



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

ELECTION PETITION NO. 10 OF 2013.

JOSHUA MUTOTO WERUNGAPETITIONER.

VERSUS

JOYCE NAMUNYAK THE RETURNING OFFICER,

ENDEBESS CONSTITUENCY1ST RESPONDENT.

INDEPENDENT ELECTROAL & BOUNDARIES COMMISSION.....2ND RESPONDENT.

ROBERT PUKOSE3RD RESPONDENT.

R U L I N G.

The application by way of Notice of Motion dated 28th May, 2013 is made by the Returning Officer Endebess Constituency (first respondent) and the I.E.B.C. (second respondent)..

Under the Constitution, the I.E.B.C. was responsible for the conduct of the disputed parliamentary election at Endebes, Trans Nzoia County on 4th March, 2013. It's chief officer on the ground was the first respondent, Joyce Namunyak.

After the election, **Robert Pukose** (third respondent), was declared the winner having garnered a total of 11,087 votes against his closest rival **Joshua Mutoto Werunga** (petitioner), who garnered a total of 8,683 votes.

However, being dissatisfied with the manner in which the election was conducted and harbouring the belief that the exercise was neither free nor fair, the petitioner filed the present petition on **10th April, 2013** within a period of 28 days after the results were published in the Kenya Gazette dated **13th March, 2013**, as provided under Section 76 (1) (a) of the Elections Act 2011.

This application seeks orders as follows:-

(a) That, 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 the results of the election in the gazette is inconsistent and contravenes the specific provision of Article 87 (2) of the Constitution.

(b) That the provisions of Section 76 (1) (a) is in conflict with the provisions of Section 77 (1) of the Elections Act.

c. That, by reason 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 and Section 77 (1) of the Elections Act being the applicable provisions on filing of petitions.

(d) That, as a consequence of the matters stated in (a) (b) and (c) above and by reason of the further provisions of Article 2(4) of the Constitution, the petition filed herein is invalid and fatally incompetent.

(e) That, this honourable court has no jurisdiction to entertain an invalid petition and ought to strike it out or alternatively dismiss the same with costs to the first and second respondents.

(f) That, costs of this application, as well as the petition, be paid by the petitioner to the first and second respondents.

The grounds in support of the application are on the body of the notice of motion and are fortified by the averments in the supporting affidavit deponed on the 28th May, 2013, by **Mr. Gumbo**, learned counsel for the first and second respondents.

Although the third respondent did not file any affidavit in support of the application, his written submissions filed herein on 18th June, 2013 through his learned counsel, **M/s. Bitok**, gave a clear indication that he is in support of the application which is opposed by the petitioner on the basis of the averments contained in the replying affidavit deponed on 11th June, 2013 by the petitioner's learned counsel, **Mr. J.M. Wafula**.

Written submissions were filed and briefly highlighted by both the petitioner and the respondents through their respective counsels.

The bone of contention is basically whether the petition is proper before this court.

It came to pass that on 4th March, 2013, the third respondent was declared the duly elected member of parliament for Endebess Constituency. He was certified as such by the second respondent through the first respondent and on the 13th March, 2013, his name was duly published in the Kenya Gazette i.e. **Gazette Notice No. 3159**. It was after the publication that this petition was filed by the petitioner i.e. on 10th April, 2013. The first and second respondents as supported by the third respondent now seek to have the petition struck out and/or dismissed for reasons that it was filed out of time in contravention of Article 87 (2) of the Constitution and by extension Section 77 (1) of the Elections Act. The grounds in support of the application identify the basic issues for determination as being whether, firstly, Section 76 (1) (a) of the Elections Act contravenes and is inconsistent with Article 87 (2) of the Constitution.

Secondly, whether the said provision is in conflict with Section 77 (1) of the Elections Act and thirdly, whether the provisions should be declared void to the extent, of its inconsistency with the Constitution and if so, whether the petition ought to be struck out and/or dismissed for being fatally incompetent and/or for want of the court's jurisdiction to entertain an invalid petition.

In their submissions, the applicants first and second respondent contended that the petition was filed out of the mandatory Constitutional time frame in that whereas the third respondent was declared the winner of the election on **5th March, 2013**, the petition was filed on 10th April, 2013, contrary to the requirements of Article 87 (2) of the Constitution.

It is the applicant's contention that in computation of time for the filing of election petitions, the guiding factor would be Article 259 (5) of the Constitution and therefore, the twenty eight (28) days contemplated under Article 87 (2) of the Constitution meant that the present petition ought to have been filed not later than 2nd April, 2013 from the date of the declaration of the results on 5th March, 2013. The applicants submitted that the time frame provided for under the Constitution is mandatory and is not negotiable as was held in the Supreme Court Petition No. 5 of 2013 **Raila Amollo Odinga vs. the I.E.B.C. and others**.

The applicants further submitted that the Elections Act is applicable in so far as it is consistent with the Constitution as provided in Article 2 (4) of the Constitution.

Further, Section 76 (1) (a) of the Elections Act 2011 is gravely at variance with the provisions of the Constitution in so far as the provision purports to present a parameter not envisaged in the Constitution and whose import is to create a conflict with the Constitution to the extent that it introduces a qualification that the time of twenty eight (28) days is to run from a period after the publication of the results in the gazette whereas the Constitution provides that the petition shall be filed within twenty eight (28) days of the declaration of the results.

The applicants contended that there is no statutory requirement for the I.E.B.C. (second respondent) to gazette results of any election held in Kenya. Accordingly, the qualification in Section 76 (1) (a) of the Elections Act is a hanging qualification.

It was further contended by the applicants that Regulation 87 (4) (3) of the Election (General) Regulation 2013, requires the Returning Officer to gazette the names of the persons elected in a composite notice essentially for information to the public and most importantly, the requirement is limited to the names of the persons elected and not results of an election, hence no argument should stand on that regulation for purposes of determining the time limitation for filing of a petition. Further, election results are declared under Part VIII (8) of the Regulations from which arises Regulation 73 (1) indicating that the presiding officer shall, at the end of voting declare the closure of the polling station without issuing a gazette notice for purposes of the declaration and Regulation 83 (1) (c) and (3) indicating that after the results of the poll from all polling stations have been received by the Returning Officer, the Returning Officer shall in the presence of the candidates or agents complete forms 34 and 35 in which the Returning Officer shall declare as the case may be without issuance of a gazette notice.

The applicants submitted that the reference to the gazette notice in Section 76 (1) (a) of the Elections Act is misplaced as it does not flow from the Constitution which talks of declaration.

With regard to the person responsible for declaring the results, the applicants contended that Regulation 3 (3) (e) of the Regulations indicates that such person is the Returning Officer and that the declaration contemplated under the Constitution is that at the end of the tallying of the results and not by any gazette notice.

The applicants submitted that the distinction in the use of the word declaration and publication in the gazette vis-a-vis Article 87 (2) is found in Article 89 (1) which shows that the Constitution could not have intended to use the words interchangeably or as an acronym to the other.

The applicants contended that the Constitution is the grand norm, it is supreme over all other laws and accordingly, any law that is inconsistent with it, is null and void to the extent of the inconsistency.

The applicants have therefore beseeched this court to declare Section 76 (1) (a) of the Elections Act void in as much as it introduced a qualification to the filing of election petitions not contemplated in the Constitution.

To buttress their arguments, the applicants relied on the decision of the Supreme Court in the case of **Samuel Kamau Macharia Vs. Kenya Commercial Bank & Others [2012] e KLR** and the decision of the High Court in the case of **Suleiman Said Shahbal Vs. The I.E.B.C. and Others Election Petition No. 8 of 2013 at Mombasa.**

The applicants have also relied on the decision in the Indian case of **Yovaraj Rai Vs. Chander Bahadur Karki Civil Appeal No. 8250 of 2004.**

This court has further been beseeched by the applicants to uphold the Constitution in terms of Articles 2 (4), 3 and 159 (1) and hold that its jurisdiction has not been properly invoked and in the circumstances down its tools as stated in the Macharia Case (supra) and in the case of **Owners of M/V Lilian "S" Vs.**

Caltex Oil (K) Ltd. [1989] KLR 1.

In highlighting their submissions, the applicants were of the view that the High Court decision in the Shahbal case (supra) although made by a court of concurrent jurisdiction has far reaching consequences in that Section 76 of the Elections Act was found to be unconstitutional and therefore null and void (see pages 19 and 21). Consequently, the said Section 76 of the Elections Act was no longer available for interpretation or interrogation by this court.

The applicants contended that the jurisdiction of this court to hear the petition is premised on Article 87 (2) of the Constitution which requires that a petition be filed within twenty eight (28) days after declaration of the results yet the present petition was filed after thirty six (36) days thereby rendering it defective for want of prosecution as the time lines set by the Constitution are not negotiable. As such, this court ought to divest its jurisdiction since a court's jurisdiction must flow from the Constitution or legislation and herein, the legislation was rendered ineffective by the decision in the aforementioned Shahbal case.

The applicants maintained that Section 76 of the Elections Act was declared a nullity and any action founded on a nullity is itself a nullity. Therefore, without jurisdiction, this court cannot proceed any further and must down its tools.

The petitioner's objection to the application is anchored on the averments contained in paragraph 3 to 8 of the replying affidavit as fortified by his written submissions filed herein on the 5th July, 2013.

Basically, the petitioner contended that since the Elections Act 2011 and the Rules made thereunder emanated from Article 87 (1) of the Constitution which empowered parliament to enact legislation to govern the hearing of election petitions, it would follow that the Constitution cannot be read and interpreted exclusive of the Elections Act. Therefore, Section 76 (1) (a) of the Elections Act cannot be said to be inconsistent with Article 87 (2) of the Constitution since Article 87 (1) was enacted in accordance with the dictates of the Constitution to ensure efficient and expeditious disposal of election petitions.

The petitioner further contended that under Section 75 (1) of the Elections Act, this court has the necessary jurisdiction to hear this matter and that the gazette notice dated 13th March, 2013 constituted the declaration of the results of the elections held on 4th March, 2013. The petitioner submitted that the gazette notice made reference to Section 34 of the Elections Act which requires that the results of the election be announced immediately by the I.E.B.C. pursuant to Article 87 (2) of the Constitution.

Further, the requirement provided by Section 76 (1) of the Act was nothing more than a mechanism established for the timely settling of electoral matters.

The petitioner contended that he is innocent and cannot be "sacrificed" or punished for mistakes made by parliament.

The petitioner submitted that he complied with the law enacted by parliament and had no reason to presume that Section 76 of the Elections Act was unconstitutional. That, the Act is part of the Constitution by virtue of Article 87 (1).

The petitioner contended that it was only the I.E.B.C. which was required to formally declare the results and not the Returning Officer whose role was only to announce the results. Further, the formal declaration was by publication of the results in the gazette. Therefore, this petition was to be filed within twenty eight (28) days after the gazette of the results.

In highlighting his submissions, the petitioner stated that the appropriate gazette notice was published on 13th March, 2013 and therefore, this petition was filed within the time provided by the Elections Act on 10th April, 2013. The petitioner, contended that the Shahbal case cited hereinabove, did not hold that Section 76 of the Elections Act was unconstitutional.

The petitioner relied on the High Court decisions in **Ferdinand Ndungu Waititu Vs. Evans Odhiambo Kidero & Others NBI Election Petition No. 1 of 2013** and **Abdukham Osman Mohamed & Another Vs. I.E.B.C. and others Garissa Election Petition No. 2 of 2013** and urged this court to dismiss this application rather than the petition.

As for the third respondent, he submitted that the words “publication” and “declaration” do not mean the same thing and that, whereas this court can only be persuaded rather than being bound by the decision of a court with equal jurisdiction, it would be bound by the decision of a higher court such as the decision of the Supreme court in the **Raila Odinga Petition** (supra) in which it was held that time lines should be adhered to.

The third respondent contended that there was lack of due diligence on the part of the petitioner's advocates since Article 87 (2) of the Constitution shortened the time for the hearing and determination of election petitions by avoiding the requirement of publication of the results. As such, interpreting the provision otherwise would in effect defeat the spirit and purpose of the Constitution.

It was submitted by the third respondent that, the petitioner's counsel disregarded the procedure laid down in the electoral laws and was less than diligent in failing to move the court to seek an extension of time so that the petition could be filed out of time.

The third respondent contended that the vote margin between himself and the petitioner was over 4,000 votes which was wide enough as to provide insight into the substance of the petition.

Having considered the application in the light of the supporting grounds and the rival submissions by the applicants and the petitioner as well as those by the third respondent in support thereof and with regard to the first issue for determination i.e. whether Section 76 (1) (a) of the Elections Act contravenes and/or is inconsistent with Article 87 (2) of the Constitution, this court must first consider the availability of Section 76 (1) (a) of The Elections Act for purposes of interpretation and/or interrogation by this court, the same having been declared unconstitutional by the High Court in the Shahbal case (supra) according to the applicants but not the petitioner.

Indeed, if Section 76 (1) (a) of the Elections Act was declared unconstitutional by a competent court of equal jurisdiction with this court, then it may be said that there in existence an effective judicial pronouncement which may be applied to this case by this court so long as this court agrees with it or so long as it has not been upset by a higher court on appeal.

In their submissions, the applicants directed the attention of this court to pages 19 and 21 of the Ruling made on 23rd May, 2013 by the High Court in Mombasa (**F.A. Ochieng – J.**) in the case of **Suleiman Said Shahbal Vs. I.E.B.C. & Others** (supra) and contended that Section 76 (1) (a) of the Elections Act has since been declared unconstitutional and no longer available for interpretation and interrogation by this court.

The petitioner holds the view that the provision was not declared unconstitutional by the court and instead the court emphasized that a purposive approach should be taken in the interpretation of the Constitution.

Perhaps, before we go any further, it would be helpful to note that the Constitutionality or otherwise of section 76 (1) (a) of the Elections Act was the subject of the High Court decision in the case of **George Mwangangi Wambua Vs. I.E.B.C. and Others Election Petition No. 4 of 2013** which was herein cited by the third respondent and in which the learned judge (**George Vincent Odunga, J.**) discussed at reasonable length the principles of Constitutional interpretation on the basis of case law and in that regard several decisions of superior courts in East African were cited including:-

1. **Ndyanabo Vs. Attorney General (2001) 2 GA 485** in which the Court of Appeal in Tanzania held that in interpreting the Constitution, the court would be guided by the general principles that:-
 - i. ***The Constitution was a living instrument with a soul and consciousness of its own,***

- ii. *Fundamental rights provisions had to be interpreted in a broad and liberal manner,*
 - iii. *There was a rebuttable presumption that legislation was constitutional,*
 - iv. *The onus of rebutting the presumption rested on those who challenged that legislation's status save that*
 - v. *Where those whom supported a restriction on a fundamental right relied on a claw back or exclusion clause the onus was on them to justify the restriction.*
2. **Kigula & Others Vs. A.G. (2005) 1 EA 132**, in which the Court of Appeal in Uganda sitting as a Constitutional Court held that the principles of Constitutional interpretation are as follows:-
 1. *That it is now widely accepted that the principles which govern the construction of statute also apply to the interpretation of Constitutional provisions and that the widest constitution possible in its context, would be given according to the ordinary meaning of the words used.*
 2. *That the entire constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other,*
 3. *That all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument.*
 4. *That a Constitution and in particular that part of it which protects and enrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realize the full benefit of the rights guaranteed.*
 5. *That in determining constitutionality both purpose and effect are relevant and*
 6. *That Article 126 (1) of the Constitution of the Republic of Uganda enjoins courts to exercise judicial power in conformity with the law and with the values, norms and aspirations of the people.*
 3. **Osostraco Ltd Vs. A.G. (2003) 2 EA 654** in which it was held that the Constitution of Uganda is the supreme law, and any law that is inconsistent with it is void to the extent of the inconsistency vide Article 2 of the Constitution. That, Section 273 of the Constitution requires existing laws to be construed with such modification, adaptations, qualifications and exceptions, as may be necessary to bring it into conformity with the Constitution.
 4. **Ruturi & Kenya Bankers Association Vs. Ministry for Finance (2002) 1 KLR 84** in which it was held that a statute or enactment worded in a language which is difficult to follow, or is ambiguous or contradictory or impossible to apply is not necessarily thereby rendered unconstitutional since it only gives rise to questions of interpretation by the court while with regard to inconsistencies and repugnancy in parts of the Act, these are not things that necessarily render a statute unconstitutional since they are things which are resolved by rules of statutory interpretation in real factual situations.
 5. **Ngare Vs. A.G. & Another (2004) 2 EA 217**, in which it was held that in interpreting the Constitution, regard must be held to the language and the wording of the Constitution so that where there is clearly no ambiguity the court has no reason to depart therefrom since ambiguity and inconsistency cannot be the same thing.

All the foregoing decisions and others were given due consideration by the court which thereby took the view that in the absence of a clear picture emerging from both the Constitution and the Act with respect to what constitutes “declaration” the law is that the purpose of legislation must be looked at to see whether or not it is unconstitutional. Therefore, the insertion of gazetteement in Section 76 (1) (a) of the

Act was meant to give certainty to reckoning of time and that being the position the court held that the requirement that results be gazetted did not render the provision unconstitutional.

The court further held that Section 76 (1) (a) of the Act was a mechanism by which the legislature was fulfilling its mandate as enjoined by Article 87 (1) of the Constitution but acknowledged the fact that the provision (i.e. Section 76 (1) (a)) could be a source of mischief, uncertainty and absurdity and that it exhibited deficiencies which make it uncertain and insufficient to properly realize the Constitutional aspiration. However, the court did not declare the provision unconstitutional and instead decided to “read in” the omitted words so as to bring the provision in line with constitutional aspirations. In that regard, the court directed the Attorney General to initiate the process of legislative amendment to the elections Act 2011 with a view to providing a reasonable time line within which the gazetting of results and not just the names of the winners of the election under Section 76 (1) (a) of the Act is to be undertaken by the Independent Electoral and Boundaries Commission.

The decision in the Shahbal case upon which this application is grounded was of a contrary view which therefore brings us to the issues at hand herein.

The last paragraph of page 19 of the ruling in the aforementioned Shahbal case goes as follows:-

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

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

Kenyans wish to have a clear and speedy mechanism for resolving electoral disputes.

By imposing a requirement for gazetting but without specifying the period for it, Section 76 of the Elections Act was putting forth an impracticable and unpredictable mechanism. It would not therefore be enhancing or enabling a timely settling of electoral dispute.”

This statement was in the opinion of this court, a finding that Section 76 of the Elections Act though created as a mechanism for resolving electoral dispute did not serve the purpose it was intended for in as much as it was created in excess of the authority conferred by the Constitution by introducing the notion of gazetting which is not provided for under Article 87 (2) of the Constitution. This court is in agreement with the finding and would add that Article 87 (2) of the Constitution provides that petitions concerning an election shall be filed within twenty eight (28) days after the declaration of the election results by the I.E.B.C. while Section 76 (1) (a) of the Elections Act on the other hand provides that a petition to question the validity of an election shall be filed within twenty eight (28) days after the date of publication of the result of the election in the Gazette. Notably, Section 77 (1) of the Elections Act repeats the wordings of the Constitution almost verbatim as it provides that a petition concerning an election, other than a presidential election, shall be filed within twenty eight (28) days after the declaration of the election results by the Commission.

It is also notable that there is no statutory provision (substantive or subsidiary) that bestow upon the I.E.B.C. or any other person, any obligation to publish election results in the Kenya Gazette. Consequently, Section 76 (1) (a) of the Elections Act is inconsistent with the provisions of Article 87 (2) of the Constitution and is void to the extent of that inconsistency in terms of Article 2 (4) of the constitution which provides that:-

“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.”

Section 77 (1) of the Elections Act should be the applicable provision for purposes of filing a petition concerning an election other than a presidential election as it is consistent with Article 87 (2) of the Constitution and does not also introduce the notion of gazettelement.

Under Regulation 87 (4) (b) of the Elections (General) Regulations, 2012, upon receipt of a certificate under sub-regulation (1), the chairperson of the commission shall in the case of other elections (other than presidential election) whether or not forming part of a multiple election, publish a notice in the Gazette, which may form part of a composite notice showing the name or names of the person or persons elected. Indeed, the material Gazette Notice published on the 13th March, 2013 was issued in compliance with this Regulation. Therefore, a notice in the Gazette is not tantamount to, or an acronym for a declaration of results and cannot be equated to declaring the results of the election.

Part XIII (13) of the Regulation provides for counting of votes and declaration of results. Regulation 83 (1) (c), falls under the part. It provides that 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 complete Form 34 and 35 set out in the schedule in which the Returning Officer shall declare, as the case may be,

Regulation 83 (1) (d) goes further to indicate that the Returning Officer shall sign and date the form and give a copy to any candidate or agent present and deliver to the commission the original Form 34 and 35 together with Form 36 and Form 37 as the case may be.

Regulation 83 (3) provides that the decisions of the Returning Officer on the validity or otherwise of a ballot paper or a vote under this regulation shall be final except in an election petition.

Being an agent and/or employee of the I.E.B.C. in a Constituency, whatever lawful action taken by the Returning Officer on the ground is deemed to be the action of the I.E.B.C. as an Independent Constitutional organ. Therefore, the declaration of results of the Parliamentary election in any particular Constituency by the Returning Officer is in this court's view the declaration envisaged under Article 87 (2) of the Constitution and indeed under Section 77 (1) of the Elections Act.

In the aforementioned Shahbal case, the court relying on the Indian decision in the case of **Yovaraj Rai Vs. Chandar Bahadur Karki** (supra), held that an unsuccessful candidate in the elections need not wait for the commission to compile the results from any other electoral area, such as a Constituency or county, before he can file his petition.

The court recognized that in that case (i.e. Shahbal), the petition was filed thirty four (34) days after the declaration of the results for the election of the Governor by County Returning Officer. However, the court did not strike out the petition as being invalid for reasons that parliament exercised its mandate under Article 87 (1) of the Constitution and came up with Section 76 of the Elections Act which was an integral part of the law in force as at the time the petition was filed. The said law was “**prima-facie**” lawful and its legality had not been challenged. Therefore, when the petitioner filed his petition within 28 days of the gazettelement by the Commission, he considered himself to be complying with the law and did not err.

The court found that the error was committed by parliament and not the petitioner who complied with the law which was presumed to be lawful at the time and it would be wrong to punish him for the mistake of parliament.

The court at page 21 of its ruling stated that:-

***“I therefore decline the applicant's invitation to strike out the petition. Instead, I hold that from this moment forwards, until and unless an appellate court, should hold. Otherwise, election petitions must be filed within 28 days of the declaration of the results of the election in question, and such declaration is the one made by the appropriate Returning Officer responsible for the electoral process in question.*”**

I consider this to constitute a purposive approach to the issue at hand. It safeguards the rights of a 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.

This court's wholesome understanding of the foregoing ruling is that Section 76 (1) (a) of the Elections Act was unconstitutional as it was enacted in excess of the authority conferred by the Constitution in so far as it provided for gazettement of the results of the elections. The statement in the ruling to the effect that ***“he had no reason, until now, (emphasize added) to presume that Section 76 of the Election Act was unconstitutional”*** was a clear confirmation of the court's declaration by way of judicial pronouncement that Section 76 (1) (a) of the Elections Act was unconstitutional. It would therefore follow that indeed Section 76 (1) (a) of the Elections Act is no longer available to this court for purposes of interpretation and/or interrogation vis-a-vis the Constitution. The provision was also no longer available to the petitioner for purposes of filing the petition and having known that the provision was found to be unconstitutional by a competent court on 23rd May, 2013, it would have been prudent for the petitioner to move the court at least for an extension of time within which to file the petition and/or to file the petition out of time.

As the position stands, the petition was filed out of time now that it is accepted that the declaration of results of the material election was made by the Returning Officer acting for and on behalf of the I.E.B.C. on the **5th March, 2013**. Having been filed on the 10th April, 2013, the petition was filed over thirty (30) days from the date of the declaration of the results contrary to Article 87 (2) of the Constitution and Section 77 (1) of the Elections Act.

Article 259 (5) (a) of the Constitution provides that in calculating time between two events for any purpose under this Constitution, if the time is expressed as days, the day on which the first event occurs shall be excluded, and the day by which the last event may occur shall be included.

Article 87 (2) read together with Article 259 (5) (a) do not make reference to commencement and/or running of time to be reckoned from the date after the publication of the results in the Gazette. It is even doubtful whether full results of all the elections which took place in Kenya on 4th March, 2013 have ever been published in the Gazette as opposed to the publication of the winners of the elections by Gazette Notice 3159 of 13th March, 2013.

Having held and agreed with the applicants that Section 76 (1) (a) of the Elections Act is not available to this court for interpretation and/or interrogation, it would follow that the first issue for determination i.e. whether Section 76 (1) (a) of the Elections Act contravenes and is inconsistent with Article 87, (2) of the Constitution has been answered in the affirmative and so has the second issue for determination i.e. whether Section 76 (1) (a) of the Elections Act is in conflict with Section 77 (1) of the Elections Act. Indeed, Section 76 (1) (a) is in conflict with Section 77 (1) which should be the applicable provision.

With regard to the third issue for determination, it is apparent that the ruling of the court in the *Shahbal* case which ruling this court associates with in relation to the unconstitutionality of Section 76 (1) (a) of the Elections Act, declared the provision to be void to the extent of its inconsistency with the constitution.

It is the Constitution which provides a foundation for ensuring the integrity of the election process through normative and institutional safeguards. The blue prints for the resolution of election related disputes at all levels is enshrined in the Constitution, which has set out very clear timelines for the resolution of such disputes. The system of electoral laws that is enshrined both in the Constitution and the Elections Act 2011 is broad but if there is a conflict between the Constitution and a statute, the Constitution must prevail since it is the Supreme Law (see Article 2 of the Constitution).

Given that the Constitution requires that exercise of judicial authority be in accordance to the purposes and principles set out in the same Constitution, the big question is what becomes of the present petition which was clearly filed out of the time prescribed by the Constitution and therefore invalid for all intents and purposes including invoking this court jurisdiction in determining whether the third

respondent was validly elected as the member of the National Assembly for Endebess Constituency, Trans Nzoia County.

This court's blunt opinion is that, much as it is easy to sympathize with the position that the petitioner finds himself in due to parliament's failure to enact good, effective and constitutional compliant electoral laws, this petition became a nullity the moment the High Court in Mombasa declared that Section 76 (1) (a) of the Elections Act was inconsistent with Article 87 (2) of the Constitution (i.e. on 23rd May, 2013) and therefore unconstitutional. Perhaps, the petition would have been salvaged by necessary application for extension of time and/or to have it filed out of time.

An action founded on a nullity is itself a nullity.

Much as parliament erred, this court must strictly apply the law by striking out and does hereby strike out this petition for being invalid and incompetent and for lack of necessary jurisdiction to determine the issues raised therein. Accordingly, the court has laid down its tools and cannot proceed any further. In sum, the application dated 28th May, 2013, is granted in terms of prayers (d) and (e) of the Notice of Motion.

With regard to costs, it is only fair that parties bear their own costs of the application and the petition due to the fact that the petitioner is a victim of legislative blunder.

Ordered accordingly.

[Read and signed this 23rd day of July 2013.]

J.R. KARANJA.

JUDGE.