



REPUBLIC OF KENYA



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**Nuri v Kombe & 2 others (Petition 38 of 2018) [2019] KESC 6 (KLR)  
(Election Petitions) (17 December 2019) (Judgment)**

*Hamdia Yaro Shek Nuri v Faith Tumaini Kombe, Amani National Congress  
& Independent Electoral and Boundaries Commission [2019] eKLR*

Neutral citation: [2019] KESC 6 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
ELECTION PETITIONS  
PETITION 38 OF 2018**

**DK MARAGA, CJ & P, MK IBRAHIM, JB OJWANG,  
SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

**DECEMBER 17, 2019**

**BETWEEN**

**HAMDIA YAROI SHEK NURI ..... PETITIONER**

**AND**

**FAITH TUMAINI KOMBE ..... 1<sup>ST</sup> RESPONDENT**

**AMANI NATIONAL CONGRESS ..... 2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 3<sup>RD</sup>  
RESPONDENT**

*(Being an appeal against the Judgment and Decree of the Court  
of Appeal (Ouko, Musinga & Murgor, JJ.A) sitting at Nairobi in  
Election Appeal No. 27 of 2018 delivered on 21st September, 2018)*

**The Court of Appeal lacks jurisdiction to hear and determine appeals concerning the validity of the election of a member of a county assembly.**

Reported by Beryl Ikamari

***Jurisdiction** - jurisdiction of the Court of Appeal - jurisdiction to determine election petition appeals - jurisdiction to determine appeals about the validity of the election of a member of a county assembly - whether the Court of Appeal had jurisdiction to hear and determine a second appeal whose subject matter was the validity of the election of a member of a county assembly - Constitution of Kenya, articles 164(3)(a) and 87; Elections Act (cap 7) sections 85A and 75(4).*



## **Brief facts**

The 1<sup>st</sup> respondent was gazetted as the 2<sup>nd</sup> respondent's nominee to the Tana River County Assembly to fill the gender top up slot. The nomination was challenged at the Chief Magistrate's Court by the petitioner on grounds that the 1<sup>st</sup> respondent was not a registered voter in Tana River County. The Chief Magistrate's Court allowed the petition and made the finding that the 1<sup>st</sup> respondent's nomination was invalid, null and void.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed an appeal at the High Court which was allowed on grounds that the petitioner had not discharged her burden of proof. In response, the petitioner filed an appeal at the Court of Appeal. The appeal was dismissed on the basis that the Court of Appeal lacked jurisdiction to hear and determine election petition appeals from the High Court, emanating from an election of a member of a county assembly (MCA). Aggrieved, the petitioner filed an appeal at the Supreme Court appeal. Amongst the grounds of appeal was the assertion that section 85A of the Elections Act was overridden by article 164(3)(a) of the Constitution of Kenya, 2010 (the Constitution) to the extent of its restrictiveness and superfluity. Section 85A allowed appeals to the Court of Appeal where the dispute concerned membership of the National Assembly, Senate or the office of county governors. It did not provide for members of a county assembly.

## **Issues**

Whether the Court of Appeal had jurisdiction to hear and determine an appeal from the High Court as a second appeal emanating from an election of a member of a county assembly.

## **Held**

1. Section 75(1A) of the Elections Act provided for the jurisdiction of the Resident Magistrate's Court as designated by the Chief Justice to hear and determine disputes as to the validity of the election of a member of a county assembly. Section 75(4) of the Act, provided for appeals to the High Court from the Resident Magistrates Court for disputes about the election of a member of a county assembly on matters of law only but it was silent on whether there would be a second appeal on such disputes to the Court of Appeal. Section 85A of the Elections Act provided for election petition appeals from the High Court to the Court of Appeal concerning the membership of the National Assembly, Senate or the Office of county governor on matters of law only. Section 85A made no mention of any appeal lying to the Court of Appeal in an election petition concerning the membership of a county assembly.
2. Section 85A of the Elections Act was a product of a constitutional scheme requiring election petitions to be settled in a timely fashion. It restricted the number, length and cost of petitions and by doing so it met the commands of timely resolution of election disputes under article 87 of the Constitution. The petitioner's contentions on the constitutional validity of section 85A were unsustainable.
3. Article 87 of the Constitution required Parliament to enact legislation to establish mechanisms for the timely settling of electoral disputes. The setting of timelines in legislation was one of the mechanisms. Mechanisms for the timely settlement of disputes also included the form of petitions, the manner of service of petitions, the scope of appeals and the level of appeals. As long as such mechanisms did not violate the Constitution and they were in accord with article 87, their validity was not questionable.
4. Section 75(4) of the Elections Act preserved a right of appeal to the High Court in disputes about the election of a member of a county assembly but fell short of extending that right to a second-tier level. To argue that notwithstanding non-provision for a second appeal in section 75(4), such right of appeal nonetheless subsisted under article 164(3)(a) of the Constitution, would be subversive of article 87 of the Constitution.
5. In the absence of an express statutory provision, no second appeal could lie to the Court of Appeal, from the High Court, from an election petition concerning the validity of the election of a member of county assembly.

*Petition dismissed.*

## **Orders**

- i. *The judgment of the Court of Appeal dated September 21, 2018 was upheld.*



ii. *Costs of the appeal were to be borne by the petitioner.*

## Citations

### Cases

#### Kenya

1. *Aramat & another v Lempaka & 3 others* Petition 5 of 2014; [2014] eKLR; [2014] KESC 21 (KLR) - (Explained)
2. *Judicial Service Commission & another v Rawal* Civil Application 308 of 2015; [2016] KECA 831 (KLR) - (Explained)
3. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014 (Consolidated); [2014] KESC 11 (KLR) - (Explained)
4. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR) - (Explained)
5. *Munya v Kitbinji & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR) - (Explained)
6. *Outa, Fredrick Otieno v Jared Odoyo Okello & 4 others* Petition 6 of 2014; [2017] KESC 25 (KLR) - (Mentioned)

## Statutes

#### Kenya

1. Appellate Jurisdiction Act (cap 9) In general - (Cited)
2. Constitution of Kenya articles 2(4); 87; 105; 164(3)(a) - (Interpreted)
3. Court of Appeal Election Rules (cap 9 Sub Leg) rules 4(1); 34(6)(d)(e)- (Interpreted)
4. Elections Act (cap 7) sections 75(1A); 75(4); 85A - (Interpreted)

## Advocates

*Mr Issa Mansur* for the petitioner

## JUDGMENT

### A. Introduction

1. The Petition of Appeal before the court is dated October 26, 2018 and lodged on even date. The petitioner seeks to challenge the decision of the Court of Appeal (Ouko, Musinga & Murgor, JJA) sitting in Nairobi, (Election Petition Appeal No 27 of 2018). The Appellate Court in its Judgment of September 21, 2018, dismissed the petitioner's appeal, and in so doing, while addressing a jurisdictional question, held that it lacked jurisdiction to hear and determine election petition appeals from the High Court, emanating from an election of a Member of a County Assembly (hereinafter, MCA).

### B. Background

#### (i) At the Chief Magistrate's Court

2. Following the August 8, 2017 General Elections, the 1<sup>st</sup> respondent was gazetted as the Amani National Congress Party (2<sup>nd</sup> respondent herein) nominee to the Tana River County Assembly to fill the gender top up slot. The petitioner was however, aggrieved by the gazette, contending that, she was the one validly nominated by the party in the gender top up list. Consequently, the petitioner filed a petition in the Chief Magistrate's Court at Milimani, (Election Petition No 23 of 2017), on September 25, 2017, seeking *inter-alia*, a declaration that the 1<sup>st</sup> respondent was not eligible for nomination as MCA, Tana River County Assembly as she was not a registered voter.



3. In its judgment delivered on January 19, 2018, allowing the petition, the Magistrate’s Court found that the 1<sup>st</sup> respondent was not eligible for nomination as a Member of County Assembly for Tana River County, as she was not a registered voter, and that her nomination as a Member of Tana River County Assembly was invalid, null and void. The Court proceeded to set aside the nomination contained in Gazette Notice No 8380; ordered the 3<sup>rd</sup> respondent, in not later than 7 days from the date of the Judgment, to gazette the petitioner Hamdia Yaroi Shek Nuri, as among the duly nominated gender top up list members of County Assembly of Tana River County.

#### **(ii) At the High Court**

4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were aggrieved and filed an appeal in the High Court (Election Appeal No 5 of 2018) on February 14, 2018. In its judgment delivered on May 4, 2018, the High Court (Kimaru, J) allowed the appeal, holding that in arriving at its decision, the lower Court had shifted the burden of proof to the respondent, thus ignoring the time-hallowed principle to the effect that he who asserts, proves. The court ruled that the Petitioner had not discharged the burden of proof.

#### **(iii) At the Court of Appeal**

5. Aggrieved by the High Court’s judgment, the petitioner filed an appeal to the Court of Appeal (Election Appeal No 27 of 2018) on May 31, 2018, seeking the setting aside of the High Court judgment and reinstatement of the Magistrates Court’s orders.
6. At the hearing of the appeal, the 1<sup>st</sup> respondent raised a preliminary objection arguing that the Court of Appeal lacked jurisdiction to entertain an appeal from the High Court arising from an election of a member of a County Assembly by dint of article 164(3) of the Constitution, section 85A of the Elections Act, and rule 4 of the Court of Appeal Election Rules. The appellant on the other hand, argued that the Court of Appeal had jurisdiction on grounds that article 164(3)(a) and (b) of the Constitution had expanded the jurisdiction of the Court of Appeal.
7. In its judgment delivered on September 21, 2018, the Court of Appeal, resolved at the outset to determine whether, it had jurisdiction to entertain the appeal.
8. In its judgment dated – the Court of Appeal held that it lacked jurisdiction to entertain a second appeal from the High Court, emanating from an election of a member of a county assembly. In arriving at its decision, the appellate court stated thus:

“In essence, section 85A, and the recently enacted rules, which are expressed in mandatory terms, are specific on the nature of appeals that can be entertained by this court. In summary, they provide that appeals shall lie to this court only where (i) the dispute concerns membership of the National Assembly, Senate or the office of county governors; (ii) the High Court acting in its original jurisdiction; and (iii) the appeal is in respect of matters of law only. Such appeals must be heard and determined within six months of the filing of the appeal. Because there was no intention to stretch electoral disputes from the magistrates’ courts beyond the High Court, there is no similar time limits for the hearing of such appeals.”

#### **(iv) At the Supreme Court**

9. Aggrieved by the judgment of the Court of Appeal, the petitioner has filed this appeal seeking the following Orders:
  - a. The appeal be allowed;



- b. The petitioner's notice of motion dated 5/3/18 filed in the High Court seeking to strike out the 1<sup>st</sup> and 2<sup>nd</sup> respondents' Memoranda of Appeal be allowed;
  - c. High Court Election Petition Appeal No 1 of 2017 and High Court Election Petition No 5 of 2018 be dismissed;
  - d. The High Court judgment dated 4/5/18 in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents be set aside;
  - e. The petitioner's Election Petition dated 25/9/17 be allowed;
  - f. The costs of the instant Appeal, the Appeal at the Court of Appeal and the two Appeals at the High court (Appeal No 1 of 2017 and Appeal No 5 of 2018) and the Magistrate's Court Election Petition No 23 of 2017 be awarded to the petitioner.
  - g. In the alternative, and without prejudice to the orders sought above, this honourable court directs that this Appeal proceeds by way of fresh hearing.
  - h. The court be pleased to make any or further orders as may be just and expedient in the circumstances.
10. The petition is premised on 13 grounds summarized thus: that the learned Court of Appeal Judges erred in law:
- a. In failing to find that article 164(3) of the *Constitution* confers direct jurisdiction to the Court of Appeal for a party to appeal a High Court decision and jurisdiction is not left to an Act of Parliament;
  - b. In failing to find that section 85A of the *Elections Act* is overridden by article 164(3)(a) of the *Constitution* to the extent of its restrictiveness and superfluity;
  - c. In failing to find that article 164(3)(a) confers both the right to appeal and jurisdiction to appeal a decision of the High Court, irrespective of whether the High court was exercising its original jurisdiction or appellate jurisdiction;
  - d. In allowing an unregistered voter to be nominated and elected to serve in Tana River County Assembly contrary to Article 193(1)(a) and section 25(1)(a) of the *Elections Act*;
  - e. In failing to strike out an incomplete Record of Appeal of the 1<sup>st</sup> and 2<sup>nd</sup> respondents that lacked certified decree and copy of judgment; and all affidavits, evidence and documents entered in evidence before the trial magistrate as required by rule 34(6)(d) & (e) of the Petition Rules 2017;
  - f. In failing to find that the memorandum of appeal in the High Court was defective for being an appeal against a judgment and not a decree; and also incomplete for lacking a certified copy of the order emanating from the ruling appealed against; and
  - g. Erred in granting leave to file a supplementary record of appeal, a pleading unknown in law as regards *Elections Petition Rules* 2017.



## C. The Parties' Cases

### (i) Petitioner's case

#### (a) On jurisdiction

11. Regarding the central question in this appeal, as to whether the Court of Appeal has jurisdiction to hear appeals from the High Court, arising from an election of a member of a county assembly, it is the petitioner's case, that indeed, the appellate court has such jurisdiction. The said jurisdiction, submits the petitioner, is founded on the provisions of article 164 (3) of the Constitution. This article provides that the Court of Appeal has jurisdiction to hear appeals from:
  - a. the High Court and
  - b. any other Court or Tribunal as prescribed by an Act of Parliament.
12. The petitioner urges that the broad and permissive language in which article 164 (3) is couched, means that there can be no limitation placed upon the jurisdiction of the Court of Appeal, to hear appeals from the High Court, whether as first appeals, or as in this case, second appeals. The petitioner further contends that the restrictive regime of the Appellate Jurisdiction Act, which conferred jurisdiction upon the Court of Appeal in terms of specific prescriptions of a statute, has been replaced by the clear language of the Constitution which, does not envisage any limitations.
13. It is the petitioner's case that, by placing reliance upon the Elections Act, which is silent on the question as to whether there lies a second appeal to the Court of Appeal in matters election, and section 85A of the said Act, which only provides for appeals from the High Court to the Court of Appeal, emanating from the election of Governor, Senator, and Member of National Assembly, to decline jurisdiction, the Court of Appeal failed to appreciate that the provisions of articles 2(4) and 164(3) of the Constitution override the former.
14. In support of her arguments, the Petitioner places reliance upon this court's decision in Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others Supreme Court App No 2 of [2011] eKLR; wherein the court held, that jurisdiction flows from either the Constitution, or an Act of Parliament, but not through judicial craft. It is the petitioner's case that the Court of Appeal's jurisdiction, to hear appeals from the High Court, including appeals emanating from the election of a member of a county assembly, flows from article 164(3) of the Constitution. The petitioner also cites, as persuasive authority, the Court of Appeal's decision in Judicial Service Commission v Kalpana Rawal [2015] eKLR wherein it was held that, the appellate court's jurisdiction is now anchored in the Constitution and hence, could not be limited.
15. The petitioner consequently submits that, should this court determine that the Court Appeal, has jurisdiction to hear a second appeal from the High Court, arising from an election of member of county assembly, then her Petition should be remitted to that court for hearing on merits. In the alternative, the petitioner prays that, this court should take over the appeal and determine it on the merits.

#### (b) The 1<sup>st</sup> respondent's case

16. In response, the 1<sup>st</sup> respondent is categorical that the Court of Appeal has no jurisdiction to hear appeals from the High Court, emanating from the election of a member of a county assembly. In agreement with the appellate court's decision, it is the 1<sup>st</sup> respondent's submission that article 164 (3) of the Constitution does not grant the appellate court a blanket jurisdiction to entertain all election petition appeals from the High Court. It is the respondent's case that the only election petition



appeals that lie from the High to the Court of Appeal are those provided for under article 105 Of the Constitution as read with sections 75(4) and 85A of the Elections Act and rule 4(1) of the Court of Appeal (Election Petition) Rules of 2017. Towards this end, argues the 1<sup>st</sup> respondent, a second petition of appeal from the High Court does not lie to the Court of Appeal, otherwise the same would have been provided for in unequivocal terms. To assume jurisdiction over election appeals emanating from the Magistrate’s Court on the basis of the general provisions of article 164(3) of the Constitution, submits the 1<sup>st</sup> respondent, would fly in the face of this court’s decision in Samuel Kamau Macharia (Supra) in which the court cautioned against inventing jurisdiction through judicial craft. The 1<sup>st</sup> respondent submits that article 164(3) must be read contextually together with articles 87 and 105 of the Constitution.

### **(c) The 3<sup>rd</sup> respondent’s case**

17. The 3<sup>rd</sup> respondent supports the submissions of the 1<sup>st</sup> respondent, arguing that by being silent on the question as to whether a further election appeal lies from the High Court to the Court of Appeal, section 75(4) of the Elections Act must be interpreted to mean that Parliament intended that the High Court would be the last port of call regarding petitions emanating from, the election of a member of a county assembly.

### **D. Issues for Determination**

18. Upon careful consideration of the grounds listed in the Petition of Appeal, the oral and written submissions by counsel for the parties, and the authorities cited in support thereof, we have formed the distinct view that only two issues clearly stand out for determination, in order to dispose of this Appeal. These are:
- i. Whether or not the Court of Appeal has jurisdiction to hear and determine an appeal from the High Court (being a second appeal) emanating from an election of a member of a county assembly; and
  - ii. If the answer to (i) above is in the affirmative, what remedies should the Court grant?

### **E. Analysis**

#### **(a) On jurisdiction**

19. The gravamen of the petitioner’s case is that, the Court of Appeal erred, in declining jurisdiction to determine her Appeal, when article 164(3)(a) of the Constitution clearly vests it with jurisdiction to “hear appeals from the High Court”. It is her argument that the Appellate Court placed undue reliance on sections 75(4) and 85 A of the Elections Act, to deny her audience, even in the face of a constitutional provision, which cannot be overridden by a statute. Our understanding of the petitioner’s stance is that, in view of the open-ended language, in article 164(3)(a) of the Constitution, which donates appellate jurisdiction to the Court of Appeal without restrictions, any legislation, the Elections Act included, which purports in any way to limit such jurisdiction, would at best, be of “doubtful constitutional validity” or at worst, “out-rightly unconstitutional”.
20. Section 75(1A) of the Elections Act provides that “a question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.” Section 75(4) of the said Act, on the other hand, provides that “an Appeal under subsection (1A) shall lie to the High Court on matters of law only...and shall be heard and determined within six months from the date of filing of the appeal.” This section is however silent, as to whether a further appeal lies from the High Court to the Court of Appeal. On its part,



Section 85A of the [Elections Act](#) provides that “an appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the Office of county governor shall lie to the Court of Appeal on matters of law only and shall be ...heard and determined within six months of the filing of the appeal.” Again, no mention is made of any appeal lying to the Court of Appeal in an election petition concerning membership of a county assembly.

21. It is the petitioner’s contention that the silence in section 75(4) and the non-inclusion in section 85A notwithstanding, a right of appeal still lies to the Court of Appeal from the High Court, in an election petition concerning membership of a county assembly, in view of, the provisions of article 164(3)(a) of the [Constitution](#).
22. The 1<sup>st</sup> and 3<sup>rd</sup> respondents are however of a different view. It is their contention, in agreement with the Court of Appeal, that article 164(3)(a) of the [Constitution](#) does not confer a general right of appeal in election disputes. They further argue, that the said article must be read with article 87 of the [Constitution](#), which mandates parliament “to enact legislation to establish mechanisms for the timely settling of electoral disputes. One such legislation, they maintain, is the [Elections Act](#) and the regulations made thereunder. There is therefore nothing un-constitutional about sections 75 and 85A of the [Elections Act](#).

**(b) Constitutional validity of Sections 75 (4) and 85A of the [Elections Act](#)**

23. Any doubts regarding Constitutional validity of section 85A of the [Elections Act](#), to the extent to which it is perceived, as limiting the appellate jurisdiction of the Court of Appeal, contrary to the provisions of article 164(3)(a) of the [Constitution](#), were long dispelled by this Court in [Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others](#), Supreme Court Petition No 2B of 2014; wherein we affirmed its constitutionality at paragraphs 63-64 thus:

“By limiting the scope of appeals to the Court of Appeal to matters of law only, section 85A restricts the number, length and cost of petitions and, by so doing, meets Constitutional command in article 87, for timely resolution of electoral disputes.

“Section 85A of the [Elections Act](#) is, therefore, neither a legislative accident nor a routine legal prescription. It is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. The section is directed at litigants who may be dissatisfied with the judgment of the High Court in an election petition. To those litigants, it says: ‘Limit your appeals to the Court of Appeal to matters of law only.’”

24. But even more categorical, was this court’s declaration in [Fredrick Otieno Outa v Jared Odoyo Okello & 4 others](#), Supreme Court Petition No 6 of 2014. In submissions reminiscent of those that have been made by the petitioner herein, learned counsel, Mr Issa Mansur, had argued that section 85A was inconsistent with article 163(4)(a) of the [Constitution](#). Counsel took the view that the right to appeal from the High Court to the Court of Appeal, under article 163(4)(a) of the current [Constitution](#) cannot be restricted. Counsel urged that, as opposed to the repealed constitution, which conferred appellate jurisdiction pursuant to a specific statute, the current Constitution vests in the Court of Appeal unrestricted powers to consider appeals from the High Court on matters of both law and fact.
25. In re-affirming the holding in [Munya \(supra\)](#), this court re-stated Constitutionality of section 85A at paragraph 73 thus:

“This court’s perception of the configuration of the governing electoral law has been clearly signalled in the recent [Munya](#) case. From that foundation, we would observe that section 85A manifests Parliament’s intention to regulate the scope of appeals to the Court of Appeal



to ‘matters of law only’. We decline, with respect, the 1<sup>st</sup> respondent’s contention that the provision should be struck out, as an undue limitation on the Court of Appeal’s jurisdiction as conferred by article 164(3)(a) of the *Constitution* [emphasis added]. We re-affirm our earlier position, that the statutory provision regarding the jurisdiction of the Court of Appeal, and in relation to ‘matters of law only’, is not a limitation to, or a restriction of the Court of Appeal’s jurisdiction under article 164(3)(a). It is our view that the appellate jurisdiction in electoral disputes, is donated not simply by virtue of article 164(3)(a), but also by legislation contemplated under article 105(3) of the *Constitution* [Emphasis added].”

26. In view of these clear and unequivocal pronouncements by the Supreme Court, regarding Constitutionality of Section 85A of the *Elections Act*, the Petitioner’s arguments to the contrary cannot be sustained. However, it can still be assumed that, what the petitioner is questioning in this case, is not the ‘matters of law only’ limb of appellate jurisdiction limitation, but the fact that both sections 85A and 75(4) of the *Elections Act*, are silent on the question as to whether, election appeals concerning the validity of the election of a member of a county assembly, lie to the Court of Appeal, from the High Court.
27. In this regard, section 85A only provides for appeals from the High Court to the Court of Appeal in election petitions concerning membership of the National Assembly, Senate, or, the office of county governor. Section 75(4) on the other hand, only provides that appeals questioning the validity of the election of a member of county assembly, lie to the High Court from the Magistrate’s Court. The said section makes no provision for a second appeal to the Court of Appeal. Such ‘silence and non-provision’, in the view of the Petitioner, is offensive to the provisions of article 164(3)(a) of the *Constitution*.
28. In declining to assume jurisdiction over the Petition at hand, the Court of Appeal took the view that, by remaining silent, as to whether election appeals concerning the validity of the election of a member of county assembly, lie to the Court of Appeal from the High Court, Parliament must have intended, that the High Court, would be the last port of call for such petitions. Such a pre-supposition, reasoned the appellate court, would be in accord with article 87 of the *Constitution*, which mandates parliament to “enact legislation to establish mechanisms for timely settling of electoral disputes.”

**(c) The sui-generis nature of electoral law**

29. This court, in keeping with comparative electoral jurisprudence, has in the past emphasized the fact that, election disputes, though not exempted from constitutional principles and the general law of the land, usually generate a ‘unique law’ of their own. This type of legal regime, while not necessarily “special”, does create normative and procedural divergences that are dictated by the “political nature” of these disputes. Towards this end, the *2010 Constitution* has gone to great lengths, in creating a distinct normative and institutional architecture, for the resolution of electoral disputes. In a number of instances, the *Constitution* has given parliament the latitude, to enact legislation to give full effect to its declared principles, and general provisions regarding elections. In *Fred Outa (supra)*, this development was thus illuminated at paragraph 59:

“the *Constitution of 2010* may, indeed, be seen as the foundation of ‘a regime of electoral law’, which, even though sharing common principles of justice and fairness with normal civil and criminal jurisdictions, bears a new ingredient that is underlined by objects of democracy, good governance, and efficiency of public institutions. This is the context in which article 105 set a foot the process of enacting new electoral legislation, and the making of attendant



rules and regulations. This is the context in which we would perceive the specific terms of the *Elections Act*- in a broad sense, a context of compatibility, rather than of discord.”

30. Guided by the foregoing philosophical rationalization, it is not difficult to critically advert to such argumentation, as would question Constitutional validity of sections 85A and 75(4) of the *Elections Act*. In this context, the starting point, in our view, must be article 87 of the *Constitution*, pursuant to which parliament is majestically charged with the duty of enacting legislation to “establish mechanisms for the timely settling of electoral disputes.” The fact that the *Constitution* lays a fundamental premium on the need for the expeditious disposal of electoral disputes, is self-evident in the plain language of article 87. The non-negotiability of timelines for the settlement of electoral disputes, is a principle that has repeatedly been decreed by this Court in a long line of cases (*Gatirau Peter Munya v Dickson Mwenda Kitbinji & 3 Others* Supreme Court Petition No 2B of 2014 [2014] eKLR; *Lemanken Aramat v Harun Meitamei Lempaka & 2 Others* Supreme Court Petition No 5 of 2014 [2014] eKLR; *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others* Supreme Court Petition No 18 of 2014 as consolidated with Petition No 20 of 2014 [2014] eKLR).
31. It has to be noted that, what article 87 requires parliament to do, is not limited to the enactment of legislation setting “timelines” for the disposition of electoral disputes. The article talks of “mechanisms for the timely” settlement of electoral disputes. As such, the setting of timelines in legislation is just but one of the mechanisms, for the timely settlement of electoral disputes. Other mechanisms, are discernible in the other provisions of the *Elections Act*, touching upon such other matters, as the form of petitions, manner of service of petitions, the scope of appeals, and in our view, the level of appeals among others.
32. As long as these “mechanisms” are not inconsistent with, or violative of the provisions of the *Constitution*, and as long as they are in accord with article 87 of the *Constitution*, their validity cannot be questioned. In this context, one of the mechanisms for the timely settlement of electoral disputes is by limiting, not the right of appeal, but the scope, and level of appeal, in election petitions. In this regard, section 75(4) of the *Elections Act*, does not limit the right of appeal emanating from an election petition, concerning the validity of the election of a member of a county assembly. The section in fact preserves the initial right of appeal to the High Court, but falls short of extending it to a second-tier level. To argue that, notwithstanding the non-provision for a second appeal in section 75(4) of the *Elections Act*, such right of appeal nonetheless subsists under article 164(4)(3)(a) of the *Constitution*, would be subversive of article 87 of the *Constitution*. It is worth repeating that the *Constitution* cannot subvert itself. Indeed, what may appear as a limitation of the jurisdictional reach of article 164(3)(a), of the *Constitution*, is borne out of article 87 of the same *Constitution*. The issue may very well be viewed differently, if what is in question, is a purely statutory limitation of appellate jurisdiction. It all depends on the nature and uniqueness of each case. This court has held that, even at the level of the Supreme Court, not all election petition appeals, lie from the Court of Appeal to this court. An intending appellant must satisfy the court, that such an appeal meets the threshold delineated in article 163(4)(a) and (b) of the *Constitution*.

## F. Determination

33. The foregoing analysis leads us to the conclusion, in agreement with the Court of Appeal, that in the absence of an express statutory provision, no second appeal lies to the Court of Appeal, from the High Court, emanating from an election petition concerning the validity of the election of a member of county assembly. As this determination conclusively disposes of the appeal before us, we shall not consider the second issue.



**G. Orders**

- (i) The Petition of Appeal dated October 26, 2018 is hereby dismissed.
- (ii) The judgment of the Court of Appeal dated September 21, 2018 is hereby upheld.
- (iii) Costs of this appeal shall be borne by the petitioner.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF DECEMBER, 2019.**

.....

**D. K. MARAGA**  
**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT**

.....

**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....

**J. B. OJWANG**  
**JUSTICE OF THE SUPREME COURT**

.....

**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR,**  
**SUPREME COURT OF KENYA**

