contained in forms 34 and 35 and as declared at the polling station and tallying hall respectively? And as correctly submitted by ***Gikandi***, not every Tom, Dick and Harry is allowed in the tallying centre. Again, the filing of election petition has been liberalised. A Petitioner need not be a registered voter in the constituency whose results he/she seeks to impugn. All that is required of him is to be a registered voter. If such petitioner was in Busia at the time of the alleged declaration by the Returning Officer in Mombasa of the results, how will he know the outcome unless through the Gazette? Indeed under Regulations 83, the original form 35 is supposed to be transmitted to the ***IEBC*** and are not to be published. Nor are those forms placed on a Notice board in the Constituency for all and sundry to easily access for the information contained therein. This would not have been the intention of the drafters of the Constitution and the legislature, knowing very well that those forms are private documents and were beyond the reach of the common mwananchi and whose circulation is in any event limited.

Thirdly, we are aware that, the returning officers and county returning officers are agents of the commission, but the Constitution at ***Article 87(2)*** has required the commission to declare the results and not the returning officer. In fact the commission at ***section 2*** has been defined as the ***IEBC*** as established under ***Article 88*** of the Constitution. The returning officers are the agents of the Commission, granted they act with the authority of the principle which is the Commission. But in this case we are of the considered view that the principle, the commission is the one mandated to declare the results. In our view, had the drafters of the Constitution intended the commissioner's agents would be the ones to declare the election results, we believe nothing would have been easier than for them to say so categorically and explicitly.

In so finding we are also fortified by the provisions relating to the filing of presidential election petitions. We consider this provisions necessary as they in essence give effect to the rule of interpretation of the Constitution that constitutional provisions ought to be read as a whole and considered together so as to discern the meaning of the words used. We are alive to the provisions of ***Article 140*** which states that:

> "*A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election*."

Then ***Article 138(1)*** of the Constitution that:

> "*138(10) within seven days after the presidential election, the Chairperson of the Independent and Electoral and Boundaries Commission shall -*
>
> - *declare the result of the election; and*
> - …

Clearly the difference can be seen. In case of the declaration of the results of the Presidential Election, the Constitution has categorically stated that it is the responsibility of the Chairperson of the Commission to declare those results. If we were to give the words used in these two Articles their ordinary and literal meaning they would support our finding above that the Constitution ought to have stated that declaration to be done by the returning Officer as it has said of the Chairperson and the presidential results. We say no more. Suffice to add that it does not add up for a person who is supposed to make a final declaration to again forward the results which are provisional to ***IEBC*** for it to make a final declaration.

In finding that ***section 76(1)(a)*** of the Elections Act is not inconsistent with the Constitution so as to be unconstitutional, we are guided by the spirit of the Constitution which has placed public interest at the core of the Constitutional interpretation and enforcement of fundamental rights and freedoms. It is clear to us the insertion of the word gazettement in ***section 76(1)(a)*** is not unconstitutional and we so find.

It follows that the appeal must fail. In answering this second question as framed for determination, we have also in the process answered the third and last question for determination. We hold in the premises that ***section 76(1)(a)*** is not unconstitutional, the declaration of results for purposes of election petition is by gazettement in the Kenya Gazette and finally time starts running from the date of such gazettement.

Accordingly, we propose to make the following orders in the appeal and cross-appeal:-

> *i. The appeal is dismissed with costs to be borne equally by* ***Joho, Ogunde, IEBC*** *and* ***Mwashigadi*****.**
>
> *ii. The cross-appeal succeeds with costs equally to be borne by* ***Joho, Ogunde, IEBC*** *&* ***Mwashigadi.***
>
> *Iii. The application in the superior court dated 29th April, 2013 is dismissed with costs to* ***Shabhal*** *to be paid equally again by* ***Joho****,* ***Ogunde****,* ***IEBC*** *and* ***Mwishigadi.***

Finally, the lawyers involved in this litigation deserve a pat on the back. They gave as much as they received. In the process they have enriched this judgment. Their industry, commitment and determination has certainly been inspirational. We thank them all.

Dated and delivered at Mombasa this 25th day of July, 2013.

ASIKE-MAKHANDIA

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT MALINDI

(CORAM: GITHINJI, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 12 OF 2013

BETWEEN

1. HASSAN ALI JOHO

2. HAZEL EZABEL NYAMOKI OGUNDE ….....APPELLANTS

AND

1. SULEIMAN SAID SHAHBAL

2. INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION

3. MWADIME MWASHIGADI ……....RESPONDENTS

(Being an appeal from part of the ruling and order of the High Court of Kenya at Mombasa (Ochieng, J.) dated 23rd May, 2013

in

H.C. Election Petition No. 8 of 2013)

****

JUDGMENT OF SICHALE, J.A.

The appellants, Hassan Ali Joho and Hazel Ezabel Nyamoki Ogunde (1st and 2nd appellants respectively) filed an appeal from part of the ruling delivered by Ochieng, J. on the 23rd May, 2013 in Mombasa H.C. Election Petition No. 8 of 2013.

The background to the appeal is that Suleiman Said Shahbel (*now the 1st respondent*) filed an Election Petition No. 8 of 2013 following the General Elections held on 4th March, 2013. In the said

elections, the 1st and 2nd appellants were declared the duly elected Governor and Deputy Governor respectively of the County of Mombasa. The 1st respondent was dissatisfied with the outcome of the said elections which were conducted by the Independent Electoral & Boundaries Commission (IEBC), the 2nd respondent in this appeal. Mr. Mwadime Mwashigadi, the 3rd respondent was the County Returning Officer of the elections conducted by the 2nd respondent. In the petition in the Superior Court, IEBC was named as the 1st respondent, Mwadime Mwashigadi**,** the 2nd respondent, Hassan Ali Joho the 3rd respondent and Hazel Ezebel Nyamoki Ogunde the 4th Respondent.

The 1st respondent's petition filed on 10th April, 2013 challenging the outcome of the gubernatorial elections in Mombasa County sought several prayers. Paragraph 10 of the Petition summed up the 1st respondent's reasons in filing the petition, that is:-

> *"... the petitioner seeks to effectively set aside the results as announced by the 1st and 2nd respondents (now 2nd and 3rd respondents in this appeal) and their aforesaid announcement, on 7th May, 2013 and the subsequent declaration and gazettment on 13th March, 2013 of the 3rd respondent (now the 1st appellant in the appeal) as Governor elect, and the 4th respondent (now 2nd appellant in the appeal) as Deputy Governor ..."*

The 1st and 2nd appellants filed a response to the 1st respondent's petition on 30th April, 2013 and raised several issues. In paragraphs 1 and 2 of their response the 1st and 2nd appellants placed great emphasis on Article 87(2) of the 2010 Kenya Constitution which provides as follows:

> *"(2) Petitions concerning an election … shall be filed within 28 twenty eight days after the declaration of the election results by the Independence Electoral & Boundaries Commission."*

as well as Section 76 of the Elections Act which provides that

76(1) A petition

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

On their part, the 2nd and 3rd respondents filed a joint response to the 1st respondent's petition on 13th May, 2013. As to the issue of the time within which to file a petition, the 2nd and 3rd respondents stated thus in paragraphs 13 and 14 of their joint response:-

> *13) "With reference to the contents of paragraph 9 of the Petition,the Respondents aver that the publication of the Third Respondent's name in Volume CXV – No.45 of the Kenya gazette of 13th March 2013 was not a declaration of results as envisaged by Article 76(a) of the Constitution of Kenya 2010 but was rather a declaration of the name of the person duly elected as for the relevant position.*
>
> *14) In the premises, the Respondents aver that by virtue of the Provisions of Article 87(2) of the Constitution of Kenya 2010,this Petition is time barred and consequently invalid and this Honourable Court has no jurisdiction to hear and/or determine the dispute questioning the validity of the aforesaid election which is the subject of this Petition.The right to question the validity of the aforesaid election bestowed by Article 87(2) aforestated was extinguished upon expiry of 28 days from the date of declaration of the results on 6th March 2013 i.e on 3rd April 2013. In this respect, the Respondents shall crave leave to refer to the various Forms 35 and 36 filed in Court."*

Hence the common position of the two appellants and the 2nd and 3rd respondents was that the

petition was filed out of time.Contemporaneously with the filing of its response to the 1st respondent's petition, the appellants filed a chamber summons application. In the chamber summons application, the appellants sought a declaration to the effect that:

> (a) *The Provisions of Section 76(a) of the Elections Act, 2011, that require the filing of an election Petition to question the validity of an election, to be "filed within twenty eight days after the date of publication of the results of the election in the Gazette" are inconsistent with, and contravene the specific provisions of Article 87(2) of the Constitution.*
>
> *(b) By reason of the provisions of Article 2(4) of The Constitution,the provisions of Section 76(a) of The Elections Act aforesaid are to the extent of that inconsistency with the Constitution, VOID.*
>
> *(c) As a consequence of the matters stated in (a) and (b) above, and by reason of the further provisions of Article 2(4) of The Constitution, the Petition filed herein is invalid.*
>
> *(d) Consequently, this Court has no jurisdiction to entertain an invalid Petition, and ought to strike it out, or alternatively dismiss the same, with costs to the 3rd Respondent.*
>
> *(e) The costs of this application, as well as the Petition, be paid by the Petitioner to the 3rd Respondent.*

This application was canvassed in the superior court and in his ruling Ochieng, J. held that:-

> *"election petitions must be filed within 28 days of the declaration of the results of the election in question, andsuch declaration is the one made by the appropriate returning officer responsible for the electoral process in question."*

He however declined to strike out the petition as according to the learned Judge the

> *"... petitioner who had complied with the law as had been enacted by Parliament. He had no reason until now, to presume that section 76 of the Elections Act was unconstitutional."*

The learned Judge also declined to award costs to the appellants and/or to 2nd and 3rd respondents.

It was the learned Judge's refusal to strike out the Petition that precipitated this appeal.In the memorandum of appeal dated 25th May, 2013 the appellants set forth the following grounds:

"*1.* The Learned Judge in the Superior Court having correctly come to the conclusion that:

> *"... when Section 76 of the Elections Act imported the requirement of Gazettement into the mechanism it created for timely settling of electoral disputes, the said stature exceeded authority bestowed upon it by the Constitution and was thus unconstitutional",*

he had no discretion in the matter than to proceed and enforce the unambiguous Provisions of Article 2(4) and declare the filing of the Petition in issue as an act done in contravention of the Constitution and therefore invalid.

2. The learned Judge made a clear finding of fact that:

> *"The Petition herein was filed about 34 days after the County returning Officer for Mombasa had declared the results of the Governor."*
>
> *This was an act, in contravention of the Provisions of Article 87 (2) of the Constitution,*

and the Learned Judge in the Superior Court, erred in law by failing to give effect to the unambiguous Provisions of Article 2 (4) which where relevant mandatorily state that: "... any act or omission in contravention of this Constitution is invalid."

3. The Honourable Judge, failed to appreciate the effect of Article 2 (4) of the Constitution of Kenya that made any Act of Parliament inconsistent with the Constitution to be void ab initio AND any act in contravention of the Constitution invalid.

4. The Honourable Judge having made a finding that Section 76 was inconsistent with Article 87(2***)*** of the Constitution could not purport to invalidate the said section from *the date of the Ruling* instead of the date of the enactment or action undertaken pursuant thereto.

5. The Honourable Judge erred in law by declining to strike out the Petition purportedly because it would be tantamount to retroactive application of the decision thus elevating an unconstitutional provision in an Act of Parliament over a Constitutional provision.

6. The Honourable Judge erred in law by finding that an unconstitutional provision in an Act of Parliament i.e. *Section 76* of the *Elections Act,* was lawful on its enactment until declared unlawful.

7. The Learned Judge in the Superior court was wholly wrong and erred both in law and in fact, when he held and came to the conclusion that at the time of filing of the impugned Petition by the 1st Respondent, *Section 76* of the *Elections Act* was prima facie lawful.

8 *(*a) The learned Judge in the Superior Court failed to give effect to the clear and unambiguous Provisions of *Article 2 (4)* of the *Constitution* when he held as follows:

"As the Petitioner complied with the law which was presumed to be lawful at the time, it would be wrong … to punish him for the mistake of Parliament.

By striking out a Petition which was prima facie lawful at the time it was filed in Court, this court would be purporting to impose this decision retroactively"

(b) The Honourable Judge erred in law and fact by considering that a striking out of the Petition at the time of Ruling would be tantamount to retroactive application of the decision when ALL decisions of a court by necessity affect the parties for the acts or omissions they have already done or omitted to do.

9. The Honourable Judge erred in law by holding that it was proper to excuse contravention of the Constitution where such contravention was through the mistake of the parties as to the understanding of the law or misreading of the constitution.

10. The Learned Judge is the Superior Court was wholly wrong and erred both in law and in fact, when he further erroneously held and made the finding that when the 1st Respondent (Petitioner in the Superior Court) filed his Petition within 28 days of gazettement by the Commission … he did not err."

11. By failing to strike out the Petition filed by the 1st Respondent, the Learned Judge in the Superior Court effectively deprived the Appellants of their Constitutional Rights of equal protection and equal benefit of the law guaranteed in Article 27 of The Constitution of Kenya.

12. The Honourable Judge erred in law and in fact by disregarding the evidence that the Petitioner actually knew or ought to have known that the computation of time for filing a Petition begun upon declaration and not publication and thus holding that the petitioners mistake was attributable to Parliament and not the Petitioner.

The appellants sought the following orders, *inter alia,* that

"(b) the part of the Ruling and decision of the superior court dated 23rd May, 2013 declining to strike out/or alternatively dismiss the Petition filed in the Superior Court on 10th April 2013 (and allowing the same to proceed to hearing) be set aside.

(c) The further Part of the said Ruling and decision directing that each party bear its own costs be set aside."

They prayed that the orders of the superior court be substituted with the following:-

"(i) The Chamber Summons dated 29th May 2013 and filed in Court on 30th May 2013 be allowed as prayed, and the Petition filed in the Superior Court on the 10th April, 2013 be struck out/dismissed, with costs.

(ii) The Costs of this Appeal and in the Superior Court, be awarded to the Appellants.

During the hearing of the appeal before us, Mr. Abdullahi, the learned Senior Counsel for the appellants submitted that one single most important issue raised by this appeal is whether the 2010 Kenya Constitution in which Article 2(4) declares its supremacy is sacrosanct; that Article 10(2)(a) obligates all public officers (*including the superior court Judge*) to uphold the Constitution; that the superior court should have struck out the petition having found that *S*ection 76 of the Elections Act is in contravention of Article 87(2) of the Constitution; that the superior court did not have discretion not to strike out the Petition having found that *S*ection 76(a) of the Elections Act is in conflict with Article 87(2) of the Constitution; that the 1st respondent's petition having been filed 34 days after the Mombasa County Returning Officer's declaration of the results (*and not within 28 days*) was void and that the court had no jurisdiction to entertain a petition filed outside the stipulated period and finally, that the continuation of the election proceedings after the finding of unconstitutionality of Section 76 of the Elections Act is a nullity.

On his part, Mr. Buti, the learned counsel submitted on behalf of the appellants that the 1st respondent knew of the computation of the time within which to file an appeal as demonstrated in an affidavit sworn by him on 26th March, 2013 when he indicated that there "*were about 7 days to go.*" Like his counterpart Mr. Abdullahi, Mr. Buti maintained that the filing of the petition outside the 28 days period was unconstitutional. Mr. Khagram for the 2nd and 3rd respondents supported the appellants position that the petition was filed outside the stipulated period. He, too, argued that the learned Judge having found that Section 76 of the Elections Act was unconstitutional, he ought to have struck out the petition. The learned counsel urged us to find that on expiry of the 28 days period, the right to challenge the outcome of the gubernatorial elections had dissipated and the petition was *"dead"* for all purposes and intents.

Mr. Gikandi on behalf of the 1st respondent opposed the appeal. However, in the course of his initial submissions it became apparent that apart from opposing the appeal, Mr. Gikandi raised issues not canvassed before us by the appellants and the 2nd and 3rd respondents. An objection was taken by the appellants as well as the 2nd and 3rd respondents' counsels. Mr. Gikandi applied to file a cross-appeal as the time for filing the cross-appeal had not expired – so as to raise the constitutionality or otherwise of Section 76 of the Elections Act. Rule 93(2) of the Court of Appeal Rules provides that a Notice of cross-appeal shall be filed not more than 30 days after service on the respondent of the Memorandum of Appeal and Record of Appeal. This appeal was filed on 27th May, 2013. It was served upon the 1st respondent on the same date, and hence the 30 days had not expired. Accordingly, the 1st respondent was allowed to file a cross-appeal in terms of rule 93(2) of this Court's Rules. In the cross-appeal filed on 12th June, 2013 the 1st respondent raised the following grounds:

*"1. **THAT** in Article 87(1) of the Constitution of Kenya, 2010 Parliament was expressly mandated to enact the law that would set out the mechanisms for the timely settling of election disputes.Parliament is the Legislative arm of the Government and represents the will*

of the people, particularly in enactment of laws.

*2. **THAT** in enacting Elections Act, 2011, Parliament followed all the necessary procedures and the said law was duly assented to by the President on 27th August, 2011. The said law was prescribed to commence on 22nd December, 2011.*

*3. **THAT** the general elections that were carried out on 4th March, 2013 were carried out under the Elections Act, 2011.Any attempt to water down the said law would have grave ramifications for the stability of the Nation.*

*4. **THAT** section 76 of the Elections Act, 2011 does not contradict any Article of the Constitution of Kenya, 2010 and indeed Article 259 as read with Article 10 of the Constitution of Kenya,2010 requires that the nterpretation of the Constitution be broad so as to realize the objectives set out in Article 10. Had the Superior Court adopted that broad interpretation, it would have found that Section 76 of the elections Act, 2011 and Article 87 of the Constitution of Kenya, 2010 were in harmony and that there was no conflict between them.*

*5. **THAT** the court failed to take into account that there exists a presumption in law that an Act of Parliament is valid unless proved otherwise and in this instant case the Appellant and the 2nd and 3rd Respondents did not rebut the said presumption and so section 76 of the Elections Act, 2011 should not have been declared null and void.*

*6. **THAT** the Superior Court erred in having failed to order that the Attorney General be served with the application dated 29.04.2013 and further erred in having made adverse orders against the Attorney General while the Attorney General was not a party in the said proceedings.*

*7. **THAT** the Superior Court erred in having failed to appreciate that while dealing with such a serious issue matter as the one that was before the Superior Court, the widest possible ventilation by all the interested parties should have been given effect which was not done.*

The relief sought by the 1st respondent in the cross-appeal was:-

> *"The decision of the superior court be varied or reversed on the part that held that section 76 of the Elections Act , 2011 was invalid in that it contravened Article 87 of the Constitution of Kenya, 2010 and further it be held that Gazette Notice No. 3155 of 13th March, 2013 was a proper means of the publication of the election results of the Mombasa gubernatorial election and accordingly, Election Petition No. 8 of 2013 filed at the Mombasa High Court was and is valid."*

In urging the 1st respondent's case Mr. Gikandi maintained that Article 87(2) of the 2010 Kenya Constitution was in harmony with Section 76 of the Elections Act; that Article 88(1) of the Constitution defines the 2nd respondent which according to him has a corporate legal personality which entity cannot be equated to a County Returning Officer. He refuted the contention that the pronouncement of the County Returning Officer on 7th March, 2013 constituted a declaration of the results of Mombasa County gubernatorial elections. He maintained that the County Returning Officer makes an announcement on provisional results which are then sent to the 2nd respondent for the latter to make a declaration; and further that under Section 87(4)(b) of the Elections (*General*) Regulation 2012 the 2nd respondent is given the power to publish a Notice in the Kenya Gazette declaring the results; that accordingly, the 2nd respondent issued Notice No. 3155 dated 13th March, 2013 declaring the 1st and 2nd appellants herein as the Governor and Deputy Governor respectively of Mombasa. The learned counsel drew our attention to High Court Constitutional Petition No. 162 of 2013 wherein the 1st respondent had moved to court to stop the gazettment of the results of the gubernatorial elections of Mombasa County. In the Constitutional Petition, the 2nd respondent raised an objection on the basis that the 1st respondent had to await

gazettment of the results, a position the 2nd respondent seemed to have since recanted. On his part, he faulted the 2nd and 3rd respondents for approbating and repprobating as they seemed to shift goal posts as regards when time begins to run. Mr. Ndegwa, learned counsel for the 1st respondent reiterated the submissions of Mr. Gikandi to the effect that there was no conflict between Section 76 of the Elections Act and Article 87(2) of the Constitution; and that the mischief that Parliament sought to address was not to leave the burden of declaration to a County Returning Officer as this would be a recipe for chaos. He urged us to find that there was good sense in Parliament providing for gazettment.

In his response to the 1st respondent's submissions, Mr. Balala**,** learned counsel for the appellants found favour with the Superior Court's Ruling in so far as it relates to "*prompt declaration*" of results by a Returning Officer. According to him, the publication in the Kenya Gazette is for purposes of notification of a winner and not the declaration of election results. He submitted that the Gazette Notice of 13th March, 2013 did not contain election results but a declaration of the successful candidates. Besides, he fathomed, the 2nd respondent acted through the various Commissioners at County levels and the actions of the County Returning Officer are the actions of the 2nd respondent.

As to the cross-appeal and in the words of Mr. Gikandi, Mr. Abdullahi, in his characteristic manner "*dismissed the cross-appeal for lacking 'legal, or near legal' issues*."

On his part Mr. Khagram for the 2nd and 3rd respondents maintained the position that there was conflict between the provisions of Article 87(2) and the Section 76 of the Elections Act and that the 1st respondent's petition was a ***"spent"*** cause of action.

The above in brief constitutes the contestations between the appellants,the 2nd and 3rd respondents on one side and the 1st respondent on the other side.

Having considered the rival arguments made by all counsels and the various authorities cited by them, the single most important issue to be resolved in this appeal is whether Section 76 of the Elections Act is in conflict with Article 87(2) of the Constitution as this will then inform the reckoning of time – whether it is 28 days from 7th March, 2013 when the Returning Officer pronounced the results or 28 days from 13th March, 2013 when the 2nd respondent published the results in the Kenya Gazette.

There is no gainsaying in stating that the appellants and the 1st respondent were embroiled in what appears to have been a hotly contested gubernatorial elections for the County of Mombasa. The elections were held on 4th March, 2013 and the Returning Officer pronounced the outcome on 7th March, 2013. Thereafter the 1st respondent who was dissatisfied with the outcome of the election results filed a Constitutional Petition No. 162 of 2013 in the High Court in Nairobi.

Mumbi, J. dismissed the said Petition on 27th March, 2013 on the grounds that it was an election petition which had been filed under the guise of a Constitutional Petition.

On 10th April, 2013 the 1st respondent filed an Election Petition in Mombasa the same being No. 8 of 2013. The matter was placed before the able hands of Ochieng, J. who whilst in the midst of hearing the 1st respondent was confronted with an application to strike out the 1st respondent's Petition for having been filed out of time. Justice Ochieng proceeded to hear the application for striking out the petition. It was his ruling delivered on 23rd May, 2013 that sparked the appellants' appeal as well as the 1st respondent's cross-appeal. The arguments put forth in this appeal and the cross-appeal supported that part of the Superior Court's ruling that each side found favour with. Each of the sides also vehemently attacked that part of the ruling that they did not find favour with. The counsels for the appellants and the 2nd and 3rd respondents propounded the view that the Superior Court Judge was right in declaring Section 76 of the Elections Act to be in conflict with Article 87(2) of the Constitution. However, they were aggrieved that the learned Judge inspite of his finding of the unconstitutionality of Section 76 of the

Elections Act, failed to dismiss the Petition. On his part, the 1st respondent faulted the Superior Court's Ruling in so far as it found ***Section 76*** of the Elections Act to be unconstitutional. However, the 1st respondent lauded the Superior Court Judge for not dismissing the petition. This indeed is the point of departure between the two rival sides.

Section 76(11) of the Elections Act provides that a petition …

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

According to the appellants as well as the 2nd and 3rd respondents' counsels this is the provision that was not in conformity with Article 87(2) of the Constitution which provides that:-

> "Petitions concerning an election, other than a Presidential election, shall be filed within 28 days after the declaration of the election results by the Independent Electoral and Boundaries Commission."

From the above it is clear that the Constitution makes reference to *"28 days from the date of the declaration of results"* - whilst Section 76 makes reference to *"28 days from the date of publication of the results of the election in the Gazette."*

It is common ground that the elections for the gubernatorial race in the County of Mombasa were held on 4th March, 2013. It is also common ground that on 7th March, 2013 the County Returning Officer pronounced the results. It is also another common ground that on 13th March, 2013 the 2nd respondent published the outcome of the results by declaring the winners in the Kenya Gazette. It is not in dispute that the 1st respondent's petition seeking to have the results of the gubernatorial race of the Mombasa County were filed on 10th April, 2013.

What is in contention is when the 28 days period begin to run. The learned counsels for the appellants, the 2nd and 3rd respondents maintained that the 28 days period began to run from the date of declaration by the Returning Officer that is on 7th March, 2013. Consequent upon this, they argued, the election petition filed on 10th April, 2013 was outside the stipulated period and the Superior Court ought to have dismissed the petition as it was a "spent" cause of action. They cited the case of Senator John Akpanudoedehe & 2 Others and Godwill Obit Akpabio – Supreme Court of Nigeria Case No. 154 of 2012

> *"When the Constitution provides a limitation period for the hearing of a matter (in this case 180 days) the right to fair hearing is guaranteed by the courts within 180 days. Once 180 days elapse the hearing of the matter fades away along with any right to fair hearing. There is no longer a live petition left. There is nothing to be tried even if a retrial order is given. It remains extinguished forever. … If this court extends the time provided in section 285(6) for the hearing of election petitions it would amount to judicial legislation and that would be wrong. The National Assembly is to make laws and that includes amending existing laws and the Constitution. The role of the Judiciary is to interpret what the National Assembly has done. Fair hearing cannot be conducted in vacuuo. There must be a live case before anyone can have a right to a fair hearing ..."*

They also relied on the well known and familiar case of Owners of Motor Vessel 'Lillian' v Caltex Oil (Kenya) Ltd [1989] KLRI where the Court delivered itself thus:-

> *"... a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away … Jurisdiction is everything. Without it, a court has no power to make one more step. … Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision*

amounts to nothing. Jurisdiction must be acquired before judgment is given."

They also relied on the recent Supreme Court Case of *Samuel Kamau Macharia vs Kenya Commercial Bank Limited [2012] EKLR Supreme Court of Kenya Application No. 2 of 2011:-*

> *"A court's jurisdiction flows from either the Constitution or legislation or both.Thus a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agreed with counsel for the 1st and 2nd respondents on his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction,the Court cannot entertain any proceedings.*
>
> *… It cannot expand its jurisdiction through judicial craft or innovation."*

According to the learned counsels for the appellants and the 2nd and 3rd respondents, as the 1st respondent's cause of action had dissipated, the Superior Court lacked jurisdiction to entertain the petition. Indeed, they submitted that the proceedings in the Superior Court were a nullity and could not be saved for being void and not voidable.They urged us to find that as the cause of action was void, the court was not vested with any discretionary power.In support of this contention, they cited the case of *Benjamin Leonard Macfoy vs United Africa Company Limited (UK)[1962] AC 152*

> *"Court has discretion in matters that are voidable not to proceedings that are a nullity for those are automatically void and a person affected by them can apply to have them set aside ex debito justitiae in the inherent jurisdiction of the court ..."*
>
> *"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. … 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."*

They relied on the authority of *Kenya Bankers Association & Others v Minister for Finance [2001] IEA 253* on the invalidity of any law that is inconsistent with the Constitution.

The arguments for the appellants and the 2nd and 3rd respondents were that the provisions of Article 87(2) of the Constitution of Kenya, 2010 which provide that:-

> *(2) Petition concerning an Election … shall be filed within 28 days after the declaration of the election results by the Independent Electoral & Boundaries Commission was in conflict with section 76(1)(a) of the Elections Act*
>
> *which provides that:*
>
> > *76 A – A petition - To question the validity of an election … shall be filed within twenty eight days after the publication of the results of the election in the Gazette.*

Their further argument was that the Gazette Notice published on the 13th March, 2013 did not *declare the election results* but was issued in compliance with regulation 87(4)(b) of the Elections (*General*) Regulations 2012 which require that the Chairperson of the 2nd respondent was to *"... publish a notice in the Gazette showing the name or names of the person or persons elected."*

Their argument was that the results of the gubernatorial elections of Mombasa County were declared on the 7th March, 2013 by the County Returning Officer and not vide Gazette Notice of 13th March, 2013 and that since Article 87(2) of the Constitution provides for a period of 28 days from the date of "*declaration*", that "*declaration*" is made by the County Returning Officer and not the publication in the Kenya Gazette. From their standpoint Section 76 of the Elections Act which provides for the

challenging of an election petition within 28 days from the date of gazettment is unconstitutional.

On the other hand the 1st respondent's position was that *Section 76* of the Elections Act provides that an election petition had to be filed within 28 days of gazettment which gazettment was made on 13th March, 2013. The 1st respondent maintained the position that the petition having been filed on *10th April, 2013* was well within time and was not a "*spent*" cause of action as postulated by the rival side. It is clear therefore that what is in contention is what constitutes a *"declaration of results.*"

In urging their case, the appellants went to a great length to try and convince the court that the County Returning Officer *"declared"* the results on 7th March, 2013. They cited the 1st respondents pleadings, in particular paragraph 23 of the 1st respondent's petition filed on 10th April, 2013 in which they stated that the 1st respondent had acknowledged that the County Returning Officer declared the results on 7th March, 2013.

In further support of their arguments the appellants and 2nd and 3rd respondents relied on Section 39 of the Elections Act which provides as follows:-

> *39(1) The Commission shall <u>determine, declare</u> and <u>publish</u> (emphasis mine) the results in an election immediately after the close of polling*
>
> *(2) Before determining and declaring the final results of an election under sub-section (1) the Commission may <u>announce</u> (emphasis mine) the provisional results of an election.*
>
> *(3) The Commission shall <u>announce</u> (emphasis mine) the provisional and final results in the order in which the tallying of the results is completed*
>
> They also relied on Regulation 83 which provides that:
>
> > *83(1) Immediately after the results of the poll from all polling stations in the constituency have been received by the returning officer, the returning officer shall in the presence of candidates or agents, and observers, if present";*
>
> *(c) complete Form 34 and 35 set out in the schedule in which the returning officer shall <u>declare</u>* (emphasis mine)*as the case may be,*
>
> *iii) Votes cast for each candidate in each polling station.*
>
> *(d) (ii) deliver to the Commission the original of Form 34 and 35 together with Form 36 and 37 as the case may be.*

The Elections (General) Regulations 2012 in Regulation 3(1) and 4(1) provide for the appointment of a returning officer and a county returning officer.To start with, the duties of a returning officer are:-

> *(a) Conducting elections at the constituency level;*
>
> *(b) receiving nomination papers in respect of candidates nominated for the post of National Assembly and Ward representative;*
>
> *(c) the tallying of results from each polling station in the constituency;*
>
> *(d) <u>announcing</u>* (emphasis mine) *results from the constituency for purposes of the election of the President, Senator, Governor, woman representative to the National Assembly and Ward representative;*
>
> *(e) the <u>declaration</u>* (emphasis mine*) of the results tallied under paragraph (c); and*

(f) such other functions as may be assigned by the Commission.

On the other hand the duties of a county returning officer as enumerated in Regulation 4(1) are:-

(a) receiving nomination papers in respect of candidates nominated for the post of Governor or county woman representative to the National Assembly and the Senate;

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

(c) the declaration and announcement (emphasis mine) *of results tallied under paragraph (b); and*

(d) such other functions as may be assigned by the Commission.

Regulation 86(1) further provides that "*After tallying and announcement* (emphasis mine) *of results, the returning officer shall seal up in separate temper proof envelope ...*"

Whilst *Regulation 87(2)* provide that

(2) The Returning officer after tallying of votes at the constituency level -

(a) *announce* (emphasis mine) *the results cast for all candidates;*

(b) issue certificates to persons elected in the National Assembly and county assembly elections in Form 38 set out in the Schedule; and

(c) electronically transmit the provisional results to the Commission."

From the above, it is clear that the duties of a returning officer entail "*announcement*" of results and that the words "*announcement*" and "*declaration"* are used interchangeably. In my view it is incorrect to argue that *Article 87(2)* by making provisions that computation of time begins from the date of "*declaration*" that declaration is made by the Returning Officer as it is evidently clear that the primary function of a Returning Officer under the Elections (General) Regulations 2012 is "*announcement.*"

Indeed the Constitution in Article 86 provides that:-

86 – At every election, the Independent Electoral and Boundaries Commission shall ensure that-

(b) The votes cast are counted, tabulated and the results announced promptly (emphasis mine) by the presiding officer at each polling station.

(c) The results from the polling stations are openly and accurately collated and promptly announced (emphasis mine) by the returning officer.

From the plain language of the Constitution the Returning Officer announces the results which announcement is not a declaration as envisaged by Article 87(2) of the Constitution.

Although the appellant and the 2nd and 3rd respondents went to great lengths to try and demonstrate that a declaration could only be made by a County Returning Officer at the County level, the Kenya Gazette Notice of 13th March, 2013 which the appellants and the 2nd and 3rd respondents submitted that it was only for the purposes of "*showing*" the names of the winners is actually entitled *"Declaration* (emphasis mine) *of Persons Elected as Governor and Deputy Governors"*

And as to the contention that the 1st respondent had acknowledged in his pleadings that the county returning officer is the one who declared the results, this is actually not correct. To be fair to the 1st respondent, paragraph 23 which was referred to by the appellants stated as follows:

> *"On the 7th March, 2013, nearly three days after the voting the 2nd respondent purportedly "announced" (emphasis mine) that the 3rd respondent had been elected as the Governor of Mombasa County. The announcement was done in disregard to protests by the Petitioner and/or his agents that there were widespread malpractices by the First Respondent's officers placed in charge of election and that the results declared did not reflect the democratic will of the voters."*

The said paragraph has used the words "*announced*" as regards actions of the County Returning Officer and "*declaration*" in so far as it related to the gazette notice.

Furthermore, a closer analysis of the legal provisions ousts the proposition that a "declaration" was to be made by a returning officer at the county level and not in a publication in the Kenya Gazette. Article 87(2) of the Constitution provides that the declaration is to be made by the Independent Electoral and Boundaries Commission (IEBC).

Article 87(2) provides …

> (*2) Petitions concerning an election, … shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.*

The IEBC is a Constitutional Commission established under Article 88 of the Constitution. As submitted by the 1st respondent's counsel, it has a corporate legal personality. Can it therefore be said that for the purposes of Article 87(2) the County Returning Officer can be equated to IEBC for the purposes of declaration of results as stipulated in Article 87(2) of the Constitution.? In my thinking the obligation imposed on IEBC by Article 87(2) cannot be whittled down to the extent whereby a Returning Officer assumes the Constitutional duty imposed on IEBC, more so when we acknowledge that elections are weighty matters affecting all the citizens of the country. Indeed, in the case cited by Mr. Khagram that is Election Commission of India through Secretary vs Ashok Kumar & Others – Supreme Court of India Civil Appeal Nos. 6843-6844 of 1999 (*reported in Landmark judgments on Election Law Volume III*) p. 29, it was stated as follows:

> *"Election disputes are not just private Civil disputes between two parties. … it affects the fate of the constituency and the citizens generally. A conscientious approach with overriding consideration for the welfare of a constituency and strengthening of democracy is called for. Neither turning a blind eye to the controversies which have arisen nor assuming the role of over-enthusiastic activist would do. The two extremes have to be avoided in dealing with election disputes."*

Being weighty and serious matters, it is my view that we cannot afford to be flippant and "*declare"* results by making pronouncements without a formal record.

Perhaps it may be useful at this stage to remind ourselves of the legal position of gazette notices. Article 260 of the Constitution defines "*Gazette*" as follows:-

> *"Gazette means the Kenya Gazette published by the authority of the National Government, or a supplement to the Kenya Gazette."*

It is also true that notices in the Kenya Gazette serve a useful purpose as ***Section 60*** of the Evidence Act

provides that "The Courts shall take judicial notice of the accession to office, names, titles, functions and signatures of public officers, if the fact of their appointment is notified in the Gazette." Simply put, the 1st and 2nd appellants were not Governor and Deputy Governor before 13th April, 2013. Indeed their designations then were "*Governor elect*" and "*Deputy Governor elect*" and they did not assume office until their positions were formalized by the Gazette Notice published by the 2nd respondent.

And just for the sake of argument, if 20 years down the line, anyone who was interested in finding out when the 1st and 2ndappellants became Governor and Deputy Governor; would they turn to the Kenya Gazette or look for the "*announcement"* made on 7th March, 2013 by the County Returning Officer of Mombasa County?

The 2nd and 3rd respondents cited several authorities from Australia and the sub-continent of India on what constitutes a "*declaration*." In the Election Commission of India through Secretary vs Ashok Kumar the Supreme Court of India Civil Appeal Nos. 6843 – 6844 of 1999 (Reported in Hardwalk Judgments on Election Law Volume III the Court held:

"When all the votes have been counted the Returning Officer declares the poll. This is the official announcement of the election result." However be as it may, this Court was not told whether the laws in Australia and India pertaining to elections are similar to the provisions in our Constitution and our Elections Act.

In arriving at the conclusion that a *'declaration'* as envisaged in the Constitution is not the pronouncement by the County Returning Officer I am fortified by Regulation 83(1) which provides that:-

> *"(a) Immediately after the results of the poll from all polling stations in aconstituency have been received by the returning officer the returning officer shall, in the presence of candidates or agents and observers if present* (emphasis mine).
>
> *(b) In the case of an election, publicly announce* (emphasis mine) *to persons present the total number of votes cast for each candidate ..."*

According to this regulation, it is possible for the results to be announced in the absence of a candidate. How can it therefore be the position that time begins to run from this date when an announcement is made either in the presence or absence of a candidate? I am persuaded that if time was to be reckoned from the date the pronouncement is made by the Returning Officer, the law would have insisted that this declaration had to be in the presence of the candidates. To hold otherwise would lead to an absurdity and is a recipe for confusion.

It is also noteworthy to state that before the 1st respondent filed Mombasa Election Petition No. 8 of 2013, he had filed Constitutional Petition No. 162 of 2013 in Nairobi. In this Petition, IEBC was named as the 1st respondent, the Secretary, IEBC the 2nd respondent, Mwashigadi Mwadime, the 3rd respondent and Hon. Hassan Ali Juma, the 4th respondent. Suffice to state that all the parties in this appeal (*save for the 4th respondent*) were also parties in the Constitutional Petition. The Court presided over by Mumbi, J. dwelt at great length on the issue of whether Section 76(1) was in contravention of Article 87(2) of the Constitution. In a Ruling delivered on 27th March, 2013the learned Judge found that Section 76(1)(a) echoed the provisions of Article 87 of the Constitution. In paragraphs 24 of her ruling she stated:

> *"The Act provides that that a petition be filed within 28 days after the results have been gazetted by the 1st respondent" (now the 2nd respondent).*

She went further to state in paragraph 25 of her ruling:

> *"The elections of the 1st appellant and the Governor of Mombasa was declared officially*

by IEBC in compliance with the provisions of Article 87(2) on 13th March, 2013 vide Gazette Notice No. 3155 contained in the special issue of the Kenya Gazette Volume CXV – No. 45 of 13th March, 2013 and titled

"*Declaration of persons elected as Governors and Deputy Governors."*

Indeed, she summed up the position as follows:-

"Counsel for the 4th respondent has asserted that this Petition is filed in breach of the provisions of Section 76(1) of the Elections Act. However, I note that it was filed on 13th March, 2013, the same day as the 4th respondent was declared Governor by the 1st respondent through Gazette Notice No. 3155. It is therefore, at least in relation to time for filing election petitions, properly before the court under the provisions of Article 87(2) and Section 76(1) of the Elections Act."

Mr. Gikandi did argue that the 2nd and 3rd respondents specifically having accepted the ruling of the learned Judge by not preferring an appeal should not now be heard to be retracting from that acceptance. I could not agree more.

The other argument raised by the appellants and the 1st and 2nd respondents was that Section 76(1) of the Elections Act is unconstitutional as it is not in conformity with Article 87(2) of the Constitution.

The power to enact legislation on electoral disputes was donated to Parliament in Article 87(1) of the Constitution which provides that:

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

Parliament enacted the Elections Act and made specific provisions in Section 76 as to gazettment of elections results and the period within which to challenge the results. Suffice to state that there is no Constitutional provision that outlawed gazettment. The learned counsels for the appellants and the 1st and 2nd respondents insistence that the '*declaration*' referred to in Article 87(2) of the Constitution was to be made by the Returning Officer is not supported by the Elections (General) Regulation, 2012 and Article 86 of the Constitution. As I have shown above, the primary function of the Returning Officer under the Elections (General) Regulation 2012 is '*announcement*' and in Article 86 the role of a Returning Officer is confined to "announcement" and I hold the view that in Parliament giving recognition to declaration by gazettment by the 2nd respondent, is not, unconstitutional.

Accordingly, I find that section 76(1)(a) is not in conflict with the provisions of Article 87(2) of the Constitution and the same is not unconstitutional.

Accordingly, I propose to make the following orders in the appeal and cross-appeal:-

i. The appeal is dismissed with costs to be borne equally by 1st and 2nd appellants and the 2nd and 3rd respondents.

ii. The cross-appeal succeeds with costs equally to be borne by 1st and 2nd appellants and the 2nd and 3rd respondents,

iii. The application in the superior court dated 29th April, 2013 is dismissed with costs to 1st respondent to be paid equally again by the 1st and 2ndappellants and 2nd and 3rd respondents.

Dated and delivered at Mombasa this 25th day of July, 2013

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR