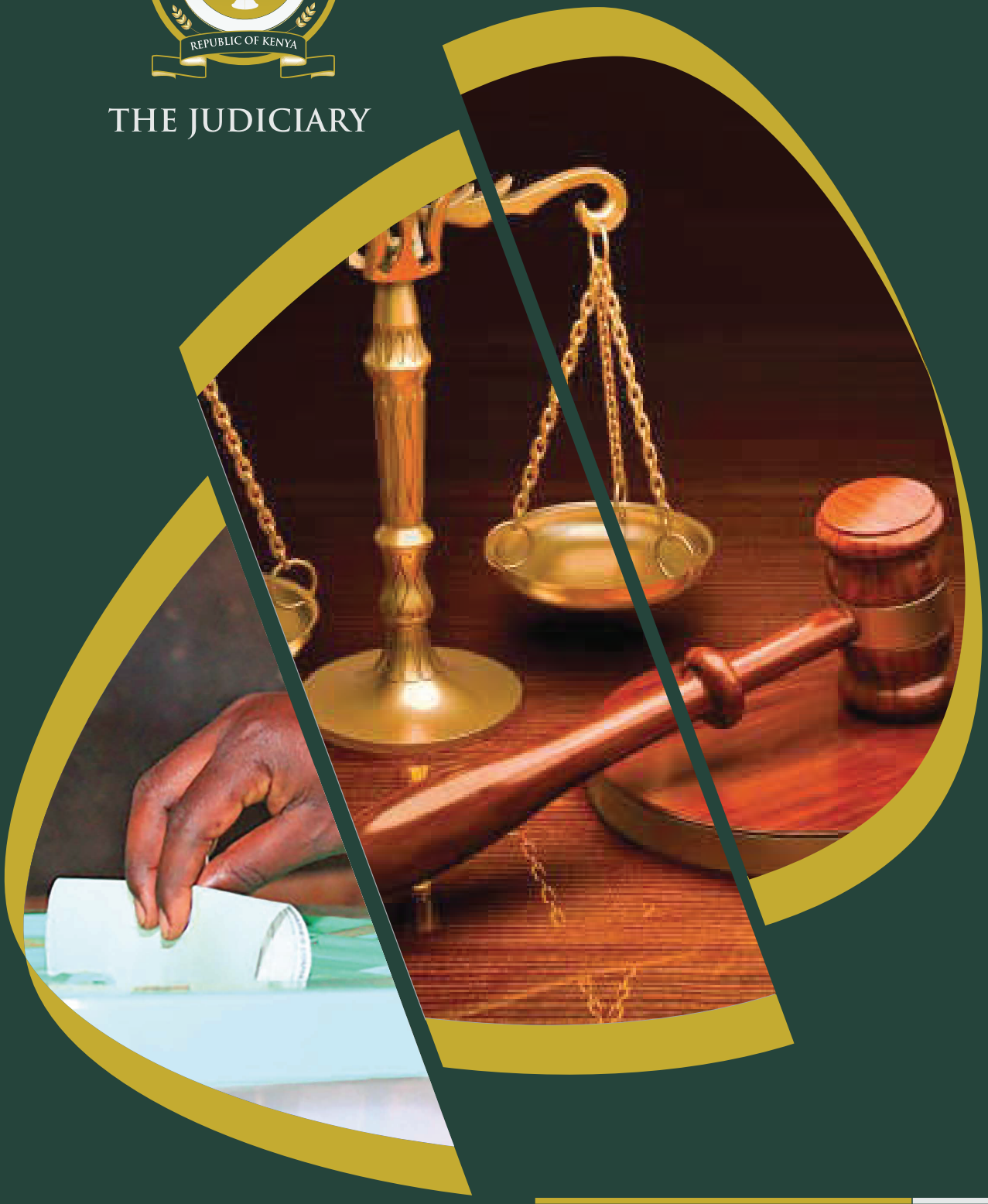
THE JUDICIARY



JUDICIARY COMMITTEE ON ELECTIONS

International Foundation for Electoral Systems · IFES · SINCE 1987 ·

Bench Book on Electoral Dispute Resolution

JUDICIARY COMMITTEE ON ELECTORAL DISPUTE RESOLUTION (JCE)

BENCH BOOK ON EDR
2nd EDITION

August 2022

Supreme Court of Kenya judges (from left) Hon. Mr. Justice Isaac Lenaola, CBS, Hon. Mr. Justice (Dr.) Smokin Wanjala, CBS, Hon. Lady Justice Philomena Mbete Mwilu, MGH (Deputy Chief Justice & Vice President), Hon. Justice Martha K. Koome, EGH (Chief Justice), Hon. Mr. Justice Mohammed Ibrahim, CBS, Hon. Lady Justice Njoki Ndungu, CBS and Hon. Mr. Justice William Ouko, CBS

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FOREWORD

HON. JUSTICE MARTHA KOOME, EGH
Chief Justice and President of the Supreme Court of Kenya

The electoral process remains central towards the realisation of the goal of democratic governance that is a core aspiration of the 2010 Constitution. The 2022 election cycle – being the third cycle since the 2010 Constitution introduced our electoral laws, principles, standards and institutions – provides a solid basis for evaluating the soundness of our electoral system, electoral jurisprudence and procedures. The Judiciary is one of the institutions that plays a central role in the conduct of credible elections. It is tasked with adjudicating disputes that arise as part of the electoral process. While, traditionally this role was activated at the tail end of the electoral cycle, the interwoven nature of various electoral processes makes the Judiciary a key player throughout the electoral cycle. Under the 2010 Constitution, the courts have been asked to determine crucial questions such as the election date, educational requirements for elective office, resignation of public servants seeking to contest elective positions, regulation of election campaign financing, the procurement of technology in elections, the rights of prisoners and persons living in the diaspora to vote, the delimitation of boundaries, the eligibility of persons who have violated Chapter Six of the Constitution to seek elective office, among others.

As an expression of our commitment to deliver on the Judiciary's dispute resolution mandate, the Judiciary has a standing committee, the Judiciary Committee on Elections (the Committee). The Committee and its predecessor, the Judiciary Working Committee on Election Preparations, have spearheaded administrative arrangements and capacity building measures for Judges of the Supreme Court, Court of Appeal, High Court, and all other Judicial Officers. This enabled the courts to hear and determine 188 election petitions in 2013 and 388 petitions in 2017.

The role played by courts in the electoral process is one that the Kenyan Judiciary continues to take seriously. It is with this appreciation of the importance of its role that the Judiciary undertook to continue to train all judges, judicial officers and court administrators on Electoral Dispute Resolution (EDR), and then avail to them a reference text in the form of this Bench Book on Electoral Dispute Resolution to guide the EDR process. The Bench Book is a quick reference to those involved in making decisions on the Bench. With the first edition of the book released in 2017, we committed to having a living document, updated regularly to capture future changes emerging from both the law and jurisprudence of our courts. This second edition is our delivery on that promise, and we look forward to continuing to update it as the law evolves.

This book is developed with the increased role of the Judiciary in all aspects of the electoral cycle in mind. It begins by setting the overarching principles and context of electoral dispute resolution before addressing key issues of concern to any judicial officer handling an electoral dispute at whatever stage of the electoral cycle it arises: from pre-election issues such as delimitation of boundaries, voter registration, procurement of election technology and materials, suitability and eligibility, nomination of candidates and political campaigns; to the resolution of election petitions after declaration of election results. It endeavours to evaluate the jurisprudence that has arisen from our courts since 2010, with the aim of highlighting areas where the jurisprudence is settled and areas where it is still budding and in need of crystallisation or direction by the apex courts.

Given the frequency with which electoral laws are changed in this country, it is also important for judicial officers to be appraised on the revisions to the law applicable to the 2022 general elections. The text therefore endeavours, through editorial notes, to highlight areas where the law has been changed either by legislative amendment or by judicial pronouncement and where gaps remain, in light of the pending revisions to the relevant statutes and rules.

It is hoped that by availing this text, which adds on to the electoral dispute resolution trainings that have been spearheaded by the Judiciary Committee on Elections in conjunction with the Kenya Judiciary Academy, the Judiciary's role will contribute to more credible and acceptable electoral outcomes. It is also our hope that, armed with this text and the Grey Book on Elections being prepared by the National Council for Law Reporting, judicial officers will be well armed to attain the basic goals of any EDR process: to give effect to the will of the people, to give effect to the desire of the voter, to avoid upsetting election results where possible, and to respect specific legislative commands.

I commend the Judiciary Committee on Elections for overseeing the preparation of the Bench Book. I am also grateful to the International Foundation for Electoral Systems (IFES) for their invaluable technical and financial support towards the Judiciary Committee on Elections and the publication of this Bench Book.

ACKNOWLEDGEMENTS

HON. MR. JUSTICE MOHAMMED IBRAHIM, CBS

Judge of the Supreme Court of Kenya
Chairperson, Judiciary Committee on Elections

EDR continues to evolve, and the jurisprudence grows richer every election cycle. This ever changing and growing sphere of EDR is what informed the review and development of the Second Edition of the EDR Bench Book. It has indeed been a journey of intellectual minds coupled with hours of research and drafting. Such long hours require commitment and dedication, two virtues which have been portrayed by the Technical Team that participated in the development of this Bench Book.

Foremost, I would like to thank Lucianna Thuo, Consultant (IFES), and Moses Owuor, the Senior Legal Advisor to the JCE, for drafting the 2nd Edition of the Bench Book. You both put in many hours to generate a comprehensive revised edition and I must commend your diligence and commitment to the process of development of this great resource material. Such good work ethic is truly admirable. To Moses Owuor, the Committee is grateful to you for spearheading the process of developing this Bench Book and for the advice and guidance you so graciously offered throughout the development process.

I also wish to extend my gratitude to members of the JCE who took time to review the Zero Draft and who were instrumental in the completion and validation of this Bench Book. Special thanks goes to the Hon. Chief Justice for entrusting the members of the Committee with spearheading activities to enhance the Judiciary's preparedness in discharging its EDR mandate, including the development of this Bench Book, and for continuously supporting the activities of JCE. I am also thankful to the Vice Chairperson, Hon. Mr. Justice Daniel Musinga, for steering the Committee in realising this milestone.

Achieving this milestone has been a collaborative effort. It would, therefore, be remiss of me not to acknowledge the legal practitioners and the stakeholders who gave comments and recommendations on the Zero Draft, and who participated in the review and validation of the Bench Book. Thanks to your collaboration and participation, JCE was able to generate a comprehensive book, which will be used as a guide and a reference point in the conduct of EDR matters. We would like to especially acknowledge

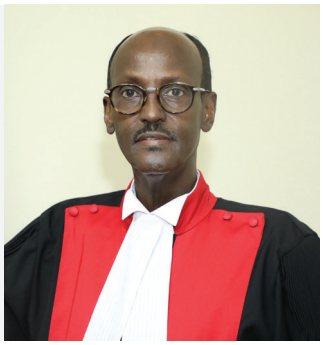
Arnold Ochieng, Peter Keya, Ochiel Dudley, Denis Moroga, Walter Khobe, Petronella Mukaindo, Victoria Miyandazi and Moses Kipkogei for their insights, and for submitting material to ensure that the draft is up-to-date with current jurisprudence. We are truly grateful that you chose to walk this journey with the Committee and commend your commitment to efficient and effective EDR, towards ultimately promoting the rule of law and enhancing access to justice. This is in line with the Chief Justice's Social Transformation through Access to Justice Agenda.

To Dr. Victoria Miyandazi, the Committee is grateful to you for taking time to proofread and format the final draft of the Bench Book and generating what, I must say, is a stellar document. I commend Brian Onderi and Miriam Ng'ang'a for the excellent research support they provided in compiling the various drafts of the Bench Book. Thank you also to Kevin Kipchirchir, Samson Muchiri and Cedric Kadima who ensured that the case links to the digitalised version were up to date for ease of reference.

I must also commend members of the Secretariat who took part in the planning and coordination of meetings and workshops and offered technical support during the process of developing this Bench Book. Your support to the Committee is truly invaluable.

The development and publication of this Bench Book would not be possible without the support of our development partners, who continue to remain steadfast in their commitment to supporting the Judiciary in its efforts to enhance effective and efficient EDR and affirm its centrality in entrenching our democracy. Special mention goes to the International Foundation for Electoral Systems (IFES) and the Electoral Law and Governance Institute for Africa (ELGIA). We are appreciative of your continuous partnership and collaboration. We also laud your commitment to entrenching democracy in Kenya.

PROFILES OF MEMBERS OF JCE



HON. MR. JUSTICE MOHAMMED IBRAHIM, CBS

Justice Ibrahim is the Chairperson of the Judiciary Committee on Elections and a member of the Judicial Service Commission. He is a Judge of the Supreme Court of Kenya and has served in the Court since his appointment in June 2011. Prior to his elevation to the Supreme Court, Justice Ibrahim served as a Judge of the High Court of Kenya, a position he was appointed to in May 2003. He holds a Bachelor of Laws Degree (LLB) from the University of Nairobi. On 11 January 1983, he become the first member of the Kenyan-Somali community to be admitted as an Advocate of the High Court of Kenya. He previously worked with Kituo Cha Sheria and was a member of the Board of the Legal Education and Aid Programme (LEAD). He was also a founding trustee of the human rights organisation, Mwangaza Trust, a position he held until 1994.

HON. MR. JUSTICE (DR.) SMOKIN WANJALA, CBS

Justice Wanjala is a Judge of the Supreme Court of Kenya and the current Director of the Kenya Judiciary Academy. Before his appointment to the Supreme Court of Kenya, Justice Wanjala served as a Law Lecturer, and, later, Senior Law Lecturer, at the University of Nairobi for a period 19 years. Justice Wanjala is a holder of an LLB from the University of Nairobi; a Diploma in Law from the Kenya School of Law; a Master of Laws Degree (LLM) from Columbia University, New York; and a Doctorate in Law (PhD) from the University of Ghent, Belgium. He has many publications to his credit, including books and articles in the fields of law, human rights and governance, and has published both locally and internationally. Justice Wanjala is also a member of the International Commission of Jurists-Kenya Chapter and the Kenya Anti-Corruption Academy.

HON. MR. JUSTICE DANIEL MUSINGA, CBS

Justice Musinga is a holder of an LLB from the University of Nairobi and was admitted to the Roll of Advocates in 1988. He was appointed a Judge of the High Court of Kenya in October 2003 and elevated to a Judge of the Court of Appeal in November 2012. A distinguished jurist, Justice Musinga was named Jurist of the Year by the International Commission of Jurists-Kenya Chapter in 2011. Justice Musinga is the current President of Kenya's Court of Appeal. He also serves as the Chairperson of the Performance Management and Measurement Steering Committee and the Vice-Chairperson of the Judiciary Committee on Elections. He is also a Fellow of the Chartered Institute of Arbitrators.

HON. MR. JUSTICE KATHURIMA M'INOTI, OGW, EBS

Justice M'Inoti is a Judge of the Court of Appeal of Kenya. In February 2021, he was appointed to the East African Court of Justice's Appellate Division. He holds LLB and LLM Degrees from the University of Nairobi and is an Advocate of the High Court of Kenya. Between 2003 and 2012, he served as Chairperson of the Kenya Law Reform Commission, the institution responsible for reviewing and proposing reforms to the Laws of Kenya. He is a Commissioner of the International Commission of Jurists, Geneva; a former member of the Executive Committee of the Commonwealth Association of Law Reform Agencies; and a former President of the Association of Law Reform Agencies of Eastern and Southern Africa. Justice M'Inoti is also a former lecturer in the Department of Public Law at the University of Nairobi. He has served in international missions as a trial observer (Uganda), election observer (Malawi) and human rights status evaluator (Ghana) for the International Commission of Jurists and Amnesty International.

Justice Achode is an alumnus of the University of Nairobi and the Kenya School of Law. She began her career on the Bench as a District Magistrate II (Professional) at Kericho Law Courts in 1986. Justice Achode was then elevated to a Judge of the High Court of Kenya in 2011 and, in March 2018, elected as the Principal Judge of the High Court. In July 2022, she was further elevated to a Judge of the Court of Appeal. She has previously served as Registrar of the High Court of Kenya and Chief Court Administrator.

HON. LADY JUSTICE LYDIA ACHODE, CBS

HON. MR. JUSTICE ROBERT LIMO

Justice Limo holds an LLB from the University of Nairobi and a Master's Degree in Ethics and Governance from Mount Kenya University. He is an Advocate of the High Court of Kenya and holds a Diploma from the Kenya School of Law. Justice Limo was appointed as a Judge of the High Court of Kenya in 2014 and is currently the Presiding Judge at Kitui High Court. He previously served as the Chairperson in the Office of the Ombudsman Environment and Land. Prior to his appointment as High Court Judge, Justice Limo served as a partner at Limo R.K & Company Advocates from 1996 to 2014 and took up various leadership positions in the Law Society of Kenya within the North Rift Region.

HON. WENDY MICHENI

Hon. Micheni began her career in the Judiciary as a Junior Magistrate, and rose through the ranks to her current position of Chief Magistrate. She currently serves as the Head of Station at Milimani Law Courts and a Trainer of Trainers (TOT) in anti-human trafficking. Hon. Micheni holds an LLB from the University of Nairobi and a post-graduate Diploma from the Kenya School of Law. She also holds a Master's Degree in Conflict Resolution and Peace Building as well as a Diploma in Human relations.

HON. DIANA MOCHACHE

Hon. Mochache holds an LLM and LLB from the University of Nairobi. She is a Chief Magistrate and is the current Head of Station at Kahawa Law Courts. Hon. Mochache joined the Judiciary as a District Magistrate II (Professional) and has risen through the ranks to her current position as Chief Magistrate.

HON. ELIZABETH TANUI, HSC

Hon. Elizabeth Tanui is a Senior Principal Magistrate having joined the Kenyan Judiciary in 2007 as a Resident Magistrate. She is currently serving as a Deputy Registrar in the Commercial and Tax Division of the High Court of Kenya in Milimani Law Courts. She is also the Deputy Registrar in charge of Automation in the Kenyan Judiciary. She acts as a liaison person between the Judiciary and the Business Community Court Users (BCUC) in the implementation of reforms towards ease of enforcement of contracts. She holds an LLB from Moi University and is an LLM Candidate at the University of Nairobi.

HON. ROSALYNN AGANYO, HSC, OGW

Hon. Aganyo holds an LLB from the University of Nairobi and a Diploma in Law from the Kenya School of Law. She joined the Judiciary as a Resident Magistrate in 2012 and is currently a Principal Magistrate serving at Wajir Law Courts as the Head of Station. She is the CEO/Secretary of the Political Parties Disputes Tribunal; a position she has held from 2017 to date. She is a member of the International Association of Women Judges-Kenya Chapter (IAWJ-K) and the Kenya Magistrates and Judges Association (KMJA).

Hon. Mbacho is a Senior Resident Magistrate and serves as Deputy Registrar at the Milimani Law Courts, Civil Division. She joined the Judiciary in November 2017. Prior to joining the Judiciary, Hon. Mbacho worked as a Prosecution Counsel in the Office of the Director of Public Prosecutions. Hon. Mbacho is a holder of an LLB from Moi University. She also holds an LLM from the University of Nairobi and is an accredited mediator.

HON. LYDIAH MBACHO

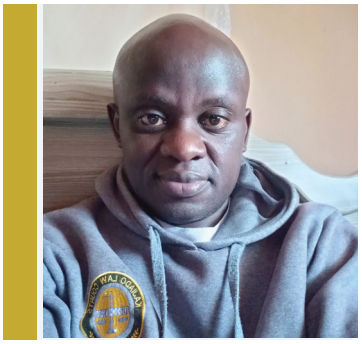
Walter Khobe is a Legal Counsel in the Office of the Chief Justice. Prior to joining the Office of the Chief Justice, he was a Lecturer at the Department of Public Law, Moi University; Partner at B.O. Akang'o and Company Advocates; and an Associate Editor of the Platform Magazine. Walter Khobe holds an LLM degree from the University of Pretoria, an LLB (Hons.) from Moi University, a Postgraduate Diploma in Legal Practice from the Kenya School of Law, and a Post-Graduate Certificate in Constitution Building from the Central European University. He is an Advocate of the High Court of Kenya.

WALTER KHOBE

Hon. Gichana is a Principal Magistrate in the Judiciary of Kenya. She joined the Judiciary in 2012. She is an alumnus of the United Nations Asia Far East Institute for the Prevention of Crime, with a focus on "Child Witnesses in the Justice System" and is a Certified Public Secretary (K). She has worked at Kikuyu Law Courts where she championed for community-centred alternative dispute resolution and Court Annexed Mediation. She has also worked at the Milimani Children's Court where she advanced the rights of children in conflict with the law and advocated for their pro bono representation before it was adopted as a policy. In December 2020, she was appointed as the Secretary to the JCE and CEO of the JCE Secretariat.

HON. ZIPPORAH GICHANA

Hon. Mulochi holds an LLB and LLM from the University of South Africa. He is currently pursuing a PhD at the University of Nairobi. Hon. Mulochi is a Senior Resident Magistrate who has served in the Judiciary since 2017. Before his appointment to the magistracy, Hon. Mulochi served as a Prosecutor with the Office of the Director of Public Prosecutions. Hon. Mulochi is the Deputy Secretary to the JCE.



HON. EDWIN MULOCHI

ACRONYMS AND ABBREVIATIONS

ACDEG	African Charter on Democracy, Elections and Governance
AfriCOG	Africa Centre for Open Governance
All ER	All England Reports
BVR	Biometric Voter Registration System
CJ	Chief Justice
CoA	Court of Appeal
CORD	Coalition for Reforms and Democracy
CTC	Constituency Tallying Centre
DPP	Director of Public Prosecutions
EA	East African Law Reports
ECC	Electoral Code of Conduct
EDR	Electoral Dispute Resolution
eKLR	eKenya Law Reports
ELRC	Employment and Labour Relations Court
ICCPR	International Covenant on Civil and Political Rights
ICDRC	Interim Constitutional Dispute Resolution Court
IDRM	Internal Dispute Resolution Mechanism
IEBC	Independent Electoral and Boundaries Commission
IFES	International Foundation for Electoral Systems
IDLO	International Development Law Organisation
IDRM	Internal Disputes Resolution Mechanism
IPPMS	Integrated Political Parties Management System
JA	Judge of Appeal
JCE	Judiciary Committee on Elections
JWCEP	Judiciary Working Committee on Elections Preparations

JR	Judicial Review
JSC	Judge of the Supreme Court (Uganda)
KLR	Kenya Law Reports
MC	Magistrate's Court
MCA	Member of County Assembly
MoU	Memorandum of Understanding between the Political Parties Disputes Tribunal and the Independent Electoral and Boundaries Commission dated 28 March 2017
NARC	National Rainbow Coalition
NCIC	National Cohesion and Integration Commission
NDPP	National Director of Public Prosecutions
NDRC	Nomination Disputes Resolution Committee
NGEC	National Gender and Equality Commission
Nm	Namibia
NSC	National Security Council
NTC	National Tallying Centre
ODPP	Office of the Director of Public Prosecutions
ODM	Orange Democratic Movement
ORPP	Office of the Registrar of Political Parties
PPDT	Political Parties Disputes Tribunal
SACC	South African Constitutional Court
SC	Supreme Court
SCI	Supreme Court of India
SCJ	Supreme Court Judge (Kenya)
WLR	Weekly Law Reports

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CHAPTER 1

BACKGROUND AND CONTEXT OF ELECTORAL DISPUTE RESOLUTION

BACKGROUND AND CONTEXT OF ELECTORAL DISPUTE RESOLUTION

1.1. Objectives of the Bench Book

1.1.1. This is the second edition of the Electoral Dispute Resolution (EDR) Bench Book which was first published under the auspices of the JCE in the run up to the 2017 general election. The main objective of this Bench Book is to provide a reference guide for judges, magistrates and other judicial officers on legal, procedural, and administrative issues that frequently arise in EDR. The specific objectives of this Bench Book are:

i. to provide a summary of the legal framework for elections, legal processes and procedures applicable to EDR;

ii. to distil and present the prevailing jurisprudence on selected issues in EDR;

iii. to provide a quick reference of key resources and authorities for selected issues in EDR; and

iv. to provide some information on the technicalities of the election process in Kenya.

1.1.2. This Bench Book takes account of the current electoral laws and EDR cases arising from the 2013 and 2017 electoral cycles, as well as some recent jurisprudence from the courts delivered in the run up to the 2022 elections. The Bench Book highlights the main provisions of the Constitution, electoral statutes, regulations, and election petition rules. It also gives an overview of the regulations, procedures and forms adopted by the Independent Electoral and Boundaries Commission (IEBC) to conduct the elections. It seeks to provide a comprehensive reference point on procedural and substantive areas of EDR.

1.2. How to use the Bench Book

1.2.1. The Bench Book is a reference material for Judges and Magistrates exercising their judicial function. It also addresses practical and administrative elements of elections and EDR which are of interest to Deputy Registrars, Court Administrators, and other judicial staff, notably on orders of scrutiny and recount. The Bench Book is not meant to supplant the official law reports or other authoritative legal texts. Instead, it is meant to complement these other sources by providing a compact but complete synopsis of key legal provisions and the prevailing jurisprudence on frequently recurring issues in EDR. This Bench Book does not dwell on any legal provision or judicial decision. Instead, it distils and highlights the key principles set out in electoral laws and the relevant judicial decisions, providing appropriate references to the law reports and other primary sources. This way, the Bench Book seeks to provide a 'one-stop shop' quick reference for the main issues that judges, magistrates, and other judicial officers are likely to encounter regarding the 2022 general election. This resource aims to complement the EDR trainings conducted for all the judges, magistrates and judicial officers under the auspices of Kenya Judiciary Academy and Judiciary Committee on Elections.

1.2.2. While attempts have been made to update the text with recent legislative amendments and jurisprudence from the courts, some of the most recent decisions may not be reflected in the text. At the time of finalisation of the text, some cases remained pending in court.

1.3. Organisation

1.3.1. This Bench book is organised as follows:

i. Chapter 1 sets out the ***background and context of EDR*** in the post-2010 constitutional framework.

ii. Chapter 2 outlines the ***jurisdiction of various courts and tribunals in EDR***, and the issue of timelines in so far as it relates to jurisdiction of various courts and tribunals. The rationale for the Chapter lies in the constitutional emphasis on timely resolution of electoral disputes (Article 87(1) of the Constitution), which often ties the jurisdiction of various courts and tribunals to the filing of electoral disputes within the prescribed timelines.

iii. Chapter 3 outlines the prevailing ***jurisprudence on pre-election disputes,*** i.e., disputes that arise before the declaration of election results.

iv. Chapter 4 outlines the prevailing case law and procedure for the handling of ***parliamentary and county election petitions***.

v. Chapter 5 focuses on the ***presidential election petition*** and highlights emerging jurisprudence.

vi. Chapter 6 focuses on ***election petition appeals.***

vii. Chapter 7 outlines the prevailing case law on ***selected issues*** that frequently arise in EDR.

viii. Chapter 8 sets out, ***appendices, timetables, checklists,*** as well as a series of selected statutory forms adopted by the judiciary for the EDR process.

1.4. The Judiciary Committee on Elections

1.4.1. Following the 2013 general election, the courts determined 188 parliamentary and county election petitions, and 3 presidential election petitions, within the timelines set out in the Constitution. The post-2013 decisions, which are set out in the law reports, constitute a rich body of EDR jurisprudence. The determination of the 2013 election petitions within the timelines set out in the Constitution is attributable to, *inter alia*, institutional preparedness spearheaded by the then Judiciary Working Committee on Elections Preparations (JWCEP), an *ad hoc* committee formed by the Chief Justice in 2012.

1.4.2. JWCEP's mandate was limited to facilitating the Judiciary's institutional preparedness for electoral disputes arising from the 2013 general election. Its successes and the need to avoid a relapse to the past legacy of delayed electoral justice pointed to the need for a permanent (as opposed to *ad hoc*) internal arrangements within the Judiciary to ensure institutional preparedness for future electoral disputes. In 2015, the Chief Justice established the Judiciary Committee on Elections (JCE) as successor to the JWCEP to continue the important work of ensuring that the Judiciary is prepared to meet the challenges of delivering a robust, fair and efficient electoral dispute resolution process in subsequent elections. The JCE steered the Judiciary in handing the 388 petitions that were filed following the 2017 elections.

1.4.3. In preparation for the 2022 general election, the JCE spearheaded legislative reform with a view to ameliorating the EDR process. These amendments had the effect of capping political party disputes appeals to the Court of Appeal, thereby bringing finality to the pre-election EDR process. In conjunction with the Kenya Judiciary Academy, JCE also facilitated the training of

Supreme Court, Court of Appeal and High Court judges, as well as other judicial officers and court administrators on EDR. The JCE has also carried out engagements with the IEBC and the PPDT as part of its institutional collaboration to ensure that the EDR process flows smoothly.

1.4.4. The JCE also engaged in a process of review of its rules to address concerns raised during the 2017 EDR process. Only minor amendments to the Rules were adopted, some of which were necessitated with the need to harmonise the Rules with the Practice Guidelines issued in the wake of the COVID-19 pandemic.

1.4.5. The JCE also embarked on developing a case management system that is aligned with EDR processes to facilitate the filing and management of election petitions.

1.5. Background

1.5.1. Kenya has had frequent elections since independence. However, the electoral framework did not correspond with enhanced democracy or constitutionalism. Elections were considered the focal point of constitutional regression and attracted significant changes between 1964 and 1992. These changes were largely considered to have contributed to systemic state failure, which triggered the 2007 post-election violence. Kenya's 2010 Constitution and the statutory feforms following constitutional enactment, therefore, sought to comprehensively reform the electoral framework.

1.5.2. As Kenya prepares for the third general election under the 2010 Constitution, EDR has evolved as a central element in the electoral process. The principles set out under the Constitution have been applied and refined in the two electoral cycles in 2013 and 2017. The resolution of electoral disputes in Kenya was previously defined by inordinate delays and the elevation of legal and procedural technicalities over substantive justice. Three notorious examples, among countless others, indicate the courts' past obsession with legal and procedural technicalities. First, the courts often struck out election petitions for want of *personal service*, even where such service was unduly difficult or impractical (*Kibaki v Moi* (No. 3) [2008] 2 KLR (EP) 351; *Mohamed v Bakari & 2 Others* [2008] 3 KLR (EP) 54). Secondly, the courts often struck out election petitions for want of *personal signature* by the petitioner, even where the petitioner suffered a disability that made it impossible to sign or had delegated the signing to a duly authorised agent (*Moi v Matiba & 2 Others* [2008] 1 KLR (EP) 622; *Jahazi v Cherogony* [2008] 1 KLR (EP) 273). Thirdly, the courts struck out election petitions for want of *locus standi* or *personal interest*, even where the petitioner had a discernible interest in the conduct of the election (*Odinga & 3 Others v Chesoni & Another* [2008] 1 KLR (EP) 432). The Supreme Court has summarised the courts' past approach to EDR as follows:

> *For many years, the courts were part of the problems impeding electoral justice, where potential petitioners were unable to serve their powerful opponents, or where they did, files would mysteriously disappear or reappear after the required filing deadlines had already passed. These issues are well documented in several reports by the International Commission of Jurists (Kenya) and other election monitoring groups, where they list the judicial system in this country, in the past, as having committed several electoral injustices, including courts insisting that Petitions must be personally signed by the Petitioner; where the Court held that a petition must be served personally upon the Respondent...; or courts requiring high security for costs to the detriment of those who are unable to raise this amount; or courts taking inordinate amount of time*

> *to dispose Petitions; or unreasonable delays, resulting in ineffectual decisions and dismissal of petitions on grounds of technicality* (Per Njoki Ndung'u SCJ (dissenting) in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others*, Supreme Court Petition No. 18 of 2014*)*.

1.5.3. Ideally, rules of procedure ought to be handmaidens of justice (*Microsoft Corporation v Mitsumi Computer Garage Ltd & Another*, Nairobi High Court Civil Case No. 810 of 2001). In other words, rules of procedure are not an end in themselves. They are only but a means to an end, the end being the determination of disputes on their substantive merits. Accordingly, legal and procedural technicalities ought not to be elevated to a fetish or enforced in a manner that defeats the ends of justice (*Microsoft Corporation v Mitsumi Computer Garage Ltd & Another*, Nairobi High Court Civil Case No. 810 of 2001).

1.5.4. The courts' past obsession with legal and procedural technicalities, together with inordinate delays that made election petitions lag in the courts until the subsequent election, gravely eroded public confidence in the Judiciary as an honest, independent and impartial arbiter of political disputes. This legacy contributed to the refusal by the aggrieved side to refer the disputed 2007 presidential election to the courts. The violence and civil strife that ensued following the disputed 2007 presidential election (the post-election violence) revealed that the absence of credible, effective and efficient EDR mechanisms can easily undermine the long-term viability of the Kenyan nation-state.

1.5.5. The Supreme Court has described the history of democracy and electoral justice in Kenya as follows:

> *Kenya's political history has been characterized by large-scale electoral injustice. Through acts of political zoning, privatization of political parties, manipulation of electoral returns, perpetration of political violence, commercialization of electoral processes, gerrymandering of electoral zones, highly compromised and incompetent electoral officials, and a host of other retrogressive scenarios, the country's electoral experience has subjected our democracy to unbearable pain, and has scarred our body politic. As a result, free choice and fair competition, the holy grail of electoral politics, have been abrogated, and our democratic evolution, so long desired, has staggered and stumbled, indelibly stained by this unhygienic environment in which our politics is played* (per Mutunga CJ in *Gatirau Peter Munya v IEBC & 2 Others*, Supreme Court Petition No. 2B of 2014).

1.5.6. According to the Kriegler Commission, for effective electoral dispute resolution, it is necessary to have flexibility and pragmatism and to keep an eye to political exigencies, even where this comes at the cost of strict legalism. Due to the politicisation of the Kenyan society and the doubt that existed about the judiciary's impartiality, it was argued that the judiciary should not be unnecessarily exposed to the risk of being politicised or being seen to be politicised due to its involvement in political disputes.

1.5.7. Following the post-election violence of 2007-2008, Kenyans adopted a new constitution as one of the means for securing the long-term viability of the Kenyan nation-state. The Constitution of Kenya, 2010 (the Constitution) introduced radical changes to the Kenyan electoral and EDR systems. The Constitution requires, *inter alia*:

(a) an electoral system that is 'simple, accurate, verifiable, secure, accountable and transparent' (Article 86(a) of the Constitution);

(b) a statutory framework characterised by mechanisms for 'the timely resolution of electoral disputes' (Article 87(1) of the Constitution);

(c) the administration of (electoral) justice 'without undue regard to procedural technicalities' (Article 159(2)(d) of the Constitution); and

(d) the administration of (electoral) justice in a manner that protects and promotes the purpose and principles of the Constitution (Article 159(2)(e) of the Constitution).

1.5.8. Kenya has made great strides since the 2007-2008 post-election violence. Public confidence in the Judiciary has been restored through, *inter alia*:

i. open, transparent and competitive recruitment of judges, magistrates and judicial staff;

ii. capacity building, through the continuous professional training of judges and magistrates;

iii. the vetting of judges and magistrates;

iv. the expeditious hearing and determination of election petitions and other electoral disputes;

v. transparency of the judiciary's proceedings, hearings and decisions; and

vi. Despite these improvements, the judiciary needs to maintain the public trust through deliberate efforts to maintain its competence and impartiality.

1.6. Context of Contemporary Electoral Dispute Resolution

1.6.1. The Republic of Kenya is founded upon the ideals of, *inter alia*, democracy, sovereignty of the people and the rule of law. This is evidenced by the primacy accorded to these ideals in multiple provisions of the Constitution (c.f. Articles 1, 4, 10, 19, 20, 24, 91 94, 127, 131, 156, 174, 175, 238, 249, 255 and 259 of the Constitution).

1.6.2. Specifically, the Constitution provides that the people of Kenya may exercise their sovereign power either directly or through their democratically elected representatives. Democratic elections, therefore, provide the most legitimate mechanism for constituting the social contract between the citizens of Kenya and their government. In other words, the conduct of free, fair and transparent elections is an essential prerequisite for the existence of the democratic system of government envisioned by the Constitution. The theoretical rationale for the country's EDR system is to ensure that those seeking the mandate to exercise the Kenyan peoples' sovereign power through elective office are elected democratically. In *Richard Kalembe Ndile & Another v Patrick Musimba Mweu & 2 Others*, Election Petitions (Machakos) Nos. 1 and 7 of 2013, the Court explained the important role of elections and the role of the courts in the democratic process as follows:

> *The golden thread running through the Constitution is one of sovereignty of the people of Kenya articulated in Article 1 of the Constitution. The exercise of this sovereignty of the people is anchored by other rights and fundamental freedoms such as the freedom of expression, association and freedom of access to information...Article 38 articulates political rights which are given effect through the electoral system set out in Chapter Seven titled, "Representation of the People." Under our democratic form of government, an election is the ultimate expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible.*
>
> (See also *Jared Odoyo Okello v IEBC & 3 Others,* Kisumu Election Petition No. 1 of 2013)

1.6.3. The role of the courts in the democratic process is to hear and determine electoral disputes, especially when the validity, credibility or legitimacy of an election are challenged by disaffected candidates or voters. This way, the courts enforce the constitutional ideals of democracy, sovereignty of the people and the rule of law. The country's EDR system, of which the courts play a central role in enforcing, is, therefore, a means for achieving the ideals of democracy, sovereignty of the people and the rule of law as set out in the Constitution.

1.7. The Guiding Principles and Values

1.7.1. Principles governing the EDR processes, as outlined in this Bench Book, are applied within the wider context of the principles governing the electoral framework. The transformative nature of Kenya's 2010 Constitution inevitably requires that the principles of EDR are applied in harmony with the underlying principles of the electoral framework. The Constitution sets out the overarching principles of elections and representation of the people under Article 81 of the Constitution. The Constitution and statutes applicable to elections also provide principles governing the core elements of the electoral cycle. Legal reforms enacted in each electoral cycle also have implications in advancing the principles set out in the Constitution.

1.8. Principles for Constitutional Interpretation

1.8.1. The Constitution is construed in accordance with the principles set out under Article 159 of the Constitution. Article 159(1) provides that:

> *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.*

1.8.2. In 2012, the Supreme Court in *Re The Matter of the Interim Independent Electoral Commission* (Constitutional Application No. 2 of 2011 at paragraph 51) adopted the words of Mohamed A J in the Namibian case of *State v Acheson* (1991) 20 SA 805 Nm (Page 813) where he stated that:

> *The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship of government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and ... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.*

1.8.3. The Constitution must also be interpreted broadly, liberally and purposively. In *John Harun Mwau & 3 Others v Attorney General & 2 Others,* Constitutional Petition 65, 123 & 185 of 2011, the High Court stated:

> *Where there are several articles that conflict it is the duty of the court to give effect to the whole Constitution and we fully adopt the principle of harmonization set out in the case of Centre for Rights Education and Awareness (CREAW) and Others v The Attorney General Nairobi Petition No 16 of 2011 (Unreported) where the Court, quoting other decisions, stated that, "In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the Constitution must be read together to get a proper interpretation. In the Ugandan case of Tinyefuza v The 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 paramountcy of the written constitution."*
>
> *A similar principle was enunciated by the United States Supreme Court in Smith Dakota v. North Carolina 192 v 268 [1940] the court stated; "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 above 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".*

1.8.4. The Kenyan Constitution is considered to rank among the categories of transformative constitutions. Therefore, its interpretation is intended to give effect to its context and contribute to the objectives of wider constitutional development. It is conceived and envisioned as an instrument of transformation and reconstruction in the sense that it introduces fundamental change in social, political and economic spheres of life and mandates key actors to effect the transformative project in multiple ways. The term 'transformative constitutionalism' is attributed to Professor Karl Klare, an American legal scholar, in his writing about South Africa's new constitutional order from which our own draws substantially. He defined 'transformative constitutionalism' to mean:

> *[...] a long-term project of Constitution enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.*

1.9. Overarching principles of the Electoral System

1.9.1. *The system of election*

1.9.1.1. The President is elected by an absolute majority of votes cast in an election or in a two round election where no candidate obtains such a majority. In a presidential election, all persons

registered as voters for the purposes of parliamentary elections are entitled to vote. The election of a president is conducted in each constituency (Article 138(2) of the Constitution). In addition to attaining more than half of the votes cast, a President-elect must receive at least twenty-five per cent of the votes cast in more than half of the counties (Article 138(4)(b)). The person nominated as a running mate by the President-elect is declared deputy President-elect.

1.9.1.2. On the same day as the presidential election, first-past-the-post elections are held for Parliament and County levels of government (National Assembly direct elections for 290 constituencies and 47 County seats reserved for women representatives, 47 Senate seats and 47 County Governor seats). In addition to the elective seats, there are 12 party list seats filled through nomination by political parties in proportion to the seats obtained by political parties in the directly elected seats to represent the interests of, *inter alia*, the youth, women and persons with disabilities.

1.9.1.3. The Senate comprises members elected through direct election to represent each of the country's 47 counties as a single member constituency (Article 98(1(a)), and 20 persons nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90. Nominated members should comprise sixteen women; two members representing the youth; and two members representing persons with disabilities (Article 98(1)(b)).

1.9.1.4. County Assemblies consist of members elected by registered voters in each Ward as a single constituency; as many special seat members necessary to ensure that no more than two-thirds of the membership of the Assembly are of the same gender (Article 98(1)(b)); and members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament (s 7 County Governments Act; s 36 Elections Act).

1.9.1.5. Gubernatorial candidates choose their running mates, just as the presidential candidates do, and upon election, the person nominated by the Governor-elect is declared Deputy Governor-elect (Article 180(6) of the Constitution). To be eligible to contest the gubernatorial election, one must be eligible to be elected to the County Assembly (Article 180(2) of the Constitution).

1.9.2. *The Election Date*

1.9.2.1 Under the 2010 Constitution, the election date is determined and runs in 5-year cycles. Six elections to fill the various constitutional elective positions (President & Deputy President, Senator, Woman Representative to the National Assembly, Member of National Assembly, Governor and Deputy Governor, and Member of County Assembly) are held on the general election date set for the Second Tuesday of every fifth year from the date of the last general election(Article 101(1)). The 2010 Constitution recast the indeterminacy of the general election date in the former Constitution. The former Constitution empowered the President to prorogue or dissolve Parliament under section 59, giving way to the general election of the members of the National Assembly. This provision caused a lot of confusion as to the date for conducting general elections, which the 2010 Constitution has now resolved.

1.9.2.2 The term of Parliament expires on the date of the general election by operation of Article 102(1) of the Constitution. The Presidential election is held every five years on the same date as the general election for the members of the two houses of Parliament (Article 136(1)). In the 2012 case of *John Harun Mwau & 3 Others v Attorney General & 2 Others,* Constitutional Petition 65, 123 & 185 of 2011, the High Court considered and interpreted the provisions concerning the date of the first election under the 2010 Constitution and made distinction between the transitional provisions with the provisions of the repealed Constitution on dissolution of Parliament. The High Court ruled that the general election could be held in the year 2012 within sixty days from

the date on which the National Coalition was dissolved by the President and the Prime Minister. However, the Court of Appeal found that the High Court had in effect given the President and the Prime Minister the power to dissolve the National Assembly, a power which had not been conferred by the Constitution. The High Court decision was therefore inconsistent with sections 10 and 12 of the Sixth Schedule. The Court of Appeal found that since it was the intention of the Constitution that the National Assembly would complete its unexpired term, the first elections could only be lawfully held within sixty days of expiry of the term of the 10th Parliament, and only the IEBC was mandated to compute this term (see *Centre for Rights Education and Awareness & Another v John Harun Mwau & 6 Others* Civil Appeal 74 & 82 of 2012).

1.9.2.3 Elections for Governors and their deputies are held on the same day as the general election for Member of Parliament (Article 180(1) Constitution) and so are the elections for member of County Assembly (Article 177 (1)(a)).

1.9.3. *Political Parties and Candidates*

1.9.3.1 Article 4 of the Constitution on the declaration of the Republic declares Kenya as a sovereign state and asserts that Kenya shall be a multi-party democratic state founded on the national values and principles of governance referred to in Article 10 (Article 4(2)). Article 10 sets out the values and principles of governance which include democracy, the rule of law, good governance, public participation and accountability (Article 10(2)). The principles under Article 10 bind all persons whenever they interpret or apply the Constitution; enacts, applies or interprets any law; or make or implements public policy decisions. The Bill of Rights provides extensive civil and political rights. Specifically, Article 38 sets out the political rights which include the right to make political choices including forming or participation in forming a political party, participating in political party activity or recruiting members for a party or campaigning for a political party or cause. In relation to elections, every citizen has the right to free, fair and regular elections based on the universal suffrage and free expression of the will of the voters for any elective office under the Constitution or any political party office to whose membership they subscribe. In line with the International Covenant on Civil and Political Rights, all citizens are entitled, without unreasonable restrictions, to be registered as voters, to vote by secret ballot in all elections and referenda and to express their candidature for public or political party office and if elected, to hold office. These provisions allow citizens to either exercise their political rights through a political party or outside of it as an independent entity. Article 85 of the Constitution cements the rights of persons who have not been members of a political party in the three months preceding an election to seek election as independent candidates.

1.9.3.2 Articles 91 and 92 of the Constitution provide for the principles and framework governing political parties. They are implemented through the Political Parties Act 2011 (see generally *Maendeleo Chap Chap Party & 2 Others v IEBC & Another,* Petition 179 of 2017).

1.9.3.3 The requirement in section 14(1) of the Political Parties Act that members of County Assemblies who switch from one political party to another for purposes of a general election should resign within one hundred and eighty days of a general election, was declared unconstitutional and a violation of Article 38(3)(c) as read together with Articles 4(2), 10, 19, 20 and 259 of the Constitution (*Peter Kibe Mbae v Speaker of the County Assembly of Nakuru & Another Registrar of Political Parties and 49 Others (Interested Parties),* Nakuru Constitutional Petition No E004 of 2022).

1.9.3.4 For purposes of the 2022 general election, the amendments in effect on the conduct of elections are those with regards to the Political Parties Act, 2011 and consequential amendments to the

Elections Act. The constitutionality of the Political Parties Amendment Act No 2 of 2022 was tested in *Salesio Mutuma Thuranira & 4 Others v Attorney General & 2 Others; Registrar of Political Parties & 4 Others (Interested Parties)* (Petition E043, E057 & E109 of 2022), where the three Judge Bench of the High Court largely found the amendments constitutional. However, the Court declined to find unconstitutional the closing of party membership lists before nominations, which had the effect of locking out losers in party primaries from joining other political parties.

1.9.3.5 Following the Political Parties Amendment Act No 2 of 2022, several amendments were introduced to the Political Parties Act. The major ones include the following:

- *Registration of Political Parties and Coalition Political Parties: the amendment introduced the objectives of political parties, legal identity of coalition political parties, requirements for the registration of coalition political parties.*
- *Membership of political parties: requirement to maintain a political parties register, the integrated political parties' membership register.*
- *Compliance: resignation from a political party, criminalisation of the registration of a political party member without consent.*
- *Nomination of candidates: clarification of the definition of nomination; introduction of Part IVA setting out provisions that political parties should abide by in nomination of candidates; preparation and submission of nomination rules; establishment of internal nomination organs; methods of nominations; procedures of nomination and presentation of nomination lists to the IEBC.*
- *Funding of political parties: recasting of the formula for allocating public funding to political parties.*

1.9.4. *Inclusion, non-discrimination and protection of the marginalised*

1.9.4.1 In the case of *Centre for Rights Education and Awareness v Attorney-General & Another,* Constitutional Petition 182 of 2015, the Court asserted:

> *The Constitution of Kenya has been described as one of the most progressive in the world. It envisions a society based on the rule of law, non-discrimination and social justice. At its core is the belief that there can only be real progress in the society if all citizens participate fully in their governance and that all, male and female, persons with disabilities and all hitherto marginalised and excluded groups get a chance at the table.*

1.9.4.2 Besides non-discrimination being a national value under Article 10, Article 27 establishes disability, age, ethnic or social origin, and sex as some of the grounds on which a person may not be discriminated against. The Constitution also imposes a duty on all State organs and public officers to address the needs of vulnerable groups in society, including women, the youth, persons with disabilities, marginalised communities, and ethnic and other minorities.

1.9.4.3 Inclusion is not only attained through giving marginalised groups seats at the national legislative and appointive levels, but also by securing their representation at the devolved government structure. Articles 90, 97, 98 and 177 mandate representation of women, the youth, persons with disabilities and such other groups as shall be defined by legislation in the case of County Assemblies through party lists. In arriving at the nominees to the national legislative institutions, the Constitution requires political parties to comply with the zebra listing rule whereby, the list alternates between male and female candidates, as well as in reflecting the regional and

ethnic diversity of the people of Kenya (Article 90(2) of the Constitution). In respect of County Assemblies, parties are required to ensure that the lists reflect the community and cultural diversity of the counties as well as ensuring adequate representation of minorities in accordance with Article 197 of the Constitution (s 7(2) County Governments Act 2012).

1.9.4.4 Inclusion of marginalised groups is also required at the party level. Political parties are required to respect the right of all persons to participate in the political process, including minorities and marginalised groups (Art 91 (1) (e)). Compliance with the inclusion mandate is one of the criteria for assessing eligibility to the Political Parties Fund. 15% of the Political Parties Fund is reserved for political parties based on the number of candidates from special interest groups elected in the preceding general election (s 25(1)(b) of the Political Parties Fund. Moreover, not less than 30% of the money allocated to a party under the Fund is required to be allocated to 'promoting the representation in Parliament and in the county assemblies of women, persons with disabilities, youth, ethnic and other minorities and marginalised communities' (s 26(1)(a) Political Parties Act 2011).

1.9.4.5 Before a political party can receive full registration, it is required to demonstrate inclusion in the following ways:

(i) that its members reflect the regional and ethnic diversity, gender balance and representation of special interest groups;

(ii) that the composition of its governing body reflects the regional and ethnic diversity, gender balance and representation of special interest groups;

(iii) that not more than two-thirds of the members of the governing body of the party are of the same gender.

(s 7 Political Parties Act 2011)

1.9.4.6 In *Centre for Minority Rights Development (CEMIRIDE) & 2 others v Attorney General & 2 others; Independent Electoral and Boundaries Commission (Interested Party)* Machakos Petition No E002 of 2022, the court found that the Integrated Political Parties Management System (IPPMS) adopted by the Office of the Registrar of Political Parties to manage the political parties' membership register did not take into account the interests of minorities and marginalised groups. In the words of the court:

> *192. I find that the State developed the Integrated Political Parties Management System without adhering to the provisions of Article 56 of the Constitution. Not only should it have ensured that the system did not curtail the rights of the marginalised by putting in place alternative avenues through which the said communities would still realise their democratic rights but that the said alternatives were sufficiently brought home to those affected in good time to enable them take advantage of the said options.*
>
> *193. I also agree with the Petitioners that currently there is no sufficient statutory or regulatory regime dealing with the rights of the marginalised groups or communities in this country. It may well be the dearth of such regimes that has confined the minorities and the marginalised communities to the periphery. I agree that in order for the rights contemplated under Articles 10, 56 and 91 of the Constitution to be realised, the State ought to take appropriate steps to make provisions that give meaningful effect to the same. The State cannot continue paying lip service to the constitutional provisions*

> *while the people for which the said provisions are meant to protect are treated as if they are outside looking in. In my view, without any statutory or regulatory framework effectuating the rights of the marginalised, the State is simply perfecting tokenism and it was the realisation that the State was not upholding the rights of the marginalised that the Constitution expressly provided for the same.*

The state was directed to put in place measures that would guarantee the full enjoyment of the fundamental rights and freedoms in Articles 6(3), 27, 35, 38 and 56 of the Constitution of Kenya, 2010 with specific attention to minorities and indigenous people

1.9.4.7 The electoral system is also required to comply with the principles that:

> *(b)not more than two-thirds of the members of elective public bodies shall be of the same gender;* and
>
> *(c) fair representation of persons with disabilities.*

1.9.4.8 Political parties are bound by the two-thirds gender rule in the process of nominating candidates and the IEBC has power to reject nomination lists that do not comply with the rule (*Katiba Institute v IEBC,* Constitutional Petition 19 of 2017). However, the two-thirds gender rule was suspended in respect of the 2022 general election as was held in the case of *Adrian Kamotho v IEBC*, JR Misc No. E071 of 2022, and confirmed in *Cliff Ombeta & Another v IEBC*, Constitutional Petition E211 of 2022 (consolidated).

1.9.4.9 Party list slots ought to be reserved for persons who would otherwise be excluded in the first-past-the-post elections for varied reasons. It is not open for political parties to adopt their own meaning of 'special interest' (*Commission for the Implementation of the Constitution v Attorney General & 2 Others*, Civil Appeal 351 of 2012). Therefore including persons who are able to contest elective positions – such as presidential and deputy presidential candidates – in party lists amounts to an 'irrational superimposition of well-heeled individuals on a list of the disadvantaged and marginalized to the detriment of the protected classes or interests' (*Commission for the Implementation of the Constitution v Attorney General & 2 Others,* Civil Appeal 351 of 2012).

1.9.4.10 While acknowledging that the term 'special interest' is not defined by the Constitution, the Court of Appeal in *Commission on the Implementation of the Constitution v Attorney General & 2 Others,* Civil Appeal 351 of 2012, ruled that whatever interpretation is given to the term, it must bear the same meaning as marginalised groups.

1.9.4.11 The IEBC is obligated to supervise the process by which parties nominate candidates to their party lists (*National Gender and Equality Commission (NGEC) v IEBC*, Nairobi Constitutional Petition No. 147 of 2013).

1.9.4.12 A party list should only include persons who meet the suitability and eligibility requirements for election to the relevant office.

1.9.5. *Boundaries Delimitation and Representation*

1.9.5.1 Three provisions under the General Principles of the Electoral System in Article 81 of the Constitution relate to representation. The Article stipulates that the electoral system is based on the principles that: '(b) not more than two-thirds of the members of elective public bodies shall be of the same gender; (c) fair representation of persons with disabilities; (d) universal

suffrage based on the aspiration for ***fair representation and equality of vote'.*** The scheme of representation is thus based on fair representation and equality of vote. The Constitution sets out limited qualifications to absolute equality of representation in constituencies and wards through the factors set out under Article 89(5) and (6). The Constitution also tempers absolute equality through affirmative action in favour of gender representation and persons with disabilities. Article 100 provides an avenue for representation of marginalised groups in Parliament.

1.9.5.2 The basis for fair representation and equality of the vote is expressed under the principles for boundary delimitation under Article 89 of the Constitution. Article 89(5), (6), (7) and (12) provide the principles and criteria for the conduct of boundaries delimitation. These provisions give effect to Article 81 of the Constitution and Article 21 of the Universal Declaration of Human Rights. These provisions aim to achieve equality of the vote, professional conduct of boundaries delimitation by the IEBC, public participation, and accountability. The IEBC has the mandate of delimiting boundaries of constituencies and County Assembly wards in accordance with the principles and criteria in Article 89 of the Constitution. The decisions of the Commission are subject to Judicial Review jurisdiction of the High Court under Article 89(10) and (11) of the Constitution (*Republic v IEBC & Another Ex-Parte Councillor Eliot Lidubwi Kihusa & 5 Others,* Miscellaneous Application 94 of 2012).

1.9.5.3 Parliament cannot enact legislation that takes away the discretion conferred on the IEBC under Article 89 of the Constitution. *Attorney-General & 2 Others v David Ndii & 79 Others*, Supreme Court Petition 12 of 2021 (consolidated with petitions 11 and 13 of 2021). In particular, Parliament cannot enact a law that guarantees every County a minimum number of wards, as such a move takes away the discretion conferred on the IEBC under Article 89(5), (6) and (7) of the Constitution (*Rishad Hamid Ahmed & Another v IEBC*, Mombasa High Court (Mombasa) Constitutional Petition No. 16 of 2016).

1.9.6 *The Right to Vote and Voter Registration*

1.9.6.1 The right to vote is the basis for expression of sovereignty under Article 21 of the Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights (ICCPR). The Constitution provides for the right to register as a voter and to vote. Accordingly, Article 38(3) of the Constitution stipulates that 'Every adult citizen has the right, without unreasonable restrictions— (a) to be registered as a voter; [and] (b) to vote by secret ballot in any election or referendum'. Article 83 then sets out the qualifications for registration as a voter.

1.9.6.2 The law sets out periods when registration of voters may not be done. This includes 60 days before a general election or fresh election under Article 138(5) of the Constitution); for by-elections, between the date when vacancy is declared and date of by-election in a specific ward or constituency; and for referenda, between the date of publication and date of referendum (s 5, Elections Act). However, the law does not bar a person from registering as a voter in a different constituency from the one in which a by-election is declared (*McDonald Mariga v Returning Officer Kibra Constituency & Others*, NDRC 3 of 2019).

1.9.6.3 An acknowledgement slip is considered sufficient proof of registration, even where the name of a voter has not been entered into the electronic register (*McDonald Mariga v Returning Officer Kibra Constituency & Others*, NDRC 3 of 2019).

1.9.6.4 A voter may transfer his/her vote to another electoral area, provided that the IEBC is notified at least 90 days before the election (s 7 Elections Act). However, a voter may not transfer their

registration in the period between the filing of an election petition and the date of a by-election where the court directs that a by-election may be held (s 5(2), Elections Act). Moreover, a voter may not transfer his/her registration unless he/she has been ordinarily resident in that constituency in the six months preceding the application for transfer (Regulation 13C, Elections (Registration of Voters) Regulations, 2012).

1.9.6.5 Voters may also make changes to their particulars or to their electoral area unless it is during such time as when the registration of voters or the revision to the voter register is not allowed or the IEBC has suspended the making of applications for transfer or changes in registration (Reg 14 & 15 Elections (Registration of Voters) Regulations, 2012.

1.9.6.6 Reasonable legal and administrative requirements in the exercise of the right to vote are not unconstitutional (*IEBC v New Vision Kenya (NVK Mageuzi) & 4 Others,* Supreme Court Petition 25 of 2014).

1.9.6.7 However, as per Article 83(3) of the Constitution, 'Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election'. While the courts will be reluctant to interfere in the administrative arrangements of the IEBC, it may make such orders as are necessary to enable potential voters to register, while taking into account the logical and financial implications of extending mass voter registration exercises which allow more people to access registration centres (*Okiya Omtatah Okoiti v IEBC & 2 Others,* Petition 47 of 2017).

1.9.6.8 Technology increases efficiency in voter registration, eases identification and authentication of voters by capturing alphanumeric and biometric data, eliminates multiple registration by use of unique biometric identifiers and eliminates impersonation during registration. The IEBC is also mandated to open up the Register of Voters for verification of biometric data within 60 days of the general election for a period of thirty days (s 6A Elections Act).

1.9.6.9 Voters are allowed to inspect the register within ninety days of the date of the notice for a general election, to ascertain whether names and other details of the voter are captured accurately in the voter's register, to initiate correction of errors and to allow voters to make objections and claims regarding eligibility of persons to be registered. The IEBC is mandated to keep the register open for inspection for a period at least thirty days, or such other period as it may consider necessary (s 6(2) Elections Act).

1.9.6.10 The voter register is updated to effect transfer of voters, make corrections and to delete deceased voters. The voter register is also audited to ascertain its accuracy and completeness, to recommend mechanisms for enhancing its accuracy and to update it (s 8A Elections Act). The firm contracted to conduct the audit advises the IEBC to initiate corrections to the register and the audit process enhances stakeholder confidence in the electoral process.

1.9.7 Integrity in the Conduct of Elections and Referenda

1.9.7.1 The Constitution was developed against the backdrop of the 2007 post-election crisis, and thus provides high standards for election integrity. The Constitution and the legal framework governing elections were therefore enacted to address weaknesses identified during the Constitution making process. Articles 81, 82 and 86 contain direct stipulations on the qualitative standard for the conduct of elections and referenda. Articles 136, 137 and 138 make additional provisions in respect of the presidential elections.

1.9.7.2 The totality of these provisions establishes the standards of elections necessary to answer to

historical challenges, guarantee the sovereignty of the Kenyan people (Articles 1 and 249), and promote constitutionalism and democratic principles (Article 249). The electoral framework is thus an essential element in the process of recruitment and ultimate accountability of democratic leaders, peaceful political transition, and preserving unity and sovereignty of the Kenyan people. The Elections Act, 2011, Election Campaign Financing Act, Election Offences Act and the Political Parties Act, 2011, make substantive provisions in relation to the elements of the electoral framework.

1.9.8 *Independence of the IEBC*

1.9.8.1 Kenya has adopted the independent model of elections management. The IEBC is established under Article 88 of the Constitution and given functional and operational autonomy subject to the Constitution. The functions of the Commission are set out under Article 88(4) of the Constitution. Article 249 guarantees the independence of independent commissions and offices. The Commission has autonomy in respect to its appointment, composition, tenure, finances and operations.

1.9.8.2 The objective of the Commission's independence is to protect the sovereignty of the Kenyan people, secure observance of democratic values and promote constitutionalism (Article 249). The legislation setting out the internal governance of the Commission is the Independent Electoral and Boundaries Commission Act, 2011. There is a significant increase in investment in the Commission to enable it to better discharge its broadened mandate. The Constitution and the aforesaid legislation, provide for an independent Commission which includes the Commissioners and a strong secretariat establishment led by the Chief Executive Officer. The Commission is composed of 7 Commissioners, including a Chair and Vice Chair. The Commission has the power to issue regulations, procedures or directives to fulfil its mandate.

1.9.9 *Electoral Dispute Resolution*

1.9.9.1 Kenya's constitutional and legal framework for elections involves a diversity of actors in EDR throughout the election process, with different powers, timelines and procedures. EDR actors range from administrative bodies like the IEBC's Nomination Disputes Resolution Committee (IEBC NDRC) with quasi-judicial powers, to quasi-judicial tribunals (Political Parties Dispute Tribunal) and ordinary courts.

1.9.9.2 Courts discharge their role in EDR guided mainly by the principles, values, requirements and standards set out in Articles 38, 81, 86 and 159 of the Constitution (*Hassan Abdalla Albeity v Abu Chiaba & Another*, Malindi Election Petition No. 9 of 2013). Articles 38(2) and 81(d) of the Constitution require the IEBC to conduct *'free, fair and regular elections based on universal suffrage and the free expression of the will of the electors'*. Articles 81(e) and 86(a) of the Constitution require the IEBC to conduct elections in a manner that is *'simple, accurate, verifiable, secure, accountable and transparent'*. Articles 81(e) and 86(d) of the Constitution require the IEBC to establish '*appropriate structures and mechanisms to eliminate electoral fraud and malpractice*'.

1.9.9.3 In the case of *Raila Odinga v IEBC & 2 Others,* Supreme Court Election Petition 1 of 2017, the Supreme Court stated:

> *Having analyzed the wording of Section 83 of the Elections Act, bearing in mind its legislative history in Kenya and genesis from the Ballot Act and also in light of the need to keep in tune with Kenya's transformative Constitution, it is clear to us that the correct interpretation of the Section is one that ensures that elections are a true*

> *reflection of the will of the Kenyan people. Such an election must be one that meets the constitutional standards. An election such as the one at hand, has to be one that is both quantitatively and qualitatively in accordance with the Constitution. It is one where the winner of the presidential contest obtains "more than half of all the votes cast in the election; and at least twenty-five per cent of the votes cast in each of more than half of the counties" as stipulated in Article 138(4) of the Constitution. In addition, the election which gives rise to this result must be held in accordance with the principles of a free and fair elections, which are by secret ballot; free from intimidation; improper influence, or corruption; and administered by an independent body in an impartial, neutral, efficient, accurate and accountable manner as stipulated in Article 81. Besides the principles in the Constitution which we have enumerated that govern elections, Section 83 of the Elections Act requires that elections be "conducted in accordance with the principles laid down in that written law." The most important written law on elections is of course the Elections Act itself. That is not all. Under Article 86 of the Constitution, IEBC is obliged to ensure, inter alia, that: "Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.*

1.9.9.4 Having evaluated these principles, the Court reached the following conclusion:

> *...it is our finding therefore that non-compliance with the constitutional and legal principles in inter alia Articles 10, 38, 81 and 86 of the Constitution and the Elections Act coupled with the irregularities and illegalities cited above, affected the process leading to the declaration of the 3rd respondent as President elect in a very substantial and significant manner that whatever the eventual results in terms of votes, the said declaration was null and void and the election was rendered invalid.*

1.9.9.5 Lastly, Article 159(2) of the Constitution requires the courts to administer justice in a manner that promotes and protects the purpose and principles of the Constitution, and without undue regard to legal and procedural technicalities.

1.9.9.6 A sound appreciation of Article 159(2) of the Constitution is a *sine qua non* for effective EDR, especially in view of the country's historical legacy of obsession with legal and procedural technicalities and the resultant electoral injustices. In *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others*, Nairobi Civil Appeal No. 228 of 2013, the Court of Appeal explained the interplay between rules of procedure and substantive justice as follows:

> *the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress...the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case...Essentially, the rules remain subservient to the Constitution and statutes. Article 159 (2) (d) of the Constitution, Section 14 (6) of the Supreme Court Act, Section 3A and 3B of the Appellate Jurisdiction Act, Sections 1A and 1B of the Civil Procedure Act and Section 80 (1) (d) of the Elections Act, 2011 place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice.*

(See also the dissenting opinion of Njoki Ndung'u SCJ in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others*, Supreme Court Petition No. 18 of 2014 at paras 217–218)

1.9.9.7 The above constitutional values and principles require election courts to appraise the validity of impugned elections from both qualitative and quantitative perspectives. The quantitative test is most relevant where numbers and figures are in question while the qualitative test is most suitable where the quality of the entire election process is questioned and the court must determine whether the election was free and fair (*Rozaah Akinyi Buyu v IEBC & 2 Others*, Kisumu Election Petition No. 3 of 2013).

1.9.9.8 In *Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others*, Nyeri Civil Appeal No. 38 of 2013, the Court of Appeal explained the constitutional basis for appraising an impugned election from both qualitative and the qualitative perspectives in the following words:

> *to determine whether the results as declared in an election ought to be disturbed, the court is not dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes. The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means. It a democratic election, the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official.*

(See also the dictum of Omolo JA in *James Omingo Magara v Manson Onyongo Nyamweya & 2 Others*, Kisumu Civil Appeal No. 8 of 2010).

1.9.9.9 In view of the country's unfortunate history of delayed electoral justice, contemporary EDR is driven by the constitutional imperative of *timely resolution of electoral disputes* (Article 87(1) of the Constitution; *Cornel Rasanga Amoth v William Oduol & 2 Others*, Kisumu Civil Appeal Application No. 26 of 2013).

1.9.9.10 Last, but not least, the courts discharge their adjudicatory function in EDR on the premise that the role of choosing the country's political leaders lies with the people. In other words, the courts will strive to give effect to the political choices made by the people at the ballot as much as possible, to the extent that such choices are clearly ascertainable. As explained in *Richard Kalembe Ndile & Another v Patrick Musimba Mweu & 2 Others*, Machakos Election Petitions Nos. 1 and 7 of 2013):

> *Under our democratic form of government, an election is the ultimate expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible...*

(See also *Hassan Abdalla Albeity v Abu Chiaba & Another*, Malindi Election Petition No. 9 of 2013 and *Jared Odoyo Okello v IEBC & 3 Others*, Kisumu Election Petition No. 1 of 2013.

1.9.9.11 Since the role of electing the country's political leaders lies with the people rather than the courts, the courts will not nullify an election based on trivial errors or irregularities arising from natural human imperfection, where such errors or irregularities have no bearing on the

integrity of the election or the question of which candidate the people elected (*Esther Waithira Chege v Manoah Karega Mboku & 2 Others*, Nairobi High Court Civil Appeal No. 4 of 2013). Indeed, section 83 of the Elections Act, 2011 forbids the courts from nullifying an election because of trivial errors or irregularities, if such errors or irregularities have no bearing on compliance with the applicable constitutional and statutory principles or the correctness of result declared by the electoral management body:

> *No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.*

1.9.9.12 Although section 83 of the Elections Act, 2011 requires the courts to strive to preserve the outcome of an election as much as possible, it is not a panacea for curing all the errors, irregularities or malpractices that may conceivably occur at an election. Moreover, the sovereignty of the people must be exercised in accordance with the Constitution (Article 1(1) of the Constitution). Accordingly, the courts will nullify an election that is conducted in a manner that is inconsistent with the principles laid down in the Constitution even if the result or choice made by the people at such an election is not affected by the alleged errors, irregularities or malpractices (*Rozaah Akinyi Buyu v IEBC & 2 Others*, Kisumu Election Petition No. 3 of 2013). The rationale for nullifying such an election lies in the duty of the court to enforce the relevant constitutional principles, and particularly the need to avoid sanctioning chaos, vandalism or thuggery in the country's electoral processes. As explained in *James Omingo Magara v Manson Onyongo Nyamweya & 2 Others*, Kisumu Civil Appeal No. 8 of 2010:

> *It is true that on the scrutiny and recount of the votes, the appellant still had the largest number of votes. But as I have pointed out that was not all the learned Judge was supposed to go by though it was an important consideration to bear in mind... The scrutiny and recount of the votes by the learned Judge disclosed numerous irregularities, among them unsigned and, therefore, unauthenticated Forms 16A, three missing ballot boxes, broken ballot seals and many others...In my view these irregularities could not have been cured under section 28 of the National Assembly and Presidential Elections Act [now s. 83 of the Elections Act, 2011]. That section cannot be used to cover a situation where even the source of the votes in the ballot boxes cannot be conclusively determined. Again, to use that section to cover the disappearance of ballot boxes, irrespective of the number of the ballot papers in the missing boxes, would simply amount to encouraging vandalism in the electoral process. Our experiences in Kenya following the 2007 elections part of which we are discussing herein, show us that no Kenyan, whether as an individual or as part of an institution, ought to encourage such practices. Section 28 cannot be used to white-wash all manner of sins which may occur during the electoral process and for my part I have no doubt that Parliament did not design the section for the purpose of covering serious abuses of the electoral process.*
>
> (*See also William Odhiambo Oduol v IEBC & 2 Others,* Kisumu Election Petition No. 2 of 2013 at pp. 7 –8).

1.9.9.13 In *Raila Odinga v IEBC & 2 Others,* Supreme Court Election Petition 1 of 2017, the Court ruled at para 211 in relation to section 83, that:

> *In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who*

> *is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.*

1.9.9.14 On the place of irregularities in nullifying an election, the Court stated at para 374:

> *...in view of the interpretation of section 83 of the Elections Act that we have rendered, this inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court has not concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the Constitution or in that law. But even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it is still good judicial practice for the court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.*

1.9.9.15 However, following the nullification of the presidential election, the Election Laws (Amendment) Act 34 of 2017 was enacted by Parliament, which proposed to make the test in section 83 conjunctive, requiring proof of both non-compliance with the Constitution or written law and the impact of irregularities on the outcome of the election before a court could nullify the result. Nevertheless, the proposed amendment to section 83 was declared unconstitutional in the case of *Katiba Institute & Africa Centre for Open Governance v Hon. Attorney General & 2 Others,* Nairobi High Court Petition No. 548 of 2017, with the Court noting that amendments to election laws 'must be forward looking in order to make elections more free, transparent and accountable, than to shield mistakes that vitiate an electoral process'.

1.9.9.16 No legislative amendment was introduced to align section 83 with the decision of the Court, nor was an appeal preferred against the decision of the Court. Reference may, therefore, be made to similar situations where an amendment was declared unconstitutional to ascertain the effect of the declaration of unconstitutionality.

1.9.9.17 In *Senate & 2 Others v Council of County Governors & Others,* Petition 25 of 2019 [2022] KSC 7 KLR, where the amendment to section 91(f) of the County Governments Act was declared unconstitutional, the Supreme Court ruled that the effect of the declaration of unconstitutionality was to restore the previously worded section 91(f) of the County Governments Act (para 14). Similarly, in the case of *Attorney-General & 2 Others v David Ndii & 79 Others,* Supreme Court Petition 12 of 2021 (consolidated with Petitions 11 and 13 of 2021), the Supreme Court addressed the issue of the quorum of the IEBC in light of the amendments to paragraph 5 of the Second Schedule to the IEBC Act, which were also declared unconstitutional in the *Katiba case*. The majority of judges endorsed the position taken in the *Senate case* that the effect of an amendment being declared unconstitutional is to restore the status quo before the amendment.

1.9.9.18 In light of the above jurisprudence of the Supreme Court, by parity of reasoning, the declaration of invalidity of the amendment to section 83 had the effect of restoring the section as it stood before Election Laws (Amendment) Act 34 of 2017. The test of invalidity thus remains a *disjunctive* rather than a *conjunctive* test, as affirmed in *Raila Odinga v IEBC & 2 Others,* Supreme Court Presidential Election Petition 1 of 2017.

CHAPTER 2

JURISDICTION AND TIMELINES IN EDR

JURISDICTION AND TIMELINES IN EDR

2.1 Jurisdiction

2.1.1. Jurisdiction to determine election petitions is a special constitutional function. It is neither Civil nor Criminal. It must be granted by the Constitution or Statute. This is consistent with the general principle that courts and tribunals can only exercise the jurisdiction conferred on them by the Constitution and the laws of the land (*Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1). A court or tribunal cannot arrogate to itself jurisdiction through the craft of legal interpretation, or by way of endeavours to discern or interpret the intentions of Parliament where the wording of legislation is clear and there is no ambiguity (*In Re The Matter of the Interim Independent Electoral Commission*, Supreme Court constitutional Application No. 2 of 2011). Moreover, a court or tribunal cannot exercise jurisdiction over an electoral dispute which falls within the exclusive competence of a different court or tribunal (*Francis Gitau Parsimei & Others v National Alliance Party & Others*, Nairobi Constitutional Petition No. 356 of 2012; *Republic v IEBC ex parte Charles Olari Chebet*, Nakuru Miscellaneous Civil Application No. 3 of 2013). Where a court or tribunal acts in the absence of jurisdiction, such action and every ensuing proceeding will be bad and incurably bad (*Mcfoy v United Africa Company Ltd* [1961] 3 All ER 1169).

2.1.2. It has long been settled that no circumstance can make up for the lack of jurisdiction. In *Sir Ali Salim v Shariff Mohammed Sharray* 1938 [KLR] (as cited in *Faith Wairimu Gitau v Hon. Wanjiku Muhia & Another*, Nairobi High Court Election Petition Appeal No. 25 of 2017), it was held that:

> *If a court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however certain and technically correct, are mere nullities and not only voidable, they are void and have no effect either as estoppel or otherwise and may not only be set aside at any time by the court in which they are rendered, but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver on their part cannot make up for the lack of jurisdiction.*

2.1.3. Disputes relating to the EDR process are special in nature. Accordingly, various Courts, Tribunals and administrative bodies are assigned the competence to hear and determine specified electoral disputes (*Thuo Mathenge v Nderitu Gachagua & 2 Others*, Nyeri Election Petition No. 1 of 2013).

2.1.4. Moreover, a court or tribunal cannot exercise jurisdiction over an electoral dispute which falls within the exclusive competence of a different court or tribunal (*Francis Gitau Parsimei & Others v National Alliance Party & Others*, Nairobi Constitutional Petition No. 356 of 2012; and *Republic v IEBC ex parte Charles Olari Chebet*, Nakuru Miscellaneous Civil Application No. 3 of 2013).

2.1.5. It is important, therefore, for a court or tribunal to ascertain, as a preliminary matter, whether it has jurisdiction before proceeding to hear and determine any electoral dispute. Since jurisdiction is always a threshold issue, it should ideally be raised at the earliest possible moment (*Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others*, Nairobi Civil Appeal No. 154 of 2013).

2.1.6. Jurisdictional challenges, however, can be raised at any stage of the litigation process, including appellate stages (*Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*, Supreme Court Petition No. 5 of 2014; *Eric Kyalo Mutua v Wiper Democratic Movement Kenya & Another*, Nairobi High Court Election Petition Appeal No. 4 of 2017 at para 41; *Martha Wangari Karua & Another v IEBC & 3 Others*, Election Petition (Kerugoya) 2 of 2017; *Martha Wangari Karua v IEBC & 3 Others*, Nyeri Election Petition Appeal 1 of 2017, *Martha Wangari Karua v IEBC & 3 Others*, Nyeri Election Petition Appeal 12 of 2018). The practical consequence of this rule is that a court cannot ignore a jurisdictional challenge on the ground that it had not been pleaded or raised at the earliest

possible moment (*Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*, Supreme Court Petition No. 5 of 2014).

2.1.7. Furthermore, jurisdictional issues are not procedural elements that can be excused through the invocation of Article 159(2)(d). Consequently, the Court or tribunal cannot exercise jurisdiction that it does not have (*Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate of & 4 Others*, Supreme Court Petition No. 4 of 2012).

2.2 Timelines

2.2.1 The jurisdiction of a court or tribunal to entertain an electoral dispute often depends on whether the complainant or petitioner has lodged the dispute within the timelines prescribed by law. The EDR timelines prescribed under the Constitution and the Elections Act, 2011— especially those relating to filing and service of election petitions and appeals from decisions of election courts—are inflexible and inextensible (*Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*, Supreme Court Petition No. 5 of 2014; *Mary Wambui Munene v Peter Gichuki King'ara & 2 Others*, Supreme Court Petition No. 7 of 2014; *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others*, Supreme Court Petition No. 18 of 2014; and *Martha Wangari Karua v IEBC & 3 Others*, Supreme Court Petition No. 3 of 2019). The rationale for this rule lies in the constitutional requirement of timely resolution of electoral disputes (Article 87(1) of the Constitution). The African Union has similarly affirmed that the establishment and strengthening of national mechanisms that redress election-related disputes in a *timely manner* is key for transparent, free, fair and democratic elections (Article 17(2) of the *African Charter on Democracy, Elections and Governance*).

2.2.2 Timelines in electoral disputes is a constitutional principle as it underpins the ability of the people to exercise their sovereignty under Article 1.

2.2.3 Courts, therefore, strictly enforce requirements relating to prescribed timelines in EDR. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2014, the Supreme Court explained the historical context and rationale for the strict enforcement of EDR timelines in the following terms:

> *This provision [i.e., Article 87(1) of the Constitution] must be viewed against the country's electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people's franchise, not to mention the entire democratic experiment...It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people's will, in [the] name of which elections are decreed and conducted, should not be held captive to endless litigation.*

2.2.4 Similarly, in *Martha Wangari Karua v IEBC & 3 Others*, Supreme Court Petition No. 3 of 2019, the Supreme Court held that:

> *Section 75 undoubtedly derives its authority from Article 87 of the Constitution which requires timely resolution of electoral disputes. We have already explained why there was a need to provide for defined timelines for settling electoral disputes. As such, we hold and maintain our position that once an election petition is filed at the High Court sitting as the Election Court, it must be determined within a period of 6 months.* The courts, therefore, are hesitant to uphold legislation or conduct that tends to undermine the constitutional objective of timely resolution of electoral disputes (*Raila Odinga v IEBC & 3 Others*, Supreme Court Petition No. 5 of 2013; *Paul Posh Aborwa v IEBC & 2 Others*, Kisumu Civil Appeal No. 52 of 2013;

and *Mary Wambui Munene v Peter Gichuki King'ara & 2 Others*, Supreme Court Petition No. 7 of 2014).

N.B. The timetables for key timelines in EDR are attached as appendices to this text in Chapter 8.

Further Authorities

The following cases also address the issue of timelines in EDR:

1 *Anami Silverse Lisamula v IEBC & 2 Others,* Supreme Court Petition No. 8 of 2014;

2 *Basil Criticos v IEBC & 2 Others*, Civil Appeal (Application) No. 33 of 2013;

3 *Charles Kamweru v Grace Jelagat Kipchoru & 2 Others*, Nairobi Civil Appeal No. 159 of 2013 (unreported);

4 *Clement Kung'u Waibara & Another v Francis Kigo Njenga & 3 Others,* Nairobi Election Petition No. 15 of 2013;

5 *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others,* Supreme Court Petition No. 10 of 2013;

6 *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others,* Supreme Court Civil Application No. 23 of 2014;

7 *Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*, Supreme Court Petition No. 5 of 2014;

8 *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others,* Civil Appeal (Application) 228 of 2013;

9 *Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 Others*, Nairobi Civil Appeal No. 191 of 2013;

10 *Paul Posh Aborwa v IEBC & 2 Others,* Kisumu Civil Appeal No. 52 of 2013;

11 *Suleiman Said Shahbal v IEBC & 3 Others,* Supreme Court Petition No. 21 of 2014

12 *Wavinya Ndeti v IEBC & 4 Others*, Nairobi Civil Appeal No. 323 of 2013; and

13 *Martha Wangari Karua v IEBC & 3 Others* Supreme Court Petition 3 of 2019

2.3 Extension of Time

Litigants who are unable to comply with prescribed timelines often request election courts, or courts hearing appeals from the decisions of election courts, to extend the time for filing proceedings or taking a step in the litigation process. The following section discusses out the prevailing laws on applications for extension of time before various courts.

2.3.1 Extension of Time at the Supreme Court

2.3.1.1 The Supreme Court has a discretionary power to extend the time for filing an appeal before it (Rule 15 (2) of the Supreme Court Rules, 2020- L.N. 101 of 2020); *Mary Wambui Munene v Gichuki King'ara & 2 Others*, Supreme Court Civil Application No. 12 of 2014; *Nicholas Kiptoo Arap Salat v IEBC & 7 Others*, Supreme Court Civil Application No. 16 of 2014; *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others*, Supreme Court Civil Application No.15 of 2014).

2.3.1.2 In determining whether to grant an application for extension of time, two varying public interest

issues must be counterbalanced. The first is the principle of timeliness in the resolution of electoral disputes as held in Article 87(1) of the Constitution. The second principle is access to justice as embodied in Article 48 of the Constitution (*Hassan Nyanje Charo v Khatib Mwashetani & 3 Others,* Supreme Court Civil Application No. 15 of 2014). While timelines and timeliness are vital to effective and efficient governance under the Constitution, the Court has an eternal mandate to consider individual cases under *considerations of justice.* Therefore, where it is clear that an applicant has exercised all due diligence but has been unable to comply with timelines due to a failure by 'sluggish judicial machinery' to avail to him/her the requisite appeal papers, an extension of time can be granted (*Hassan Nyanje Charo v Khatib Mwashetani & 3 Others,* Supreme Court Civil Application No. 15 of 2014).

2.3.1.3 Such was the case in *Bernard Kibor Kitur v Alfred Kiptoo Keter v IEBC* Supreme Court Petition Application 27 of 2018, where there was uncertainty as to whether time was to be calculated from the time of lodging the Notice of Appeal at the Court of Appeal registry or from the time the notice was transmitted to the Supreme Court registry. It was also unclear whether the computation included public holidays and weekends. The submission of documents was done on the last day of filing, which happened to be the last day of the court's recess. The court, guided by its decision in *Charo v Mwashetani* Supreme Court Application 15 of 2014, ruled that there was no inordinate delay in bringing the appeal and that responding appropriately to individual claims as dictated by compelling considerations of justice, it was proper to allow the application.

2.3.1.4 In *Nicholas Kiptoo Arap Salat v IEBC & 7 Others*, Supreme Court Civil Application No. 16 of 2014, the Supreme Court gave the following guiding principles that a court should consider in exercising its discretion when determining applications for extension of time:

i. *Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*

ii. *A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*

iii. *Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*

iv. *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*

v. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*

vi. *Whether the application has been brought without undue delay; and*

vii. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

2.3.1.5 A litigant who seeks to appeal to the Supreme Court outside the prescribed time must first seek leave to file the appeal out of time (*Nicholas Kiptoo Arap Salat v IEBC & 7 Others*, Supreme Court Civil Application No. 16 of 2014). Any appeal filed out of time without the leave of the Supreme Court is a nullity and liable to be struck out; it cannot be salvaged by filing an application for extension of time and the deeming of the appeal as properly filed (*Nicholas Kiptoo Arap Salat v IEBC & 7 Others*, Supreme Court Civil Application No. 16 of 2014).

2.3.1.6 The Supreme Court has a discretionary power to extend the time for filing and serving pleadings and any necessary documents or evidence when exercising its exclusive original jurisdiction in presidential election petitions (Rule 15 (2), Supreme Court Rules, 2020); and *Raila Odinga v IEBC & 3 Others*, Supreme Court Petition No. 5 of 2013).

2.3.1.7 The jurisdiction of the Supreme Court to extend the time for filing an appeal does not extend to timelines prescribed by the Constitution (*Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 Others*, Supreme Court Civil Application No. 18 of 2014; and *George Mike Wanjohi v Steven Kariuki*, Supreme Court Civil Application No. 6 of 2014). This jurisdictional restriction is especially relevant where events subsequent to the decision of an EDR court, e.g. the declaration of a vacancy in the relevant elective office, requires a by-election to be held within a specified number of days (*Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 Others*, Supreme Court Civil Application No. 18 of 2014, and *George Mike Wanjohi v Steven Kariuki*, Supreme Court Civil Application No. 6 of 2014).

2.3.1.8 Further, the jurisdiction of the Supreme Court to extend the time for filing appeals in EDR does not extend to admission of fresh evidence or consideration of new issues in such appeals (*Chris Munga N Bichage v Richard Nyagaka Tong'i, IEBC & Robert K Ngeny*, Supreme Court Petition No. 17 of 2014; *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others,* Supreme Court Petition No. 4 of 2014). The rationale for this rule lies in the need to ensure fairness to all parties.

2.3.1.9 An exception was made in the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others,* Supreme Court Petition 7 & 9 of 2018 (consolidated) where the apex Court ruled that Rule 18(3) of the Supreme Court Rules, 2012 (now Rule 26(3) of the Supreme Court Rules, 2020), which granted the Court the power to allow additional evidence for sufficient reason, was not a legislative accident. While departing from its 2015 decision in *Bichage*, the Court ruled that it had jurisdiction to entertain applications for additional evidence. However, this jurisdiction was to be exercised sparingly. The Court set out the following guiding principles on when the jurisdiction to allow additional evidence in appellate courts can be exercised:

(i) That the additional evidence be directly relevant to the matter and in the interest of justice;

(ii) That it be such that if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

(iii) Where it is demonstrated that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce additional evidence;

(iv) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;

(v) The evidence must be credible in the sense that is capable of belief;

(vi) The additional evidence must not be so voluminous as to make it impossible for the other party to respond effectively;

(vii) Whether a party would reasonably have been aware of and procured the further evidence in the course of trial as an essential consideration to ensure fairness and process;

(viii) *Where the additional evidence discloses a strong prima facie case of wilful deception of the Court;*

(ix) *The Court must be satisfied that the additional evidence is not utilised to remove lacunae and fill in gaps in evidence but that the further evidence is needful;*

(x) *A party who has been unsuccessful at trial must not seek to adduce additional evidence to make a fresh case, fill up omissions or patch up the weak points in her case on appeal; and*

(xi) *The Court will consider the proportionality and prejudice of allowing the additional evidence. This will require the court to assess the balance between the significance of the additional evidence and the swift conduct of litigation together with any prejudice that may arise from the additional evidence.*

2.3.1.10 In addition, the appellate jurisdiction of the Supreme Court in EDR is limited to *matters of law only* (for a somewhat different opinion, and a very broad view of the jurisdiction of the Supreme Court, see *Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*, Supreme Court Petition No. 5 of 2014).

2.3.1.11 An application for extension of time to file an appeal before the Supreme Court can only be brought after expiry of the stipulated time. The Supreme Court will not, therefore, extend time where a party is merely apprehensive that the stipulated time may lapse before filing of the appeal (*Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others*, Supreme Court Civil Application No. 20 of 2014).

Further authorities

1. *Mawathe Julius Musuli v IEBC & Another,* Supreme Court Petition 16 of 2018
2. *Raila Amolo Odinga & Another v IEBC & 2 Others,* Supreme Court Election Petition 1 of 2017

2.3.2 Extension of Time at the Court of Appeal

2.3.2.1 Previous jurisprudence from the Court of Appeal determined that the Court had no jurisdiction to extend the time for filing an EDR appeal (*Wavinya Ndeti v IEBC & 4 Others*, Nairobi Civil Appeal No. 323 of 2013; *Basil Criticos v IEBC & 2 Others*, Civil Appeal (Application) No. 33 of 2013; and *Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 Others*, Nairobi Civil Appeal No. 191 of 2013). The rationale for this rule lies in the wording of section 85A of the Elections Act, 2011 and the overriding principle of timely resolution of electoral disputes as set out in Article 87(1) of the Constitution.

2.3.2.2 However, under the 2017 Rules, the Court may, for sufficient reasons, extend or reduce the timelines based on terms and conditions deemed just and expedient. Such an extension or reduction does not apply to timelines set by the Constitution and the Elections Act, 2011 (Rule 17, Court of Appeal (Election Petition) Rules, 2017; s 85A, Elections Act, 2011; and Article 87(1) of the Constitution).

2.3.2.3 In the case of *John Munuve Mati v Returning Officer Mwingi North Constituency, IEBC & Paul Musyimi Nzengu*, Nairobi Election Petition Appeal No. 5 of 2018, the Court of Appeal allowed an application to extend time for the filing of a Notice of Appeal, notwithstanding its late filing, as

no party was prejudiced and the appellant had explained the reason for the delay.

2.3.2.4 The six-month timeframe set out in section 85A of the Elections Act is not applicable to cases where a pre-election issue is the subject of litigation in the High Court in exercise of its ordinary or supervisory jurisdiction under Article 165 of the Constitution, and which then goes on appeal to the Court of Appeal. As the Court of Appeal found in *Annie Wanjiku Kibeh v Clement Kungu Waibara & Another,* Civil Application No. NAI E390 of 2021:

> *19. The core issue in Hon. Waibara's petition was whether the Parliamentary seat held by Hon Kibeh fell vacant because Hon Kibeh was disqualified from being elected as a member of National Assembly representing Gatundu North Constituency as she was still a member of the County Assembly of Kiambu at the time of her nomination and gazettement of the nomination. The original jurisdiction of the High Court to hear a constitutional petition under Rule 105(1)(b) of the Constitution as read with section 76(1)(c) of the Elections Act must be distinguished from the High Court's jurisdiction as an election court.*
>
> *20. This means that while Hon Waibara's petition was subject to the six-month timeline provided under Article 105(2) of the Constitution, it was not subject to section 85A of the Elections Act that provides a 30-day time limit within which an appeal from the High Court judgment is to be filed, or a six-month timeline within which appeals from the High Court in election petitions is to be heard and determined. Nor are the Court of Appeal Election (Petition Rules) 2017, Rule 8(5) which provide a 30-day timeline for filing appeals from the election Court from the date of the impugned judgment, applicable.*
>
> *21.An appeal to this Court from Hon. Waibara's constitutional petition was one governed by the timelines provided in the Court of Appeal Rules, 2010 which as per Rule 75(2) provides for 14 days for filing the notice of appeal, and as per Rule 82(1), which provides 60 days for filing the record of appeal. The applicant's motion is therefore misconceived because it is anchored on Section 85A of the Elections Act and the Court of Appeal Election (Petition Rules), 2017 that are not applicable to Hon. Waibara's constitutional petition.*

Further authorities

The following authorities also address the broad theme of the jurisdiction of the Court of Appeal to extend time in EDR:

1. *Charles Kamweru v Grace Jelagat Kipchoru & 2 Others*, Nairobi Civil Appeal No. 159 of 2013 (unreported);
2. *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others,* Supreme Court Petition No. 18 of 2014;
3. *Wavinya Ndeti v IEBC & 4 Others,* Supreme Court Petition No. 19 of 2014;
4. *Ferdinand Ndung'u Waititu v IEBC & 8 Others,* Civil Appeal (Application) No. 137 of 2013 (UR 94 of 2013);
5. *Andrew Toboso Anyanga v Mwale Nicholas Scott Tindi & 3 Others* Election Petition Appeal (Application) 3 of 2017;
6. *Timamy Issa Abdalla v IEBC & 3 Others Mombasa,* Election Appeal No. 4 of 2018;

7. *John Munuve Mati v RO Mwingi North & Others,* Nairobi Election Petition Appeal 5 of 2018; and

8. *Sumra Irshadali v IEBC & Another,* Nairobi Election Appeal 22 of 2018.

2.3.3 *Extension of Time at the High Court*

2.3.3.1 The High Court has no jurisdiction to extend the EDR timelines set out in the Constitution or the Elections Act, 2011 *(Said Buya Hiribae v Hassan Dukicha Abdi & 2 Others,* Mombasa Election Petition No. 7 of 2013*; Kumbatha Naomi Cidi v County Returning Officer, Kilifi & 3 Others,* Malindi Election Petition No. 13 of 2013*; Simon Kiprop Sang v Zakayo K. Cheruyot & 2 Others,* Nairobi Election Petition No. 1 of 2013*; Martha Wangari Karua v IEBC & 3 others,* Supreme Court Petition No. 3 of 2019*; Sila Samuel Mulwa v IEBC & 3 Others,* Malindi High Court Election Petition 11 of 2017*; Andrew Toboso Anyanga v Mwala Nicholas Scott Tindi & 3 Others,* Kakamega High Court Election Petition 12 of 2017*; Stephen Kolimuk v IEBC & 2 Others,* Kapenguria High Court Election Petition 12 of 2017*; Jimmy Mkala Kazungu v IEBC & 2 Others,* Mombasa High Court Petition 9 of 2017*;* and *Bernard Kibor Kitur v Alfred Kiptoo Keter & IEBC,* Eldoret High Court Election Petition 1 of 2017).

2.3.3.2 Timelines fixed by the Elections Act such as for service of the petition (s 77, Elections Act; *Kiplagat Richard Sigei & 2 Others v IEBC & Another,* Kericho High Court Election Petition 1 of 2017; *Rozaah Akinyi Buyu v IEBC & 2 Others,* Kisumu Civil Appeal No 40 of 2013; and *Aluodo Florence Akinyi v IEBC & Others,* Siaya High Court Election Petition 4 of 2017), or deposit of security for costs (s 78 of the Elections Act), are also generally not within the ambit of the court to extend (*Charles Maywa Chedotum & Another v IEBC & 2 Others,* Kitale Election Petition No. 11 of 2013; *Mohamed Odha Maro v County Returning Officer, Tana River & 3 Others,* Malindi Election Petition 15 of 2013; *Evans Nyambaso Zedekiah & Another v IEBC & 2 Others,* Kisii Election Petition 10 of 2013; *Milton Kimani Waitinga v IEBC & 2 Others,* Kiambu Election Petition 2 of 2017; *Robert Mwangi Kariuki v IEBC & 2 Others,* Nyeri High Court Election Petition 1 of 2017; *Tom Onyango Agimba v IEBC & Another,* Nairobi High Court Election Petition 18 of 2017; *Ibrahim Ahmed v IEBC & 2 Others,* Nairobi High Court Election Petition 21 of 2017; and *Sila Samuel Mulwa v IEBC & 3 Others,* Malindi High Court Election Petition 11 of 2017).

2.3.3.3 For a somewhat different reasoning on the import of s 78(3) of the Elections Act, 2011, which provides that 'if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the respondent may apply to the election court for an order to dismiss the petition' (see *Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & Others,* Machakos High Court Election Petition 8 of 2013; *Fatuma Zainabu Mohamed v Ghati Dennitah & 10 Others,* Kisii Election Petition 6 of 2013; *Samwel Kazungu Kambi v Nelly Ilongo & 2 Others,* Malindi High Court Election Petition 4 & 5 of 2017; *Yaite Philip Okoronon v Jakaa Gardy Ogara & Another,* Busia Magistrate's Court Election Petition 8 of 2017; and *Kiplagat Richard Sigei & 2 Others v IEBC & Another,* Kericho High Court Election Petition 1 of 2017).

2.3.3.4 This rule, however, does not extend to timelines prescribed in procedural rules or fixed by directions of the Court (Rule 19, Elections (Parliamentary and County Elections) Petitions Rules, 2017). This Rule empowers election courts to extend the timelines prescribed in those Rules. The High Court can extend the time for service of pleadings already filed in court (*Bwana Muhamed Bwana v Silvano Buko Bonaya & 2 Others*, Petition No. 7 of 2013), but only if it does not prejudice the other side by depriving them an opportunity to adequately prepare or wreak havoc

on the timelines agreed upon during the pre-trial conference (*Clement Kungu Waibara v Annie Wanjiku Kibeh & Another,* Kiambu High Court Election Petition 1 of 2017). Where documents are substituted in the court records out of time and without the leave of the court, they are liable to be struck out (*Sila Samuel Mulwa v IEBC & 3 Others,* Malindi High Court Election Petition 11 of 2017; and *William Kahindi Mganga v IEBC & 4 Others,* Malindi High Court Election Petition 5 of 2017).

2.3.3.5 Time can also be extended for filing of further evidence either in addition to existing evidence or entirely new evidence if it assists the court in the just disposal of the matter (*Wavinya Ndeti v IEBC & 4 Others,* Nairobi) High Court Petition No. 4 of 2013). Discretion may be exercised in favour of an applicant provided that it will not prejudice the opposing side (*Habil Nanjendo Bushuru v IEBC & 3 Others,* Kakamega High Court Election Petition 8 of 2017; *Ahmed Abdulahi Mohamad & Another v Hon. Mohammed Abdi Mahamud,* Nairobi High Court Election Petition 14 of 2017 (consolidated with Garissa High Court Election Petition 3 of 2017); and *Apungu Arthur Kibira v IEBC & 2 Others,* Kakamega High Court Election Petition 6 of 2017). To establish the nature, extent and context of the proposed further evidence, a party should annex the proposed affidavits (*Ahmed Abdulahi Mohamad & Another v Hon. Mohammed Abdi Mahamud & 2 Others,* Nairobi High Court Election Petition No. 14 of 2017).

2.3.3.6 Leave will not be granted where it would change the nature of the petition by the additional evidence introducing new and distinct complaints requiring responses and further replies by the petitioners, which may have an adverse impact on the EDR timelines (*Benjamin Ogunyo Andama v Benjamin Andola Andayi & 2 Others*, Kakamega Election Petition No. 8 of 2013; *Robinson Simiyu Mwanga & Another v IEBC & 2 Others,* Kitale High Court Election Petition 1 of 2017; and *Albeity Hassan Abdalla v IEBC & 2 Others,* Malindi High Court Election Petition 8 of 2017); or where such evidence was available at the time of filing (*Robinson Simiyu Mwanga & Another v IEBC & 2 Others,* Kitale High Court Election Petition 1 of 2017) or where it would only act as a fishing expedition and serve to expand the petition (*Michael Gichuru v. Hon. Rigathi Gachagua & 2 Others,* Nyeri High Court Election Petition No. 2 of 2017).

2.3.3.7 Moreover, Rule 19(2) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 is clear that it is not open to the election court to extend the time for filing, hearing and determining a petition.

Further authorities

The following authorities also address the broad theme of the jurisdiction of the High Court to extend time in EDR:

1. *Josiah Taraiya Kipelian Kores v Joseph Ole Lenku & 4 Others,* Kajiado Election Petition 2 of 2017;
2. *Mary Emase Otucho v IEBC & Another,* Busia High Court Election Petition No. 1 of 2017;
3. *Seth Ambusi Panyako v IEBC & 2 Others,* Kakamega High Court Election Petition No. 14 of 2017;
4. *Rishad Hamid Ahmed v IEBC & 2 Others,* Malindi High Court Election Petition 1 of 2017; and
5. *Albeity Hassan Abdalla v IEBC & 2 Others,* Malindi High Court Election Petition 8 of 2017.

2.3.4 *Extension of Time in Magistrate's Courts*

2.3.4.1 Although there is no clear authority on this point, logical deduction from prevailing case law leads to the conclusion that magistrate's courts, just like other courts and tribunals, do not have jurisdiction to extend the EDR timelines set out in the Constitution or the Elections Act, 2011 (*Abdia Mohammed Oshow v IEBC & 3 Others,* Marsabit Magistrates Court Election Petition 2 of 2017). This, however, does not apply to timelines prescribed in procedural rules or fixed by directions of the Court (Rule 19, Elections (Parliamentary and County Elections) Petitions Rules, 2017). Rule 19 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 grants an election court the power to extend and reduce the time required to do anything prescribed by the Rules or ordered by the court. This power is available to the Magistrate's Court when sitting as an election court (*Amani National Congress Party & Another v Hamida Yaroi Shek Nuri & Another,* Election Petition Appeal 5 of 2018 & 1 of 2017 (Consolidated)).

2.4 Specific jurisdiction of Various Courts and Tribunals in EDR

2.4.0. The Kenyan EDR framework is characterised by a continuum of hierarchical institutions, each with a specific jurisdiction (*Moses Mwicigi & 14 others v IEBC*, Supreme Court Petition No. 1 of 2015; and *Okiya Omtatah Okoiti & 15 Others v Attorney General & 7 Others,* Nairobi Petition E090 of 2022 (consolidated)). These institutions include political parties; the Political Parties Disputes Tribunal (PPDT); the IEBC Nomination Disputes Resolution Committee (IEBC NDRC); Magistrate's Courts, the High Court, the Court of Appeal and the Supreme Court. The EDR jurisdiction of each of these institutions is outlined below.

2.4.1. *Political Parties*

2.4.1.0. The Political Parties Act envisions various means of resolving pre-election disputes under the Act. Accordingly, dispute resolution can be through the Political Parties Internal Dispute Resolution Mechanism, Registrar of Political Parties, Political Parties Tribunal and the High Court in appeal/review.

2.4.1.1 Political Parties Internal Dispute Resolution Mechanism

2.4.1.1.1 The Political Parties Act requires each political party to outline in its Constitution or Rules, an Internal Dispute Resolution Mechanism (IDRM) (s 9 of the Political Parties Act, as read with paragraph 23 of the Second Schedule thereto). A political party's IDRM must contain provisions that respect and promote:

(a) the democratic principles of good governance (Article 91(1)(d) of the Constitution);

(b) human rights and fundamental freedoms and gender equality and equity (Article 91(1)(f) of the Constitution);

(c) democracy, through free and fair elections (Article 91(1)(d) of the Constitution);

(d) the principles of the Constitution and the rule of law (Article 91(1)(g) of the Constitution); and

(e) the Electoral Code of Conduct (Article 91(1)(h) of the Constitution).

2.4.1.1.2 Each coalition agreement is also required to provide for an IDRM (s 40(3), Political Parties Act). In *Salesio Mutuma Thuranira & 4 Others v Attorney General & 2 Others; Registrar of Political Parties & 4 Ohers (Interested Parties)*, Petition E043, E057 & E109 of 2022, the Court asserted:

> *[309] It was the petitioners' submissions that the above impugned section is discriminatory in as much as the coalition political party is not subject to the Political Parties Disputes Tribunal. In their argument, they referred to the impugned section 40(3) of the Political Parties Act which reads as follows: "A coalition agreement shall provide for internal dispute resolution mechanism"*
>
> *[310] It is our finding that nowhere in the impugned amendment does the Act exempt a coalition political party from the jurisdiction of the Political Parties Disputes Tribunal. A political party is defined to include a coalition political party, hence a dispute between a political party and a coalition political party is deemed to be a dispute between political parties under section 40(1)(c) of the Act. It is therefore deemed to be a dispute subject to trial by the Tribunal. We therefore find that the plea by the petitioners in respect of that amendment cannot stand.*

2.4.1.1.3 An integral feature of the IDRM is respect for the fair hearing rights of members of political parties. A member of a political party can only be expelled from its membership after he/she has been afforded a fair hearing in accordance with the political party's Constitution or Rules (Section 14B, Political Parties Act; *Hon. Aisha Jumwa Katana v ODM*, PPDT Complaint No. 1 of 2019; and *Hon Isaac Mwaura Maiga v Jubilee Party & 3 Others,* Nairobi High Court Civil Appeal No. E248 of 2021).

2.4.1.1.4 The existence of a coalition political party does not extinguish the rights of each individual member of a political party. In In *Salesio Mutuma Thuranira & 4 Others v Attorney General & 2 Others; Registrar of Political Parties & 4 Ohers (Interested Parties)*, Petition E043, E057 & E109 of 2022, the High Court clarified the position of coalition political parties as follows:

> *... we find that the creation of a coalition political party does not curtail the enjoyment of the citizens' political rights under Article 38 of the Constitution because each constituent political party remains in existence with its operational constitution, its rights and status. Members of the parties retain their right to participate in the activities of the respective parties.*

2.4.1.1.5 On disputes listed in Section 40(1)(a), (b), (c) and (e) of the Political Parties Act, aggrieved persons are required to first exhaust the IDRM. Failure to do so could lead to dismissal of a subsequent complaint in another court or tribunal (s 40(2), Political Parties Act; *Dr Lilian Gogo v Joseph Mboya Nyamuthe & 4 Others*, Nairobi Civil Appeal No. 135 of 2017; *Samuel Kalii Kiminza v Jubilee Party & Another*, Civil Appeal No. 157 of 2017; *Gabriel Uminda Olenje & 4 Others v Orange Democratic Movement & Another*, Nairobi Election Petition No. 67 of 2017 (being a judgment which upheld a similar decision by the PPDT in Complaint No. 85 of 2017); *Ibrahim Abdi Ali v Mohamed Abdi Farah & Another*, Complaint No 29 of 2015; *Jared Kaunda Chokwe Barns v Orange Democratic Movement & 2 Others*, Complaint No. 259 of 2017; *Hon. Kieru John Wambui & Another v Jubilee Party; Secretary General, Jubilee Party & 2 Others (Interested Parties),* PPDT Complaint No. E005 of 2021; *Clerk Nairobi City County Assembly v Speaker Nairobi City County Assembly & Another; Orange Democratic Party & 4 Others (Interested Parties),* ELRC Petition No. 194 of 2019; *Republic v Speaker, West Pokot County Assembly & 2 Others Exparte David Pkeu Kapeliswa & Another; Kenya African National Union (KANU) (Interested Party),* Judicial Review No. 4 of 2020; *Maendeleo Chap Chap v The Registrar of Political Parties & Others*, PPDT Complaint No. E060 Of 2022 (Consolidated With PPDT Complaint E016 of 2022); and *Martin Mugo Maina v The Registrar Of Political Parties and Others (Azimio La Umoja One Kenya Coalition).*

2.4.1.1.6 Where a political party neglects, refuses or otherwise fails to activate its IDRM, aggrieved members can refer their disputes to the Political Parties Disputes Tribunal (PPDT) (*Stephen*

Asura Ochieng & 2 Others v Orange Democratic Movement Party & 2 Others, Nairobi Constitutional Petition No. 288 of 2011; *Samuel Kalii Kiminza v Jubilee Party & Another*, Civil Appeal No. 157 of 2017, *George Okode & 5 Others v The Orange Democratic Movement & Another*, Nairobi Constitutional Petition No. 294 of 2011). In terms of party primary dispute resolution timelines, political parties are required to 'hear and determine all intra party disputes arising from political party nominations within thirty days' (s 38I, Elections Act, 2011; and *Hussein Weytan Mohamed Abdirahman v Deka Ali Khala & 3 Others* Civil Appeal No E326 of 2022).

2.4.1.1.7 A person who is aggrieved by the decision of the internal party dispute resolution mechanism can refer the dispute to the PPDT, not the IEBC (s 40(1)(fa) of the Political Parties Act; *Moses Mwicigi & 14 Others v IEBC & 5 Others*, Supreme Court Petition No. 1 of 2015).

2.4.1.1.8 For the PPDT to be seized of the matter, it is sufficient to demonstrate that an attempt was made to resolve the dispute through the IDRM (s 40(2), Political Parties Act No 11 of 2011; *Ibrahim Abdi Ali v Mohamed Abdi Farah & Another*, Complaint No 29 of 2015; *Jared Kaunda Chokwe Barns v Orange Democratic Movement & 2 Others*, Complaint No. 259 of 2017). A court will only interfere in internal party processes where the political party is reluctant to enforce its own rules and decisions of its own tribunals or the PPDT (*Abdul Salam Kassim v Hazel Nyamoki Katana & Another,* Election Appeal 87 of 2017).

2.4.1.2 The Registrar of Political Parties

2.4.1.2.1 The Registrar of Political Parties may investigate and act on complaints against political parties (s 34 and 34C of the Political Parties Act; *Amani National Congress Party v Hon. Godfrey Osotsi & Registrar of Political Parties, consolidated with National Congress Party v Hon. Godfrey Osotsi,* Civil Appeal No. 511 & 512 of 2019).

2.4.1.2.2 The Registrar of Political Parties may investigate and act on complaints against political parties (s 34(g), Political Parties Act).

2.4.1.2.3 It is also the role of the Registrar of Political Parties to verify party membership of those on the party list (s 34(fc), Political Parties Act; s 34(8), Elections Act).

2.4.1.2.4 It is also the role of the Registrar to certify party lists (s 35A of the Elections Act). Disputes arising from certification of party lists are to be heard by the PPDT (s 35A(3), Elections Act).

2.4.1.2.5 The decisions of the Registrar, in this regard, are appealable to the PPDT (s 40(1)(f), Political Parties Act).

> **Editorial Note:** While the Political Parties Amendment Act No 2 of 2022 had attempted to confer on the Registrar the role of supervising the conduct of party nominations, the High Court in *Salesio Mutuma Thuranira & 4 Others v Attorney General & 2 Others; Registrar of Political Parties & 4 Ohers (Interested Parties)*, Petition E043, E057 & E109 of 2022, declared section 34(fd) of the Act unconstitutional as the mandate of supervising party nominations had been conferred on the IEBC by the Constitution itself.

2.4.1.3 The Political Parties Disputes Tribunal

The PPDT has jurisdiction to hear and determine: (i) disputes within and among political parties; and (ii) appeals from decisions of the Registrar of Political Parties (s 40(1), Political Parties Act; *Stephen Asura Ochieng & 2 Others v Orange Democratic Movement Party & 2 Others*, Nairobi Election Petition No. 288 of 2011); and *Joseph Mboya Nyamuthe v Orange Democratic Movement*

& 4 Others, Nairobi Election Petition Appeal No. 5 of 2017). Section 40(1) of the Political Parties Act provides as follows:

> *40. Jurisdiction of Tribunal*
>
> (1) *The Tribunal shall determine—*
>
> (a) *disputes between the members of a political party;*
>
> (b) *disputes between a member of a political party and a political party;*
>
> (c) *disputes between political parties;*
>
> (d) *disputes between an independent candidate and a political party;*
>
> (e) *disputes between coalition partners;*
>
> (f) *appeals from decisions of the Registrar under this Act;*
>
> *(fa) disputes arising out of party nominations.*

Editorial note: The amendments to the Political Parties Act in 2022 changed the nomenclature of the process by which political parties select or elect candidates for the general election from '**party primary**' to '**party nomination**'.

2.4.1.3.1 The PPDT has no jurisdiction to hear or determine a dispute under paragraphs (a), (b), (c), (e) or (fa) of the aforesaid section 40 unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms (s 40(2), Political Parties Act; *Jeremiah Ekaimas Lomorukai v County Government & 2 Others*, Kitale Election Petition No. 11 of 2014; *Francis Mutuku v Wiper Democratic Movement – Kenya & 2 Others*, Machakos Election Petition No. 597 of 2014; *Born Bob Maren v Speaker Narok County Assembly & 3 Others*, Naivasha Election Petition No. 1 of 2014; *Ephraim Mwangi Maina v Attorney General & 2 Others*, Nairobi Election Petition No. 220 of 2011).

2.4.1.3.2 The PPDT, however, has jurisdiction to entertain an intra-party or inter-party dispute where the relevant political party has failed to:

- establish internal dispute resolution procedures; or
- hear and determine the dispute in accordance with its internal dispute resolution procedures.

See *Stephen Asura Ochieng & 2 Others v Orange Democratic Movement Party & 2 Others*, Nairobi Constitutional Petition No. 288 of 2011; *George Okode & 5 Others v The Orange Democratic Movement & Another*, Nairobi Constitutional Petition No. 294 of 2011; and *Samuel Kalii Kiminza v Jubilee Party & Another*, Civil Appeal No. 157 of 2017.

2.4.1.3.3 Of the disputes arising from party primaries in the run up to the 2017 and 2022 general elections, the High Court had occasion to further clarify the jurisdiction of the PPDT.

In respect of party nominations, the jurisprudence and amended Political Parties Act have clarified that the PPDT has jurisdiction to hear disputes arising out of party nominations (s 40(1)(fa), Political Parties Act; and *The Party of National Unity v Dennis Mugendi & 3 Others*, Nairobi High Court Election Petition Appeal No. 1 of 2017). Any irregularity arising out of party

nominations 'is a dispute which should be addressed by the party dispute resolution mechanism or PPDT and not the court directly' (*Magero Gumo v Political Parties Dispute Tribunal & 2 Others,* Election Petition Appeal No 11 of 2017).

> **Editorial note:** While it was unclear whether the IDRM was required in respect of party nominations during the 2017 elections (*Peter Oluoch Owera v David Ruongo Okello & Orange Democratic Movement*, Nairobi High Court Election Petition Appeal No. 42 of 2017 at para 5; *Eric Kyalo Mutua v Wiper Democratic Movement Kenya & Another*, Nairobi High Court Election Petition Appeal No. 4 of 2017, where the court stressed that the PPDT has original jurisdiction on such matters and must not be heard to say that the non-filing of a dispute within the party's internal process, *simpliciter*, prohibits a party from moving to the PPDT for relief; *Thomas Ludindi Mwadeghu v John Mruttu & Another*, Nairobi High Court Election Petition Appeal No. 8 of 2017; *Alexander Khamasi Mulimi & 3 Others v Amani National Congress*, Nairobi High Court Election Petition Appeal No. 22 of 2017); *Mwangi wa Iria v Jamleck Kamau & 5 Others*, Nairobi High Court Election Petition Appeal No. 57 of 2017; amendments to the Political Parties Act 2022 have clarified that in respect of party nominations, IDRM is mandatory (section 40(2) Political Parties Act as amended by Political Parties (Amendment) Act 2 of 2022).

2.4.1.3.4 Coalition political parties are also required to make provision for IDRM in their coalition agreements (s 40(3), Political Parties Act) and exhaust this mechanism (*Josephine Wairimu Kinyanjui v Pamoja A frican Alliance Party & Another*, PPDT Complaint E006 of 2022 (unreported)) and the PPDT mechanisms before approaching the High Court (*Martin Maina Mugo v Registrar of Political Parties, Azimio la Umoja One Kenya Coalition & Maendeleo Chap Chap (Interested Party)*, Civil Appeal E 303 of 2022 (unreported); and *Republic v The Registrar of Political Parties & 3 Others Ex Parte Mahat Rashid Hassan*, Miscellaneous Application E048 of 2022 (unreported)).

2.4.1.3.5 With regard to independent candidates, the High Court in *Wiper Democratic Movement of Kenya v Bernard Muia Tom Kiala & Hon. Wavinya Ndeti*, Nairobi High Court Election Petition Appeal No. 31 of 2017 (at para 33), determined that a reading of sections 40(1)(d) and 40(1)(fa) of the Political Parties Act 'evidently point to a situation where an independent candidate who is aggrieved with certain happening in the party primaries would be entitled to move the PPDT'.

The High Court will reverse decisions by the PPDT if the latter prematurely assumes jurisdiction before exhaustion of the party's IDRM (*Kennedy Omondi Obuya v Orange Democratic Movement Party & 2 Others*, Nairobi High Court Election Petition Appeal No. 35 of 2017). The Court of Appeal in *Dr Lilian Gogo v Joseph Mboya Nyamuthe & 4 Others*, Nairobi Civil Appeal No. 135 of 2017, confirmed this position when it held as follows:

> *There could well be disputes that arise out of party primaries that do not fall within the categories of disputes set out under paragraphs a, b, c, and e of Section 40(1) of the Act in which case such disputes can be taken directly to PPDT. In the present case, there is no doubt that the dispute arose out of party primaries of the 2nd respondent. That dispute is between members of the same political party. Although it is a dispute arising from the party primaries, it is nonetheless a dispute that falls under paragraphs a, b, c, and e of Section 40(1) of the Act that is required to be heard by the party's internal dispute resolution mechanism before the PPDT can take cognizance of it. That is the procedure dictated by Section 40 of the Act.*

Similarly, in the case of *Samuel Kalii Kiminza v Jubilee Party & Another*, Nairobi Civil Appeal No. 157 of 2017, the Court of Appeal, citing the case of Dr Lilian Gogo v Joseph Mboya Nyamuthe &

4 Others, Nairobi Civil Appeal No. 135 of 2017, held as follows:

> *The appeal before us is on all fours with **Lilian Gogo v Joseph Mboya Nyamuthe (supra)** on the issue of whether disputes arising out of political parties nominations under Section 40 (1)(fa) are also subject to IDRM. We wholly agree with that finding of the Court and adopt it. Suffice to add that it could not have been the intention of the legislature to make disputes between members of a political party; disputes between a member of a political party and a political party subject to IDRM and exclude disputes arising out of political parties nominations whereas, disputes arising out of political parties nominations are essentially disputes between political parties and its members. Our view is further buttressed by Section 13 (2A) of the Elections Act...*

2.4.1.3.6 The jurisdiction of the PPDT has been broadly interpreted to include determination of the question whether a party member's constitutional rights have been violated. In *Jeconia Okungu Ogutu & Another v Orange Democratic Movement Party & 5 Others,* Nairobi High Court Election Petition Appeal No. 41 of 2017, the Court, in response to a finding by the PPDT that it had no jurisdiction to determine whether irregularities at the primaries violated the appellants' constitutional rights under Articles 38 and 91 of the Constitution, held as follows:

> *...the Political Parties Dispute[s] Tribunal misconstrued the provision of Section 40 (1)(a) of the Political Parties Act on the question as to whether the Appellants' constitutional rights were affected since the issue was corollary to the core issue of determining the question as to whether the elections/ nominations were conducted in accordance with the law, the party constitution and nomination rules. The Tribunal therefore wrongly denied itself jurisdiction to determine a matter strictly within its mandate to hear and determine under Section 40 (1) of the Political Parties Act.*

(For a different reasoning on the power of the PPDT to interpret the Constitution see *R v Chairman, Political Parties Disputes Tribunal & 2 Others Ex Parte Susan Kihika Wakarura,* Miscellaneous Civil Application 305 of 2017, which involved a dispute between an independent candidate and a member of a political party. The High Court ruled that while the PPDT has power to apply the Bill of Rights in disputes before it and to promote 'the values that underlie an open and democratic society based on human dignity, equality, equity and freedom', the interpretative mandate remains the preserve of the High Court, even where political disputes are concerned)

2.4.1.3.7 In terms of enforcement of a decision from the PPDT, the same is to be enforced in a similar manner as a decision from a Magistrate's Court (s 41(3) of the Political Parties Act).

> **Editorial Note:** While in 2017 the PPDT did not have express provision in the Political Parties Act empowering it to punish for contempt as s 41 only provided for enforcement similar to Magistrate Court decisions, reference had to be made to s 10(1) of the Magistrates' Courts Act, 2015 and the Contempt of Court Act (see High Court decision upholding this position in *Republic v Orange Democratic Movement & Another Ex parte Lawises Juma Otete*, Nairobi High Court Miscellaneous Election Petition Appeal No. 7 of 2017). The Tribunal now has the power to punish for contempt of its decisions by virtue of amendment to section 41(3) of the Political Parties Act. This legislative amendment also clarifies that this power is the equivalent of the High Court's power to punish for contempt, thus resolving the conflicting jurisprudence of the High Court on this issue arising from the 2017 EDR process (See *Secretary General & Another v Salah Yakub Farah,* Election Petition Appeal No 13 of 2017, where the High Court

ruled that the PPDT had power to punish only for contempt on the face of the court; contrasted with *David Odhiambo Ofuo v ODM & Others,* Election Petition Appeal No 11 of 2017, where it was ruled that the PPDT can punish for wilful disobedience of judgment, decree, order or direction; and *Dancun Ochieng Oluoch & Others v ODM,* Miscellaneous Election Petition Application No 4 of 2017, for a finding that the PPDT can punish for disobedience of its orders).

2.4.1.3.8 All disputes referred to the PPDT are to be resolved expeditiously, and in any case within three months of the date when the same is lodged at the Tribunal (s 41(1), Political Parties Act). The Tribunal has the same power as the High Court to punish for contempt of its decisions (s 4 (3), Political Parties Act). Also, the proceedings in the PPDT should not have regard to procedural technicalities (s 41(4), Political Parties Act).

2.4.1.3.9 In 2017 jurisprudence, courts ruled that the jurisdiction of the PPDT is not terminated upon the acceptance of a candidate's nomination by the IEBC. Jurisdiction of the PPDT remained and so did the appellate jurisdiction of the courts. Accordingly, in *Eric Kyalo Mutua v Wiper Democratic Movement and Another,* Civil Appeal No. 173 of 2017, the Court of Appeal asserted that section 13 of the Elections Act cannot oust the jurisdiction of either the courts or the PPDT:

> *24. Section 13 of the Elections Act on which the learned Judge relied provides for timelines within which a political party should nominate its candidates and the circumstances under which a political party may change the candidate nominated after the nomination of that person has been received by the IEBC. It does not, with respect, oust the jurisdiction of the PPDT or the court under Sections 40 and 41 respectively of the Political Parties Act to adjudicate over a dispute arising from nominations provided such jurisdiction is properly invoked.*
>
> *25. The decisions of the High Court in **Billy Elias Nyonje vs. National Alliance Party of Kenya and another** (above) and **John Pesa Dache vs. IEBC & another [2013] eKLR** to which we were referred do not, in our view, support the proposition advanced that the jurisdiction of the PPDT and the High Court to hear and determine disputes arising from nominations is ousted by Section 13 of the Elections Act. To that extent, the learned Judge of the High Court erred in concluding that the PPDT did not have jurisdiction over the matter by dint of Section 13 of the Elections Act.*

2.4.1.3.10 However, in *Joseph Ibrahim Musyoki v Wiper Democratic Movement- Kenya & Another,* Civil Appeal 203 of 2017, the Court of Appeal asserted that once a candidate's nomination has been accepted, the dispute shifts from a party dispute to a nomination dispute, falling within the jurisdiction of the IEBC. This decision was adopted in 2022 in *Ochola v Odhiambo & 2 Others; IEBC (Interested Party),* Civil Appeal E389 of 2022 and *Hussein Weytan Mohamed Abdirahman v Deka Ali Khala & 3 Others*, Civil Appeal No E326 of 2022. The preponderance of the jurisprudence now appears to be that the PPDT jurisdiction is ousted upon acceptance of a candidate's nomination papers by the IEBC.

2.4.1.3.11 Appeals from decisions of the PPDT may be made to the High Court on points of law and facts (s 41(2), Political Parties Act; and *Faith Wairimu Gitau v Hon. Wanjiku Muhia & Another*, Nairobi High Court Election Petition Appeal No. 25 of 2017). A further appeal, on points of law only, can be made to the Court of Appeal.

2.4.1.3.12 The decision of the Court of Appeal is final and so parties cannot further appeal to the Supreme Court (s 41(2), Political Parties Act).

2.4.2. *Independent Electoral and Boundaries Commission*

2.4.2.0. The IEBC has jurisdiction to settle electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes arising after the declaration of election results (Article 88(4)(e) of the Constitution; s 74(1), Elections Act, 2011; *Moses Mwicigi & 14 Others v IEBC & 5 Others*, Supreme Court Petition No. 1 of 2015; *Joash Wamang'oli v IEBC & 3 Others*, Bungoma Election Petition No. 6 of 2013; and *Orie Rogo Manduli v Catherine Mukite Nobwola & 3 Others*, Kitale Election Petition 3 of 2013). The resolution of disputes is done by the IEBC NDRC.

2.4.2.1. IEBC – in addition to its duty to register and regularly revise the register of voters – also has a primary role of resolving voter registration disputes. There are two forms of disputes: disputes in the nature of claim (s 12, Elections Act, 2011; and *McDonald Mariga v Returning Officer Kibra Constituency & Others*, NDRC 3 of 2019) and disputes in the nature of objection (Rule 7, Rules of Procedure on Settlement of Disputes).

2.4.2.2. The former category of disputes cannot be raised within 90 days of the date of a general election or referendum or within 60 days of the date of a by-election (Reg 17(2) Elections (Registration of Voters) Regulations, 2012). The latter could be based on one of three scenarios:

(i) that the person has registered in more than one registration centre;

(ii) that the person has been convicted of an election offence at any time material to the registration; or

(iii) that the person is not qualified to be registered under any law.

(Reg 7 (1) Elections (Registration of Voters) Regulations, 2012)

2.4.2.3.The Registration Officer is the principal officer for the resolution of the dispute. Any person who is dissatisfied may appeal to the Principal Magistrate as the first appellate court (Reg 20 & 21 Elections (Registration of Voters) Regulations, 2012). A final appeal lies to the High Court.

2.4.2.4. The jurisdiction of the IEBC in EDR extends to determination of disputes relating to independent candidacy, including disputes as to whether an aspirant is eligible to contest an election as an independent candidate (*William Omondi v IEBC*, Nairobi High Court Constitutional Petition No. 288 of 2014; and *John Mbugua & Another v The Attorney General & Others*, Nairobi High Court Constitutional Petition No. 92 of 2013). The IEBC NDRC has asserted that it has no jurisdiction over election offences (*Dr Ekuru Aukot v Raila Odinga*, DRC Complaint No 82 of 2022).

2.4.2.5. Since the nomination of candidates by political parties precedes their registration/clearance by the IEBC, the two processes are intricately linked. The interconnection between the two processes creates a potential for jurisdictional overlap, confusion and forum shopping between the PPDT and the IEBC. Attempts to delimit party processes (party nominations) from the registration of candidates by IEBC were made through amendments to the Political Parties Act (particularly s 40(1)(fa) granting jurisdiction over party nominations to PPDT) and proposed amendments to the Elections Act. While the amendments to the Political Parties Act were adopted, the amendments to the Elections Act remained pending at the time of going to elections in 2022.

2.4.2.6. Courts have, however, clarified that the IEBC's jurisdiction to settle disputes under Article 88(4)(e) of the Constitution does not extend to the adjudication of the nomination process of a political party (*Moses Mwicigi & 14 Others v IEBC & 5 Others*, Supreme Court Petition No. 1 of 2015).

Further, in explaining this position, the Court in *The Party of National Unity v Dennis Mugendi & 3 Others,* Nairobi High Court Election Petition Appeal No. 1 of 2017, distinguished the various levels of nomination as being: nomination at the party level (party primaries (now party nominations)), nomination at the IEBC level (i.e., presentation of party nominees), and nomination under Article 90 of the Constitution (IEBC's receipt of party lists). The Court found that the Constitution's intention was that only the IEBC would have jurisdiction to resolve disputes arising out of the IEBC level processes, and political parties were responsible for their own internal governance issues, with possible appeal to the PPDT and thereafter to the High Court. This was captured in the Memorandum of Understanding between IEBC and PPDT of March 2017.

2.4.2.7. The jurisdiction of the IEBC vis-à-vis the PPDT on nomination matters was more succinctly addressed in the case of *Republic v IEBC & 2 Ex Parte Wavinya Ndeti,* Nairobi Miscellaneous Application 301 of 2017, where the High Court opined that:

> *It was contended that the 3rd interested party ought to have lodged his complaint with the Party's Internal Dispute Resolution Mechanism first and as this was not done the Committee had no jurisdiction to entertain the matter. In my view the IEBC Committee exercises original jurisdiction under section 74 of the* ***Elections Act*** *unlike the Political Party Dispute Tribunal which exercises an appellate jurisdiction. Accordingly, in matters which purely fall within section 74 of the* ***Elections Act*** *and within the exclusive jurisdiction of the IEBC Committee, it is my view that the Committee is not deprived of jurisdiction by the mere fact that the complainant did not lodge his complaint with the Party's Internal Dispute Resolution Mechanism.*
>
> *Whereas the PPDT and the IEBC have jurisdiction over electoral disputes, the Court must interpret their jurisdiction in a manner that does not render one statutory tribunal redundant. The Court must in such matters adopt a purposive interpretation of the respective electoral statutes. Therefore to interpret their jurisdiction in a manner that gives leeway to parties to either bypass one or ignore decisions made by the other would militate against the purpose for which the two Tribunals were set up.*
>
> *It is now clear that the PPDT deals with disputes arising from party primaries and this is clear from its jurisdiction. The IEBC on the other hand, it is my view, deals with nomination disputes that do not fall within the jurisdiction of the PPDT since appeals from the PPDT do not lie to the IEBC but to the High Court. If it were the position that the IEBC Committee would be free to determine issues which had already been determined by the PPDT without an appeal being preferred to the High Court, that position would amount to elevating the IEBC to an appellate Tribunal over the decisions of the PPDT. That scenario would also imply that even where a decision of the PPDT has been the subject of the High Court's appellate jurisdiction, the IEBC might still be at liberty to entertain such a matter under the guise of resolving a nomination dispute. To my mind that would clearly be contrary to the principle of judicial hierarchy and would be incongruous to the statutory scheme and subversive of the true legislative intent. If it were so, the legislative intent would have been devoid of concept of purpose.*
>
> *Where however the matter does not fall within the jurisdiction of the PPDT, the IEBC must be the first port of call as long as its jurisdiction is not excluded under section 74 of the* ***Elections Act****. To that end the issue of double jeopardy would not arise.*

2.4.2.8. However, the Court of Appeal has asserted that the jurisdiction of the IEBC and PPDT concerning nominations remains concurrent (*Fredrick Odhiambo Oyugi v Orange Democratic Movement & 2 Others,* Civil Appeal No 199 of 2017, and that the obligation of the IEBC in relation to party nominations cannot be ousted by the MoU between the two institutions. The appellate Court stated at para 29:

> *The conferment of jurisdiction on the PPDT to hear and determine disputes relating to party primaries under the Political Parties Act cannot however oust the jurisdiction of the IEBC to adjudicate over a dispute arising from nominations provided such jurisdiction is properly invoked. Neither can that jurisdiction be taken away from IEBC by a memorandum of understanding.*

2.4.2.9. The IEBC must determine electoral disputes falling under its jurisdiction *within ten days* of filing and, where the dispute relates to a prospective nomination or election, before the date of the nomination or election (s 74(2) and (3) of the Elections Act, 2011).

2.4.2.10. A Complaint to the IEBC is initiated by delivering a duly filed complaint form in the required format to either the Returning Officer of the region in which the complaint relates to or the Commission (Rule 8, IEBC Rules of Procedure on Settlement of Disputes, 2012). Further, in 2022, three panels were established to handle disputes relating to registration of candidates.

2.4.2.11. A person aggrieved by the decision of an IEBC Returning Officer may appeal to the IEBC using the prescribed form (Rule 13, IEBC Rules of Procedure on Settlement of Disputes, 2012).

2.4.2.12. The courts will not entertain an electoral dispute which falls within the jurisdictional competence of the IEBC or any other body or tribunal (*Francis Gitau Parsimei & Others v National Alliance Party & Others,* Nairobi Constitutional Petition No. 356 of 2012; *Republic v IEBC ex parte Charles Olari Chebet,* Nakuru Miscellaneous Civil Application No. 3 of 2013;and *Okiya Omtatah Okoiti & 15 Others v The Hon. Attorney General & 7 Others,* Nairobi Petition E090 of 2022 (consolidated)).

2.4.2.13. A party who has exhausted the IEBC dispute resolution mechanism, however, may challenge the IEBC's decision, or the process leading to that decision, through the High Court's supervisory jurisdiction under Article 165(6) of the Constitution (*Jared Odoyo Okello v IEBC & 3 Others*, Kisumu Election Petition No. 1 of 2013). They may also institute judicial review proceedings under the Constitution or the Civil Procedure Rules (*Reuben Kigame Lichete v IEBC & Another,* Constitutional Petition E275 of 2022 (unreported)). This review jurisdiction does not extend to a consideration of new issues not raised before the IEBC NDRC (*Republic v IEBC & Others, Ex Parte Wavinya Ndeti*, Nairobi High Court Judicial Review Application No. 301 of 2017).

2.4.2.14. A disputant similarly has a right to fair administrative action remedies such as *certiorari* (Article 47 of the Constitution), particularly where there is an error on the face of the record or a defect in the process as opposed to the merits (*Julius Chacha Mabanga v IEBC & Another,* Nairobi Miscellaneous Civil Application No. 41 of 2013*).*

2.4.2.15. Unlike the PPDT, from which there is a statutory right of appeal, there is no express right of appeal from a decision of the IEBC NDRC to the High Court (*Dennis Gakuu Wahome v IEBC and Others,* Nairobi High Court Petition No. E321 of 2022 (Johnson Sakaja Koskei)*; and Reuben Kigame Lichete v IEBC & Another,* Constitutional Petition E275 of 2022 (unreported)).

2.4.2.16. The jurisdiction of the High Court over a pre-election issue falling within the mandate of the IEBC is not ousted where the dispute has not been resolved by the IEBC (*Kituo cha Sheria v John Ndirangu Kariuki,* Nairobi Election Petition 8 of 2013; *Janet Ndago Ekumbo Mbete v IEBC & 2 Others,* Constitutional Petition 116 of 2013; and *Habil Nanjendo Bushuru v IEBC & 3 Others,* Kakamega HCEP 8 of 2017). In *Silverse Lisamula Anami v IEBC & 2 Others,* Supreme Court Petition 30 of 2018, the Court stated:

> *... Our view is that Articles 88(4) (e) and 105 (1) and (3) must be read holistically, and that whereas the IEBC and PPDT are entitled, nay, empowered by the Constitution and Statute*

to resolve pre-election disputes including nominations, there are instances where the Election Court, in determining whether an election is valid, may look to issues arising during the pre-election period, only to the extent that they have previously not been conclusively determined on merits by the IEBC, PPDT or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution. Where a matter or an issue has been so determined then the Election Court cannot assume jurisdiction as if it were an appellate entity, since that jurisdiction is not conferred on it by the Constitution.

2.4.2.17. In *Sammy Ndung'u Waity v IEBC & 3 Others,* Supreme Court Petition 33 of 2018, the Supreme Court gave the following guidelines on determining whether an election court had jurisdiction over a pre-election issue:

(i) *All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT, as the case may be, in the first instance;*

(ii) *Where a pre-election dispute has been conclusively resolved by the IEBC, PPDT or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, such dispute shall not be a ground in a petition in an Election Court;*

(iii) *Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution; the High Court shall hear and determine the dispute before the elections, and in accordance with the constitutional timelines;*

(iv) *Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the Election Court;*

(v) *The action or inaction in (iv) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, even after the determination of an election petition; and*

(vi) *In determining the validity of an election court under Article 105 of the Constitution, or Section 75(1) of the Elections Act, an election Court may look into a pre-election dispute if it determines that such dispute goes to the root of the election, and that the Petitioner was not aware, or could not have been aware of the facts forming the basis of that dispute before the election.*

2.4.2.18. Since the EDR jurisdiction of the IEBC does not extend to election petitions, parties to an election petition are not obliged to accept any clarifications or explanations prepared by the IEBC subsequent to the filing of an election petition (*Joash Wamang'oli v IEBC & 3 Others,* Bungoma Election Petition No. 6 of 2013).

2.4.2.19. The IEBC also has jurisdiction over the violations of the Electoral Code of Conduct. This mandate appears to overlap with that of the Directorate of Public Prosecution, which is vested with the mandate of investigating and prosecuting alleged election offences and violations of the Electoral Code of Conduct (s 20 and 21, Election Offences Act 37 of 2016). Electoral Code of Conduct Enforcement Committee is by law, charged with resolving disputes arising out of the Electoral Code of Conduct. Sanctions that may be imposed against a candidate or party include:

a formal warning; a fine; prohibition from participation in the next election; prohibition from engaging in certain campaign activity, including being banned from holding meetings, erecting banners and distributing other literature (s 7, Electoral Code of Conduct). The IEBC may also apply to the High Court for an order that a candidate or a party should not participate in the current election (s 9, Electoral Code of Conduct).

> **Editorial Note:** In the case of *Sabina Wanjiru Chege v IEBC,* Nairobi Constitutional Petition E073 of 2022, the Electoral Code of Conduct (ECC) Enforcement Committee established under section 15 of the Code was declared unconstitutional for contravening Aricles 2(4), 3(1), 249 and 252 of the Constitution. Article 252(3) of the Constitution does not list the IEBC as one of the Chapter 15 Commissions that have the power to summon witnesses for purposes of conducting investigations. Thus, it was held that any law that conferred on the IEBC the power to issue summons to witnesses was in contravention with the Constitution and, therefore, null and void. The ECC had thus exceeded the Constitution in granting the ECC Enforcement Committee power to summon, and by virtue of Article 2(4) of the Constitution, granting of such power was void to the extent of the inconsistency. The Court deprecated the Code for allowing the IEBC to act simultaneously as complainant, witness, prosecutor and arbiter. Sections 7, 8, 10 and 15 of the Code, as well as Rules 15(4) and 17(1) and (2) of the Rules of Procedure which granted the ECC the power to summon witnesses and conduct hearings, were also declared unconstitutional.
>
> Further, the High Court clarified that while the IEBC has the jurisdiction to conduct investigations either *suo moto* or on a complaint made by a member of the public, its only recourse, if it forms the opinion that there is need for further action, is to refer the matter to the DPP or institute proceedings in the High Court. It cannot conduct hearings or summon witnesses. It may, however, also initiate mediation and conciliation through the use of its Peace Committees.
>
> The Court further ruled that the ECC was not binding where a person and/or their political party had not subscribed to the ECC and where a person had not been nominated to contest an elective post, even though the ECC provided that the Code was in effect from the date of publication of the notice of election. The decision was upheld on appeal in the case of *IEBC v Hon Sabina Wanjiru Chege,* Civil Appeal E255 of 2022 (unreported).

2.4.3. *Magistrate's Courts*

2.4.3.0. A Resident Magistrate's Court designated as an election court by the Chief Justice, has jurisdiction to hear and determine petitions challenging the validity of the election of a *member of a county assembly* (s 75(1A), Elections Act, 2011; and *Milkah Nanyokia Masungo v Robert Wekesa Mwembe & 2 Others,* Bungoma Election Petition No. 1 of 2013).

2.4.3.1. This includes a petition challenging the election of a person by nomination through the party list (*Moses Mwicigi & 14 others v IEBC & 5 Others,* Supreme Court Petition 1 of 2015; *Orange Democratic Movement v Yussuf Ali Mohammed and 5 Others,* Civil Appeal 37 of 2018). As stated by the Court of Appeal in *Jaldesa Tuke Dabello v IEBC & Another,* Civil Appeal No. 37 of 2014:

> *We are cognizant of the principle that upon gazettement of members of the County Assembly, they are deemed to be elected members of the County Assembly and thus Section 75 (1A) of the Elections Act expressly indicated that the jurisdiction to consider,*

hear and determine the question as to the validity of election of Members of County Assembly is vested with the Resident Magistrate's Court designated by the Chief Justice.

2.4.3.2. Such a petition is to be heard and determined *within six months* (s 75(2), Elections Act, 2011). Further, the Chief Justice may, by notification in the Kenya Gazette, appoint special magistrates to hear and determine matters relating to election offences.

2.4.3.3. A Magistrate's Court constituted by a Principal Magistrate, has jurisdiction to hear appeals, on matters of fact and law, from decisions of the IEBC Registration Officer regarding a claim presented by a person for their name to be included in the register (s 12(2) of the Elections Act, 2011). Such appeals must be lodged within fourteen days after the Registration Officer's determination of the claim (Regulation 21 of the Election (Registration of Voters) Regulations, 2012). The appellant must deliver a written request to the court, signed and briefly stating the grounds of appeal (Regulation 22(1) and (2) of the Election (Registration of Voters) Regulations, 2012).

2.4.3.4. Once the Magistrate's Court determines the Appeal, parties have another right of Appeal to the High Court on points of law only (s 12(2), Elections Act, 2011). Regulation 23 of the Elections (Registration of Voters) Regulations, 2012 requires the Registration Officer to deliver the following documents to the Principal Magistrate's Court for every request filed:

(a) a copy of the Claim and new application under regulation 18;

(b) a copy of the Notice of Determination of the Claim under regulation 20(3); and

(c) written reasons for the determination.

2.4.3.5. The Chief Justice is also empowered by the Election Offences Act to appoint, by notification in the Kenya Gazette, special magistrates to handle offences under the Act (s 23(1), Election Offences Act, 2016). For the 2022 elections, the Chief Justice has appointed 119 special magistrates to handle election offences.

2.4.3.6. Prosecution of election offences must be commenced within 2 years of the commission of the act in question and, where the offence is the result of a finding by an election court under section 87 of the Elections Act, time starts to run on the date of the final judgment (s 22, Election Offences Act, 2016).

2.4.3.7. Of concern to magistrates tasked with hearing election offence cases include the question of whether there is sufficient admissible evidence presented by the prosecution to warrant a conviction. This would require an assessment of the level of compliance with sections 78A and 106B of the Evidence Act.

2.4.3.8. Where hate speech is alleged, there is need for proof that the accused spoke publicly, that there were abusive words spoken against the complainant, and that the intention of the accused person was to provoke a breach of the peace. There is also a need for the prosecution to supply evidence of witnesses who would testify to the effect that the words have on them or to indicate that the words would likely cause them to resort to violence. If the utterances are made at an unknown place, without demonstration that they were addressed to members of the public, the element of stirring ethnic hatred among the public is not demonstrated. It is also necessary, where reliance is placed on social media reports, to avail reports of verification of the social media accounts relied on. In *Republic v Oscar Sudi,* Criminal Case No 58 of 2020, the Court held:

In a matter where it is alleged that the act was intended to provoke a breach of

peace, the prosecution is duty-bound to prove beyond reasonable doubt that the act complained of was likely to make people resort to physical violence,

2.4.3.9. To guide the adduction of non-testimonial evidence, the High Court gave the following guidelines in *Republic v Mark Lloyd Steveson,* Kiambu Criminal Revision 1 of 2016:

> *37. For avoidance of doubt and for future guidance, it is important to point out that authentication is required where any "real" evidence (as opposed to testimonial evidence) is sought to be adduced at trial. This applies both to e-evidence as well as other documents or items sought to be admitted into evidence. Authentication of proposed evidence is a crucial step in its admission – one which reliance on section 78A of the Evidence Act (or even section 106B) does not obviate.*
>
> *38. To avoid confusion it is important to set out where authentication fits into the evidence map. The admission and consideration of tangible exhibit in evidence follows the following steps:*
>
> a. ***First,*** *the Court determines if the proposed evidence is relevant. Here, the Court simply determines the probative value of the proposed evidence: whether the proposed evidence has tendency to make the existence of any fact that is of consequence to the determination of a fact in issue more or less probably that it would be without the evidence. If the proposed evidence passes the Relevancy Test, it proceeds to the second step.*
>
> b. ***Second****, in the case of tangible exhibits (like the two documents in this case), the Proponent for the evidence authenticates the proposed piece of evidence that is the Proponent must prove that the evidence is what the proponent claims it to be. The court only proceeds to the third step if the proposed evidence passes muster under the Authentication Test. It is important to explain here that the term "authentication" though the technically correct word which is widely used for this step can be misleading. In fact, what is meant by "authentication" at this stage is merely that a proper foundation for admission of the document or exhibit has been laid. It does not, at all, mean that the exhibit must now be accepted and believed. The Trial Court, as the fact finder, must ultimately weigh (in step 4 below) the admitted evidence in light of all the circumstances. The weighing can only happen after the foundation for the proposed evidence has been laid.*
>
> c. ***Third,*** *the Court, at the urging of the parties or on its own motion, determines if there is any other rule of evidence that excludes the proposed evidence. Here is the Court considers whether the evidence is excluded by the Constitution (for example the right against self-incrimination discussed above, prohibition against hearsay evidence or whether the proposed evidence would lead to unfair prejudice with its probative value substantially outweighed by the danger of unfair prejudice. If the proposed evidence survives this Exclusion Test, then the proposed evidence is admitted into evidence and the Court proceeds to the fourth step.*
>
> d. ***Fourth****, the Court considers the weight to be accorded to the admitted evidence. At this stage the opponent may still bring to the Court's attention evidence opposing authenticity of the evidence, thereby allowing the Court to give less weight to the evidence or no weight at all.*

2.4.4. *The High Court*

2.4.4.0. The High Court's jurisdiction in EDR is a special one conferred by the Constitution and EDR laws (*Gideon Mwangangi Wambua & Another v IEBC & 2 Others*, Mombasa Election Petition No. 4 of

2013; and *Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*, Supreme Court Petition No. 5 of 2014). This special jurisdiction is not conterminous, and should not be confused with the High Court's unlimited jurisdiction in civil and criminal matters, or the High Court's supervisory jurisdiction over inferior bodies and tribunals (*Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*, Supreme Court Petition No. 5 of 2014).

2.4.4.1. In *Orange Democratic Movement v Yusuf Ali Mohamed & 5 Others,* Civil Appeal 37 of 2018, the Court of Appeal stated:

> *(44) .... a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...*

2.4.4.2. According to the Supreme Court, to allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under Article 165(3) of the Constitution, or through judicial review proceedings, carries the risk of opening up a parallel electoral dispute resolution regime (*Moses Mwicigi & 14 Others v IEBC& 5 Others,* Supreme Court Petition 1 of 2015; and *Ethics and Anti-Corruption Commission v Granton Graham Samboja & Another; Kenyatta University & Another (Interested Parties),* Constitutional Petition 382 of 2017). Courts of equal status to the High Court may also not exercise jurisdiction over matters reserved for the High Court (*Karisa Chengo & 2 Others v Republic,* Criminal Appeal Nos 44, 45 & 76 of 2014).

2.4.4.3. The rule that the High Court's jurisdiction in EDR is a special one has many important consequences. First, an electoral dispute cannot be handled by or remitted to a judge other than the one designated and gazetted to hear and determine it (Rule 6(3), Elections (Parliamentary and County Elections) Petitions Rules, 2017; *Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*, Supreme Court Petition No. 5 of 2014; *John Ndirangu v Commission on Administrative Justice & Another,* Civil Appeal 257 of 2014; *Orange Democratic Movement v Yussuf Ali Mohammed & 5 Others,* Civil Appeal 37 of 2018; *Tuneiya Hussein Dado v IEBC & 2 Others,* Garsen High Court Election Petition No. 2 of 2017; *Lenny Maxwell Kivuti v IEBC & 3 Others,* Embu High Court Election Petition No. 1 of 2017; *Kaltuma Abdulahim Maalim v The Speaker County Assembly of Wajir & Others,* Garissa Constitutional Petition No. 14 of 2017). Even where the petition is said to raise serious constitutional issues, it is handled by one judge, as the Rules are clear that the election court is properly constituted when it is comprised of one judge (*Hon. Martha Wangari Karua & Another v IEBC & 3 Others,* Kerugoya HCEP No. 2 of 2017).

2.4.4.4. The transfer of an election petition may be sanctioned by the Chief Justice, on the advice of the court gazetted to hear the petition (*John Munyes Kiyonga v Josephat Koli Nanok & 2 Others,* Lodwar High Court Election Petition No. 1 of 2017). Sufficient material must be placed before the Court on the basis of which the gazetted court can advise the Chief Justice on the transfer (*Paul Ekuwon Nabuin v Christopher Doye Nakuleo & 2 Others,* Lodwar High Court Election Petition No. 2 of 2017; *George M. O. Ayacko v IEBC & 3 Others,* Kisii High Court Election Petition No. 13 of 2017). However, where imperative security concerns demand it, a petition can be heard in a different court station by the gazetted judicial officer if agreed on at pre-trial (*Mohamed Dado Hatu v Dhadho Gaddae Godhana & 3 Others,* Garsen Election Petition 1 of 2017). Nevertheless, the court must be careful not to sanction transfers at the request of parties who cite a threat of violence as this may play into the hands of those who want to cause violence, thus creating a

bad precedent of election petitions not being heard in certain court stations (*Amb. Ukur Yattani Kanacho v IEBC & 2 Others,* Marsabit High Court Election Petition No. 2 of 2017).

2.4.4.5. Transfer of a petition filed in the wrong court to the appropriate registry, rather than striking it out, has also been ruled to be in line with the public interest nature of an election petition (*Milkah Nanyokia Masungo v Robert Wekesa Mwembe & 2 Others,* Bungoma Election Petition No. 1 of 2013).

2.4.4.6. Secondly, the High Court has no jurisdiction to entertain an election petition filed later than *28 days* following the declaration of election results (*Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*, Supreme Court Petition No. 5 of 2014; *Mary Wambui Munene v Peter Gichuki King'ara & 2 Others*, Supreme Court Petition No. 7 of 2014; and *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others*, Supreme Court Petition No. 10 of 2013). The 28-day period starts running immediately the Returning Officer issues a certificate of election to the successful candidate (*Mary Wambui Munene v Peter Gichuki King'ara & 2 Others*, Supreme Court Petition No. 7 of 2014; *Anami Silverse Lisamula v IEBC & 2 Others*, Supreme Court Petition No. 8 of 2014; and *Martha Wangari Karua v IEBC & 3 Others,* Supreme Court Petition 3 of 2019).

2.4.4.7. To ensure compliance with these timelines, the Supreme Court issued the following guidelines in the *Martha Karua* case:

> *(a) All Applications by a Respondent in an election petition, save in exceptional circumstances, should form part of the response to the Petition. Similarly, a Petitioner should as much as possible file any application arising from his Petition e.g. for scrutiny or recount at the same time as the Petition.*
>
> *(b) Unless for want of jurisdiction or in any other deserving circumstance, a trial Court should exercise restraint in striking out a Petition or a response, where such an action is likely to summarily dispose of the matter.*
>
> *(c) All applications for striking out an election petition for want of jurisdiction, or for any other reason, must be made and determined within the constitutional and statutory timelines for the resolution of electoral disputes. In this regard, it is for the trial Court, to make and enforce such case management orders, so as to meet this objective.*
>
> *(d) Appeals on interlocutory applications, other than for striking out in circumstances explained in (b) and (c) above, should await the final determination of the whole petition before the trial Court.*
>
> *(e) In exceptional circumstances, an appellate Court may dispose of an appeal arising from an interlocutory application filed and determined by the trial Court while the substantive matter is still ongoing at the trial Court. In doing so, the timeframe question as explained above must always be borne in mind.*

2.4.4.8. Thirdly, the jurisdiction of the High Court in EDR is time bound to *six months* after the date of the filing of an election petition. In other words, the High Court ceases to have jurisdiction on an electoral dispute after the lapse of six months from the date of filing an election petition (*Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*, Supreme Court Petition No. 5 of 2014).

2.4.4.9. The High Court has *supervisory jurisdiction* on electoral disputes that fall within the ambit of the IEBC (Article 165(6) of the Constitution; and *Jared Odoyo Okello v IEBC & 3 Others*, Kisumu Election Petition No. 1 of 2013).

2.4.4.10. The High Court also has jurisdiction in relation to violations of the Electoral Code of Conduct. If after conducting investigations, the IEBC forms the opinion that there is need for further action in relation to a violation of the Electoral Code of Conduct, it can either refer the matter to the DPP or institute proceedings in the High Court under section 9 of the Electoral Code of Conduct (*Sabina Wanjiru Chege v IEBC*, Nairobi Constitutional Petition E073 of 2022; and *IEBC v Sabina Wanjiru Chege*, Civil Appeal E255 of 2022 (unreported)).

2.4.4.11. The High Court has *appellate jurisdiction* over decisions of the PPDT, on *points of law and fact* (s 41(2), Political Parties Act). The High Court also has an appellate jurisdiction over EDR decisions of Magistrate's Courts, limited to *matters of law only* (s 75(4) of the Elections Act, 2011). A person seeking to appeal a Magistrate's Court's interlocutory decision to the High Court must await the final hearing and determination of the election petition by the Magistrate's Court.

2.4.4.12. Unlike the PPDT from which there is a statutory right of appeal, there is no express right of appeal from a decision of the IEBC NDRC to the High Court (*Dennis Gakuu Wahome v IEBC and Others*, Nairobi High Court Petition No. E321 of 2022 (Johnson Sakaja Koskei); *Reuben Kigame Lichete v IEBC & Another*, Constitutional Petition E275 of 2022 (unreported)).

2.4.4.13. Where disputants apply for a review of the court's orders as derived from an EDR judgment, the court has held that such a review may only be granted to correct an 'error apparent on the face of the record' (*Bob Micheni Njagi v Orange Democratic Movement*, Nairobi High Court Election Petition Appeal No. 2 of 2017). It has previously been established that the 'error or omission must be self-evident and should not require an elaborate argument to be established'. (*National Bank of Kenya Limited v Ndungu Njau*, Nairobi Court of Appeal Civil Appeal No. 211 of 1996).

> **Editorial Note:** In light of the principles enunciated by the Supreme Court in *Sammy Ndung'u Waity v IEBC & 3 Others* Supreme Court Petition 33 of 2018, the High Court exercises jurisdiction over pre-election matters outside of the framework for electoral dispute resolution given by the Constitution and Elections Act. The fifth principle enunciated by the apex Court in this case permits a litigant to present a pre-election dispute '*for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the Constitution, even after the determination of an election petition*'. This creates the possibility of an election issue being determined outside of an election court within the *sui generis* legal framework established for the resolution of electoral disputes. It also creates the possibility of electoral disputes being resolved outside the 6-month timeline established for EDR. As asserted by the Court of Appeal in *Annie Wanjiku Kibeh v Clement Kungu Waibara & Another*, Nairobi Civil Application No. E390 of 2021, the 6-month timeline for election appeals is not applicable to such cases. While there is no clear point on the applicability of the 6-month timeline at the High Court, save for cases brought under Article 105(2) of the Constitution, there is need for jurisprudential guidance from the apex Court on how to reconcile expeditious disposal of electoral disputes with the principles in *Sammy Waity*.

2.4.5. *The Court of Appeal*

2.4.5.0. The Court of Appeal is the final port of call for appeals from political party disputes. In *Salesio Mutuma Thuranira & 4 Others v Attorney General & 2 Others; Registrar of Political Parties & 4 Ohers (Interested Parties)*, Petition E043, E057 & E109 of 2022, the High Court declined to declare Section 41(2) of the Political Parties (Amendment) Act, 2022 unconstitutional for truncating the right of appeal pertaining to matters arising from the Political Parties Dispute Tribunal to the Court of Appeal, and asserted:

> *[311] The 1st and 2nd to 5th petitioners raised issue with the above section. They claim that the amendment to section 41 of the Act is unconstitutional as it denies disputants the right of appeal to the Supreme Court. We do not agree with them on this because the right of appeal to the Supreme Court is not automatic as can be seen from the provisions of article 163(4) of the Constitution ....*
>
> *[312]...We therefore find nothing unconstitutional about the above section since the jurisdiction of the Supreme Court of Kenya in hearing appeals is clearly set out in the Constitution and Supreme Court of Kenya Act. Appeals to the Supreme Court must be certified by the Court of Appeal or the Supreme Court to be matters of general public importance, as provided for by the law. The same applies to matters related to disputes arising from party primaries.*

2.4.5.1. The jurisdiction of the Court of Appeal in EDR is limited to matters of law only (s 85A of the Elections Act, 2011; *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2016; *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others*, Supreme Court Petition No. 4 of 2014; and *Timamy Issa Abdalla v Swaleh Salim Imu & 3 Others*, Malindi Civil Appeal No. 36 of 2013).

2.4.5.2. The jurisdictional restriction of the Court of Appeal to matters of law only effectively limits the number, length and costs of election petitions and, consequently, facilitates the achievement of the constitutional objective of timely settlement of electoral disputes (*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2014).

2.4.5.3. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, the Supreme Court held that the phrase '*matters of law only*', as used in section 85A of the Elections Act, 2011 refers to:

> (a) *the interpretation, or construction of a provision of the Constitution, an Act of Parliament, subsidiary legislation, or any legal doctrine, in an election petition in the High Court; or*
>
> (b) *the application of a provision of the Constitution, an Act of Parliament, subsidiary legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial judge in an election petition; or*
>
> (c) *the conclusions arrived at by the trial judge in an election petition where the appellant claims that such conclusions were based on "no evidence," or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same.*

2.4.5.4. The credibility of witness testimony and veracity of documents filed before an election court are matters of fact and, therefore, outside the jurisdiction of the Court of Appeal (s 85A, Elections Act, 2011; *Frederick Otieno Outa v Jared Odoyo Okello & 4 Others*, Supreme Court Petition No. 6 of 2014; and *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2014):

> *Flowing from these guiding principles, it follows that a petition (sic) which requires the appellate Court [i.e. the Court of Appeal] to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted.*

2.4.5.5. The statutory restriction of the jurisdiction of the Court of Appeal in EDR to '*matters of law only*' does not preclude the Court of Appeal from reversing a trial court's conclusions of fact and appraisal of witness accounts, where such conclusions or appraisal of witness accounts are absurd, irrational or so perverse that no reasonable tribunal would arrive at them (*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2014; and *Frederick Otieno Outa v Jared Odoyo Okello & 4 Others*, Supreme Court Petition No. 6 of 2014).

2.4.5.6. The Court of Appeal has a '*deferred and sequential*' jurisdiction to hear appeals against interlocutory decisions of an election court. This rule is to be found in, *inter alia*, *Nathif Jama Adam v Abdikhaim Osaman Mohamed & 3 Others*, Supreme Court Petition No. 13 of 2014, *Peter Gichuki King'ara v IEBC & Others*, Nyeri Civil Appeal No. 23 of 2013; and *Benjamin Ogunyo Andama v Benjamin Andola Adayi & 2 Others*, Civil Appeal (Application) No. 24 of 2013). The concept of '*deferred and sequential*' jurisdiction means that, in the first place, that the Court of Appeal will not entertain appeals on interlocutory matters during the pendency of the substantive dispute before an election court. The practical consequence of this rule is that a litigant who seeks to appeal against an interlocutory decision of an election court must await the final hearing and determination of the substantive dispute before the election court (*Cornel Rasanga Amoth v William Oduol & 2 Others*, Kisumu Civil Appeal Application No. 26 of 2013).

> **Editorial Note:** While as a general rule only appeals relating to an interlocutory decision that has led to the petition being struck out for want of jurisdiction will be heard by the Court of Appeal, interlocutory decisions that are dispositive of the petition are appealable immediately. Moreover, in exceptional circumstances, an appellate Court may dispose of an appeal arising from an interlocutory application filed and determined by the trial Court while the substantive matter is still ongoing at the trial Court, so long as the 6-month timeline is adhered to (*Martha Wangari Karua v IEBC & 3 Others*, Supreme Court Petition No. 3 of 2019).

2.4.5.7. Secondly, the concept of deferred and sequential jurisdiction means that the Court of Appeal can fault or reverse election courts' interlocutory decisions, even where such decisions are not formally appealed from (*Nathif Jama Adam v Abdikhaim Osaman Mohamed & 3 Others*, Supreme Court Petition No. 13 of 2014).

2.4.5.8. The rationale for the '*deferred and sequential*' jurisdiction of the Court of Appeal on interlocutory decisions lies in the constitutional objective of timely resolution of electoral disputes. In *Cornel Rasanga Amoth v William Oduol & 2 Others*, Kisumu Civil Appeal Application No. 26 of 2013, the Court of Appeal stated as follows:

> *the exclusion of this Court from entertaining appeals from orders made on interlocutory applications was not by accident. The exclusion was deliberate given the History of electoral dispute resolution mechanisms in this country...When the people of Kenya promulgated the Constitution of Kenya 2010, they were unhappy with the period electoral disputes took to be resolved. In some cases, the disputes were not resolved for the entire life of Parliament. In their wisdom, therefore the people of Kenya prescribed the period within which those disputes should be resolved, hence the parameters set out in Article 105 (2) and*

> *(3) ...If all orders, directions and rulings made in interlocutory applications were appealable, there would be no possibility that electoral disputes would be resolved within the strict timelines set out in the supreme law of the land.*

2.4.6. *The Supreme Court*

2.4.6.0.1. The Supreme Court has exclusive original jurisdiction to hear and determine disputes relating to the election of the President of the Republic of Kenya (Articles 163(3)(a) and 140 of the Constitution; *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate,* Supreme Court Advisory Opinion No. 2 of 2012; and *International Centre for Policy and Conflict & 5 others v Attorney General & 5 Others*, Nairobi High Court Constitutional Petition No. 552 of 2012). This is so even where the results of the presidential election have not yet been declared (*The Africa Centre for Open Governance (AfriCOG) v Ahmed Issack Hassan & Another,* Petition 152 of 2013). However, it has no jurisdiction to interpret its own decisions or those of other courts *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others,* Supreme Court Presidential Petition No. 1 of 2017. The Court may also inquire into any allegations of voter-registration malpractices, where such are said to affect the validity of a Presidential election (*Raila Odinga v IEBC & 3 Others*, Supreme Court Presidential Petition No. 5 of 2013).

2.4.6.0.2. The Supreme Court also has a circumscribed appellate jurisdiction over decisions of the Court of Appeal, limited to:

> *(a) cases involving the interpretation or application of the Constitution (Article 163(4)(a) of the Constitution); and*
>
> *(b) cases certified by the Court of Appeal or the Supreme Court as involving a matter of general public importance (Article 163 (4) (b) and (5) of the Constitution).*

2.4.6.0.3. The appellate jurisdiction of the Supreme Court over EDR decisions of the Court of Appeal, therefore, is limited to cases involving the interpretation or application of the Constitution or cases involving a matter of general public importance (as discussed in sections 2.4.6.1 and 2.4.6.2 below). A party seeking to invoke the jurisdiction of the Supreme Court must specify under what limb of Article 163(4) of the Constitution they seek to move the court (*National Rainbow Coalition Kenya (NARC Kenya) v IEBC; Tharaka Nithi County Assembly & 5 Others (Interested Party)*, Supreme Court Petition 1 of 2021). It will not be assumed by way of elimination (*Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone,* Supreme Court Application 4 of 2012, *Daniel Kimani Njehia v Francis Mwangi Kimani & Another,* Civil Application No 3 of 2014; and *Mike Mbuvi Sonko v Clerk County Assembly of Nairobi*, Supreme Court Petition 11(E008) of 2022). The Supreme Court in *Suleiman Mwamlole Warrakah & 2 Others v Mwamlole Tchappu Mbwana & 4 Others,* Supreme Court Petition 12 of 2018, asserted:

> ***[52]** On our part, we find it inconceivable, contrary to the submissions of Counsel for the petitioners, that a party can seek to invoke this Court's appellate jurisdiction, without unequivocally indicating under which constitutional provision he/she seeks to move the Court. One cannot seek refuge in Rule 9 and the template in Form B of the Supreme Court Rules to justify such a fundamental omission. The appellate jurisdiction of this Court is donated by the Constitution. It is neither original nor unlimited. The limits of its jurisdiction are set out by the Constitution as clarified by this Court in a number of its decisions. In the circumstances, an intending appellant must either seek certification under Article 163(b) of the Constitution or bring him/her(self) within the ambit of Article 163(4)(a) thereof. This second option is by no means automatic as pronouncements of*

the Court in past decisions clearly demonstrate.

[53] *In this appeal, what Counsel for the petitioners is asking us to do is to assume jurisdiction by way of elimination. This Court is being called upon to hold that, because certification, was not sought by the intending appellant, then it must follow that the said appellant, is invoking the Court's jurisdiction as of right, under Article 163 (4) (a) of the Constitution, even without demonstrating that, such right obtains in the first place. This we cannot do, as it would make a mockery of our past pronouncements on the matter. In* ***Daniel Kimani Njihia v. Francis Mwangi Kimani & Another*** *[2015] eKLR this Court was categorical that in preferring an appeal, "a litigant should invoke the correct constitutional or statutory provision; and an omission in this regard is not a mere procedural technicality, to be cured under Article 159 of the Constitution." This statement of principle, in our view, still holds sway, and we see no reason to engineer a shift from it.*

2.4.6.0.4. While there is no clear constitutional or statutory provision on the matter, the appellate jurisdiction of the Supreme Court in EDR is limited to *matters of law only* (*Chris Munga N Bichage v Richard Nyagaka Tong'i, IEBC & Robert K Ngeny,* Supreme Court Petition No. 17 of 2014). The Supreme Court has also asserted that 'matters of fact that touch on evidence without any constitutional underpinning are not open for this Court's review on appeal' (*Mike Mbuvi Sonko v Clerk County Assembly of Nairobi*, Supreme Court Petition 11(E008) of 2022).

2.4.6.0.5. An appeal must also, of necessity, be against the outcome of a case based on the reasons for the outcome. Without reasons for the decision being availed to the court, there is no basis upon which the petition can be jurisprudentially determined (*Jimi Wanjigi v Wafula Chebukati & 2 Others*, Supreme Court Application No 6 of 2022; *Oscar Oluoch Ouma Abote v Loice Akoth Kawaka & 4 Others*, Supreme Court Petition No 16 (E019) of 2022).

2.4.6.1 Cases Involving Interpretation or Application of the Constitution

2.4.6.1.0 Not every decision of the Court of Appeal is appealable to the Supreme Court. For a party to Appeal to the Supreme Court they must show that the decision involved a matter of interpretation or application of the Constitution; or get Certification that their intended appeal raises matters of general public importance (*Nasra Ibrahim Ibren v IEBC & 2 Others,* Supreme Court Petition No 19 of 2018).

2.4.6.2.0 The Supreme Court has no jurisdiction to entertain an appeal turning solely on the issue of costs, as the issue of costs does not ordinarily entail the application or interpretation of the Constitution (*Ledama Ole Kina v Samuel Kuntai Tunai & 9 Others*, Supreme Court Petition No. 16 of 2014).

2.4.6.3.0 Further, the Supreme Court has no jurisdiction to entertain an appeal based on the interpretation or application of the Constitution where the relevant constitutional issue has not been the subject of litigation and opinion by the courts below (*Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others*, Supreme Court Petition No. 15 of 2014; and *Richard Nyagaka Tong'i v Chris Munga N. Bichage & 2 Others*, Supreme Court Petition No. 17 of 2014). In *Lawrence Nduttu & 6000 Others v Kenya Breweries Limited & Another*, Supreme Court Petition No. 3 of 2012, the Supreme Court expressed the rule as follows:

the appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal

on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163(4)(a).

2.4.6.4.0 Although the above dictum points to a strict approach to the appellate jurisdiction of the Supreme Court, the Court has, in practice, often adopted a liberal approach in EDR cases. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Application No. 5 of 2014, it held as follows:

where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application... While we agree [with counsel for the 1st Respondent] regarding his contention that Section 87 of the Elections Act cannot be equated to a constitutional provision, we must hasten to add that the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution...

2.4.6.5.0 The Supreme Court has ruled that its role of interpretation involves 'revealing or clarifying the legal content or meaning of a constitutional provision, for purposes of resolving the dispute at hand', while application concerns 'creatively interpreting the Constitution to eliminate ambiguities, vagueness and contradictions, in furtherance of good governance' (*Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others,* Supreme Court Petitions 18 & 20 of 2014).

The Supreme Court in *Zebedeo John Opore v IEBC & 2 Others,* Supreme Court Petition 32 of 2018, while finding that its jurisdiction had not been properly engaged, distilled the categories of electoral appeals that may be lodged at the apex Court as follows:

(a) *In election petitions before this court, a party may not invoke the Court's jurisdiction under Article 165(4)(a), where the trial Court had found that alleged irregularities and malpractices were not proved, as a basis then does not lie for an application or interpretation of the Constitution;*

(b) *The Articles of the Constitution cited by a party as requiring interpretation or application by this Court, must have required interpretation or application at the trial Court, and must have been a subject of appeal at the Court of Appeal; in other words, the Article in question must have remained a central theme of constitutional controversy, in the life of the cause.*

(c) *A party seeking this Court's intervention has to indicate how the Court of Appeal misinterpreted or misapplied the constitutional provision in question. Thus, the said constitutional provision must have been a subject of determination at the trial Court.*

(d) *As a logical consequence of the foregoing, a party must indicate to this Court in specific terms, the issue requiring the interpretation or application of the Constitution, and must signal the perceived difficulty or impropriety with the Appellate Court's decision.*

2.4.6.6.0 A question of conduct of an election under Articles 81 and 86 of the Constitution falls within the jurisdictional ambit of Article 163(4)(a) of the Constitution (*Alfred Nganga Mutua & 2 Others v Wavinya Ndeti & Another,* Supreme Court Petition 11 & 14 of 2018; and *Clement Kungu*

Waibara v Annie Kibeh & Another, Supreme Court Petition 24 of 2018), and so is one involving constitutional timelines for EDR under Articles 87(1) and 105 (*Martha Wangari Karua v IEBC & 3 Others,* Supreme Court Petition 3 of 2019).

2.4.6.7.0 If an appeal includes both questions of constitutional interpretation and application and other matters which do not fall within the scope of Article 163(4) of the Constitution, the apex Court has ruled that it has the discretion to exercise jurisdiction over those falling within its mandate and exclude the rest (*Clement Kungu Waibara v Annie Kibeh & Another,* Supreme Court Petition 24 of 2018).

2.4.6.8.0 The Supreme Court will be hesitant to interfere with the exercise of the Court of Appeal's discretion unless the appellant can demonstrate that: (i) the Court of Appeal acted on a whim, (ii) the Court of Appeal's decision was unreasonable, (iii) the decision of the Court of Appeal was made in violation of any law or the Constitution, or (iv) that the decision was plainly wrong and caused undue prejudice to a party (*Musa Cherutich Sirma v IEBC & 2 Others,* Supreme Court Petition 13 of 2018).

2.4.6.9.0 In the exercise of its jurisdiction, the Supreme Court is empowered by the Supreme Court Act 2011 to proceed, where it considers it necessary, by way of a fresh hearing, or to grant any order or relief that was open to the Court of Appeal to grant (*Cyprian Awiti & Another v IEBC & 3 Others,* Supreme Court Petition 17 of 2018).

2.4.6.2 Cases Involving Matters of Public Importance

2.4.6.2.0 Although the Supreme Court and the Court of Appeal have concurrent jurisdiction in certifying a case as involving a matter of public importance, a litigant who seeks to appeal to the Supreme Court on a matter of public importance must seek certification of the case from the Court of Appeal in the first instance (Rule 33(1) of the Supreme Court Rules, 2020; Hassan Nyanje Charo v Khatib Mwashetani & 3 Others, Supreme Court Civil Application No. 14 of 2014; and Sum Model Industries Ltd v Industrial and Commercial Development Corporation, Supreme Court Civil Application No. 1 of 2011). The Supreme Court may review and affirm, vary or overturn a decision of the Court of Appeal certifying a case as one involving a matter of general public importance (Article 163(5) of the Constitution).

Further authorities

1. *Naomi Wangechi Gitonga & 3 Others v IEBC & 4 Others*, Supreme Court Civil Application No. 2 of 2014

CHAPTER 3

PRE-ELECTION DISPUTES

PRE-ELECTION DISPUTES

3.1. General Rules

3.1.1. The resolution of pre-election disputes, i.e., disputes arising before the declaration of election results, is shared among political parties, PPDT, IEBC and the courts (Article 88(4)(e) of the Constitution; s 40, Political Parties Act; and s 74, Elections Act, 2011). Generally, the courts will not entertain a pre-election dispute (including questions of validity of party nominations, qualification for elective office, commission of election malpractices, citizenship, resignation from public office before elections, voter registration, party list disputes and campaign violations) where the parties have not exhausted prescribed dispute resolution mechanisms at the political party, the PPDT, the IEBC or other prescribed pre-election dispute resolution forums (*International Centre for Policy and Conflict & 5 Others v Attorney General & 5 Others,* Nairobi High Court Constitutional Petition No. 552 of 2012; *Francis Gitau Parsimei & 2 Others v National Alliance Party & 4 Others*, Nairobi High Court Constitutional Petition No. 356 of 2012; *Isaiah Gichu Ndirangu & 2 Others v IEBC & 4 Others,* Nairobi High Court Petition No. 83 of 2015; *Vincent Ngw'ono Manyisa v Wiper Democratic Party & 3 Others,* Nairobi High Court Election Petition Appeal No. 38 of 2017; *Sammy Ndung'u Waity v IEBC & 3 Others,* Supreme Court Petition 33 of 2018; *Silverse Lisamula Anami v IEBC & 2 Others,* Supreme Court Petition 30 of 2018; *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others; Ahmed Ali Muktar (Interested Party),* Supreme Court Petition 7 of 2018; *Okiya Omtatah Okoiti & 15 Others v The Hon. Attorney-General & 7 Others,* Nairobi Petition E090 of 2022 (consolidated)).

3.1.2. The rationale for this was explained in *Diana Kethi Kilonzo & Another v IEBC & 10 Others*, Nairobi High Court Constitutional Petition No. 359 of 2013:

> *We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.*

3.1.3. Equally, litigants cannot evade the political party, the PPDT, the IEBC or other prescribed pre-election dispute resolution fora by presenting the nature of the pre-election dispute as one relating to the interpretation, supremacy or enforcement of the Constitution (Isaiah Gichu Ndirangu & 2 Others v I*EBC & 4 Others,* Nairobi High Court Petition No. 83 of 2015; and *International Centre for Policy and Conflict & 5 Others v Attorney General & 5 Others,* Nairobi High Court Constitutional Petition No. 552 of 2012).

3.1.4 Historically, there was divided opinion on the place of the election court in determining disputes arising before declaration of results. The Divestiture School of thought presented the view that the election court is divested of jurisdiction to hear and determine matters falling within the ambit of the parties' IDRM, the PPDT and the IEBC. The rationale for the courts' reluctance to exercise original jurisdiction over pre-election disputes is twofold. First, public interest requires citizens to refrain from litigation where there are effective alternative procedures for resolving a particular dispute (*Francis Gitau Parsimei & 2 others v National Alliance Party & 4 Others*, Nairobi High Court Constitutional Petition No. 356 of 2012; *Godfrey Mwaki Kimathi & 2 Others v Jubilee Alliance Party & 3 Others*, Nairobi High Court Petitions Nos. 102 and 145 of 2015; and *Pasmore & Others v The Oswaldtwistle Urban District Council* [1898] AC 387).

3.1.5 Secondly, Article 159(2)(c) of the Constitution requires the courts to promote alternative dispute resolution procedures, which cannot be achieved if the courts were to readily entertain disputes which ought to be resolved in other forums (*Dickson Mukwelukeine v Attorney General & 4 Others* Nairobi High Court Petition No. 390 of 2012; *Godfrey Mwaki Kimathi & 2 Others v Jubilee Alliance Party & 3 Others*, Nairobi High Court Petitions Nos. 102 and 145 of 2015; *Charles Ong'ondo Were v Joseph Oyugi Magwanga & 2 Others,* Homa Bay Petition 1 of 2013; *Josiah Taraiya Kipelian Ole Kores v David Ole Nkedianye & 3 Others,* Nairobi Election Petition 6 of 2013; and *Republic v IEBC Ex parte Charles Ondari Chebet,* Nakuru High Court Judicial Review Application No. 3 of 2013). It is only if dissatisfied with the decisions of these mechanisms that a litigant can approach the High Court in exercise of its judicial review or supervisory jurisdiction (not an election court) for a review of the decision (*Jared Odoyo Okello v IEBC & 3 Others,* Kisumu Election Petition No. 1 of 2013; *John Ndirangu v Commission on Administrative Justice & Another,* Civil Appeal 257 of 2014; *Clement Kungu Waibara v Annie Wanjiku Kibeh*, Kiambu Election Petition 1 of 2017; and *Ahmed Abdullahi Mohamad & Another v Mohamed Abdi Mohamed & 2 Others,* Nairobi High Court Election Petition 14 of 2017 (consolidated with Garissa High Court Election Petition 3 of 2017)).

3.1.6 On the other hand, the Preservative School propounded the view that, despite the existence of alternative dispute resolution mechanisms/organs (Parties' IDRMs, PPDT, IEBC), the election court is not divested of jurisdiction to determine pre-election disputes. Election courts have held that they had jurisdiction to entertain pre-election disputes notwithstanding the non-exhaustion of the party IDRM, PPDT and IEBC mechanisms, provided that such disputes went to the root of the election (*Karanja Kabage v Joseph Kiuna Kariambegu Ng'ang'a & 2 Others*, Nakuru Election Petition No. 12 of 2013; *Godffrey Mwaki Kimathi & 2 Others v Jubilee Alliance Party & 3 Others* Petition 102 and 145 of 2015; *Jared Odoyo Okello v IEBC & 3 Others,* Kisumu Election Petition No. 1 of 2013; *Mohamed Dado Hatu v Dhadho Gaddae Godhana & 3 Others,* Garsen Election Petition 1 of 2017; *Armstrong Mwandoo Kiwoi & Another v Granton Graham Samboja & 7 Others,* Voi Election Petition 1 of 2017; *Kennedy Moki v Hon Rachael Kaki Nyamai & 2 Others,* Nairobi Election Petition Appeal 2 of 2018; and *Silverse Lisamula Anami v IEBC & 2 Others,* Supreme Court Petition 30 of 2018).

3.1.7 There are two main reasons for this. The first is that an election is a process, as opposed to an event, comprising multiple stages. Accordingly, any serious malpractice, error or irregularity which impacts on the fairness, integrity or credibility of an election will vitiate the election irrespective of whether it happened before or after the date of the election (*In the Matter of the Principle of Gender Representation in the National Assembly and the Senate,* Supreme Court Advisory Opinion No. 2 of 2012). In *William Odhiambo Oduol v IEBC & 2 Others,* Election Kisumu Petition No. 2 of 2013, the Court held as follows:

> *...the 1st and 2nd Respondents submitted that this court does not have jurisdiction to deal with whatever acts of fraud, malpractice, irregularity and breach that may have occurred during nominations and campaigns; that the jurisdiction of the court is limited only to the acts that may have taken place during voting, counting, tallying and declaration of results. He relied on Article 88 (4) (e) [of the Constitution] that deals with settlement of [pre]electoral disputes...Once again, an election is a process and not an event...I hope I have said enough to show that the contention that what happens during campaigns does not concern an election petition court is without any legal basis. In any case, what I have said in the foregoing in relation to what constitutes a free and fair election, and the meaning of section 83, clearly show that what happens prior to actual voting can affect the integrity of the election and therefore a court dealing with a challenge to that election can deal with issues prior to the voting.*

See also *Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 Others*, Nakuru Election Petition No. 12 of 2013. For a somewhat different opinion, see *Josiah Taraiya Kipelian Ole Kores v Dr. David Ole Nkedianye & 3 Others,* Nairobi Election Petition No. 6 of 2013.

3.1.8 The second rationale for nullifying elections based on malpractices, errors or irregularities that occurred prior to the election date is that a contrary approach would encourage unscrupulous politicians to engage in electoral offences and malpractices prior to the election period. In *John Okello Nagafwa v IEBC & 2 Others*, Busia Election Petition No. 3 of 2013, the respondent urged the election court to ignore allegations of bribery because the alleged acts had taken place before the election and the official campaign period. The respondent further submitted that the petitioner ought to have referred the alleged acts of bribery to the IEBC in accordance with the prescribed pre-election dispute resolution procedures. The Court rejected the submission in the following words:

> *What this Court must consider is whether as an election court it should censure a Respondent for electoral malpractice in the nature of bribery, treating, violence or undue influence which is committed prior to the election period…Under Article 81 of the Constitution an integral element of a free and fair election is that it is free from violence, intimidation, improper influence or corruption. Any act or conduct that subverts free and fair election affronts not only the Constitution but [also] electoral laws. The timing of the act and conduct may be immaterial as long as it has the effect of perverting the course of an election. Even if committed prior to the election period, that act or conduct will amount to an electoral malpractice as long as it remains operative and capable of subverting a free and fair election…Unscrupulous politicians should not be afforded the luxury of engaging in malpractices that are intended and capable of unlawfully influencing an impending election in the comfort that acts done are outside [the] election period and therefore outside the ambit of the Elections Act. There is therefore a basis for me to inquire as to whether there was bribery…*

3.1.9 In the aftermath of the 2017 polls and election petitions, the Supreme Court had an opportunity to clarify the law on the election court's mandate over pre-election disputes in three cases that turned on this issue. First, in *Sammy Ndung'u Waity v IEBC & 3 Others,* Supreme Court Petition 33 of 2018 the Court appreciated the *'Divestiture'* and *'Preservative'* Schools of thought.

3.1.10 In harmonizing the two schools of thought, the Supreme Court established the following principles to guide the Courts:

a. *All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT as the case may be in the first instance.*

b. *Where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the Constitution, such dispute shall not be a ground in a petition to the election Court.*

c. *Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the Constitution. The High Court shall hear and determine the dispute before the elections and in accordance with the Constitutional timelines.*

d. *Where a person knew or ought to have known of the facts forming the basis of a*

pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court.

e. *The action or inaction in (d) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the Constitution, even after the determination of an election petition.*

f. *In determining the validity of an election under Article 105 of the Constitution or Section 75(1) of the Elections Act, an election court may look into a pre-election dispute if it determines that such dispute goes to the root of the election and that the petitioner was not aware or could not have been aware of the facts forming the basis of that dispute before the election.*

3.1.11 In the case of *Silverse Lisamula Anami v IEBC & 2 Others*, Supreme Court Petition 30 of 2018, the Supreme Court held as follows:

> *How do we resolve the apparent conflicting positions taken by the Court of Appeal and election Courts? Our view is that Articles 88(4)(e) and 105(1) and (3) must be read holistically and that whereas the IEBC and PPDT are entitled, nay, empowered by the Constitution and Statute to resolve pre-election disputes including nominations, there are instances where the election Court in determining whether an election is valid, may look to issues arising during the pre-election period only to the extent that they have previously not been conclusively determined, on merits, by the IEBC, PPDT or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the Constitution. Where a matter or an issue has been so determined, then the election Court cannot assume jurisdiction as if it were an appellate entity since that jurisdiction is not conferred on it by the Constitution.*

3.1.12 The two decisions quoted above would later be applied in the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others; Ahmed Ali Muktar (Interested Party),* which similarly turned on the issue of the election court's jurisdiction to entertain a petition founded on a ground that had been determined by the IEBC prior to the nomination.

3.1.13 The ensuing sections of this Chapter outline the prevailing jurisprudence on the settlement of distinct types of pre-election disputes.

3.2 Delimitation of Boundaries

3.2.1 The IEBC must review the names and boundaries of constituencies at intervals of not less than eight years and not more than 12 years (Article 89(2) of the Constitution). The IEBC must also review the number, names and boundaries of counties periodically (Article 89(3) of the Constitution). Where a general election is to be held within 12 months of a review, the new boundaries do not take effect for purposes of that election.

3.2.2 Parliament cannot enact legislation that takes away the discretion conferred on the IEBC under Article 89 of the Constitution (*Attorney General & 2 Others v David Ndii & 79 Others,* Supreme Court Petition 12 of 2021 (Consolidated with Petitions 11 and 13 of 2021)). In particular, Parliament cannot enact a law that guarantees every county a minimum number of wards, as such a move takes away the discretion conferred on the IEBC under Article 89(5), (6) and (7) of the Constitution (*Rishad Hamid Ahmed & Another v IEBC*, Mombasa High Court Constitutional Petition No. 16 of 2016).

3.2.3 The concept of territorial integrity, as used in Articles 5 and 6 of the Constitution, only applies to the Republic of Kenya in its capacity as a sovereign state and subject of international law. Accordingly, counties (and other devolved units into which Kenya is divided) cannot invoke the concept of territorial integrity in proceedings relating to their boundary disputes (*Turkana County Government & 20 Others v Attorney General & 7 Others*, Nairobi High Court Constitutional Petition No. 113 of 2015).

3.2.4 The boundaries of counties can only be altered by an independent commission set up by Parliament for that purpose, through a recommendation passed with the support of the prescribed majorities (Article 188 of the Constitution; *Turkana County Government & 20 Others v Attorney General & 7 Others*, Nairobi High Court Constitutional Petition No. 113 of 2015; and *County Government of Isiolo & 10 Others v Cabinet Secretary, Ministry of Interior and Coordination of National Government & 3 Others*, Nairobi Petition No. 511 of 2015).

3.2.5 Any person aggrieved by a decision of the IEBC on delimitation of boundaries may apply to the High Court for a review *within 30 days* of the publication of the decision in the Kenya Gazette (Article 89(9) and (10) of the Constitution). The application for review may take the format of judicial review, constitutional petition, notice of motion or any other application invoking Article 89(10) of the Constitution (*Peter Odoyo Ogada & 9 Others v IEBC & 14 Others*, Nairobi Civil Appeal No. 307 of 2012). A person seeking the High Court's review must demonstrate an error, omission or default in the delimitation or alteration of the relevant boundaries (*Peter Odoyo Ogada & 9 Others v IEBC & 14 Others*, Nairobi Civil Appeal No. 307 of 2012). Further, the High Court cannot entertain an application for review filed after the expiry of the 30-day period (*Rishad Hamid Ahmed & Another v IEBC*, Mombasa High Court Constitutional Petition No. 16 of 2016).

3.2.6 Although persons who are aggrieved by the delimitation or alteration of boundaries have a right to move to the High Court for review, the role of the High Court in the review is limited to ensuring that the bodies tasked with the delimitation and alteration comply with the Constitution and applicable laws (*Turkana County Government & 20 Others v Attorney General & 7 Others*, Nairobi High Court Constitutional Petition No. 113 of 2015). Courts have no jurisdiction, and are ill-equipped, to redraw boundaries or substitute their own view with that of the bodies constitutionally tasked with the delimitation and alteration of boundaries (*Peter Odoyo Ogada & 9 Others v IEBC & 14 Others*, Nairobi Civil Appeal No. 307 of 2012). In *Shaban Mohamud Hassan & 2 Others v Shaban Mohamud Hassan & 3 Others*, Nairobi Civil Appeal No. 281 of 2012, the Court explained the rationale for this rule as follows:

> *It is not the court's duty to substitute the decision of IEBC with its own views but to use the constitutional yardstick to evaluate the process and final decision of the IEBC and to declare and hold unconstitutional any decision or part thereof that does not comply with the Constitution...The delimitation process is necessarily complex and the commissions are required to consider a myriad of factors. Balancing these factors within the limits of the law and the Constitution is the duty cast on the IEBC and the court will respect the choices made if those choices accord with the Constitution and the law.*

3.2.7 Courts can quash the delimitation of boundaries (by the order of *certiorari*) where the bodies constitutionally tasked with the delimitation or alteration have breached the Constitution or applicable laws (*Shaban Mohamud Hassan & 2 Others v Shaban Mohamud Hassan & 3 Others*, Nairobi Civil Appeal No. 281 of 2012).

3.2.8 Courts can also restrain (by the order of prohibition) the bodies constitutionally tasked with the delimitation or alteration of boundaries from undertaking the exercise in a manner that

is inconsistent with the Constitution or applicable laws (*Shaban Mohamud Hassan & 2 Others v Shaban Mohamud Hassan & 3 Others*, Nairobi Civil Appeal No. 281 of 2012). Further, they can direct the body constitutionally tasked with the delimitation and alteration of boundaries to go back and do the correct and proper thing (*Peter Odoyo Ogada & 9 Others v IEBC & 14 Others*, Nairobi Civil Appeal No. 307 of 2012).

3.3 Voter Registration

3.3.0.1 The IEBC is required to put in place structures to ensure the continuous registration of citizens as voters (Article 82 (1)(c) of the Constitution). The registration of all adult citizens as voters is a prerequisite for the realisation of the constitutional requirement of an electoral system based on universal suffrage based on fair representation and equality of the vote (see Articles 38(2) and 81(d) of the Constitution). The constitutional requirement of an electoral system based on universal suffrage means that state organs cannot prevent or impede an adult citizen from registering as a voter, or a registered voter from voting, without a lawful justification. In *Arnold Keith August & Another v Electoral Commission & Others*, CCT 8/99 [1999] ZACC 3, the Constitutional Court of South Africa explained the importance of universal suffrage in the following words:

> *Universal adult suffrage on a common voters' roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.*

3.3.0.2 In aiming to be inclusive and to enhance participation rights, electoral systems are increasingly accommodating special interests in voter registration and related voting rights. Two of these scenarios are discussed below.

3.3.1 *Citizens Residing Outside Kenya*

3.3.1.1 The IEBC must put in place an infrastructure for the progressive registration of citizens residing outside Kenya, and the progressive realisation of their right to vote (Article 82 (1)(e) of the Constitution (*IEBC v New Vision Kenya (NVK Mageuzi) & 4 Others*, Supreme Court Petition No. 25 of 2014).

3.3.1.2 The obligation to ensure the progressive registration of the Kenyan diaspora as voters, and the progressive realisation of their right to vote, applies to all elective posts (*IEBC v New Vision Kenya (NVK Mageuzi) & 4 Others*, Supreme Court Petition No. 25 of 2014; and *New Vision Kenya (NVK Mageuzi) & 3 Others v IEBC & 5 Others*, Nairobi Civil Appeal No. 350 of 2012). The High Court dismissed the case of *Republic v IEBC & 6 Others Ex Parte James Gitau,* Miscellaneous Application No E069 of 2020, where the applicant had sought to have diaspora voters take part in the anticipated BBI referendum. The High Court asserted that since the orders sought to be enforced had been issued by the Supreme Court, the correct forum to adjudicate over compliance or lack thereof with the apex Court's orders was the Supreme Court. The High

Court's judicial review jurisdiction had, therefore, been wrongfully invoked.

3.3.1.3 In South Africa, the Constitutional Court has found that citizens who are registered as voters and are abroad on polling day are entitled to vote, provided they give notice of their intention to do so in order to facilitate planning (*Richter v Minister of Home Affairs and Others, Democratic Alliance & Others Intervening,* CCT 09/09 [2009] ZACC 3).

3.3.1.4 The IEBC is required to publish, at regular intervals, the names of countries where registration and voting is scheduled to take place. The determination of these registration centres is based on the presence of a Kenyan Embassy, High Commission or Consulate (Regulation 34(2), Elections (Registration of Voters) Regulations 2012); the number of citizens registered with Kenyan missions in the host countries; whether the political environment is conducive, stable and predictable; and financial sustainability to support logistical, operational and administrative costs of carrying out the activity.

3.3.1.5 To ensure viability of these voting centres, the IEBC has set a threshold of 3000 voters before a registration centre can be established. In 2017, the IEBC facilitated citizens residing in Uganda, Tanzania, Rwanda, Burundi and South Africa. Then, in 2022, United Arab Emirates, United States of America, United Kingdom, Germany, Canada, Qatar and South Sudan were added to the list, bringing the total to 11 countries. However, Kenyan diaspora voters' participation is limited to presidential elections and referendums (Regulation 39, Elections (Registration of Voters) Regulations, 2012).

3.3.2 *Prisoners*

3.3.2.1 The Constitution does not bar prisoners, other than those convicted of election offences, from being registered as voters. Prisoners who are not convicted of election offences have a right, therefore, to be registered as voters and to vote in elections and referenda (*Priscilla Nyokabi Kanyua v Attorney General & Another,* Interim constitutional Dispute Resolution Court Nairobi Constitutional Petition No. 1 of 2010; and *Sauvé v Canada* (Chief Electoral Officer) (2002) 3 SCR 519, 2002 SCC 68). Further, Article 51 of the Constitution provides that 'a person who is detained, held in custody or imprisoned under any law, retains all the rights and fundamental freedoms in the bill of Rights, except to the extent that any right or fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned'.

3.3.2.2 The right to vote is not '*clearly incompatible*' with the fact of being imprisoned. Accordingly, prisoners have a right to be registered as voters and to vote in elections and referenda (*Kituo Cha Sheria v IEBC & Another,* Nairobi High Court Constitutional Petition No. 574 of 2012). Moreover, denying prisoners the right to vote would not serve any legitimate governmental objective or purpose (*Priscilla Nyokabi Kanyua v Attorney General & Another*, Interim Constitutional Dispute Resolution Court (Nairobi) Constitutional Petition No. 1 of 2010).

3.3.2.3 Since prisoners constitute a vulnerable group, the state is obliged to take positive steps to protect, promote and fulfil the enjoyment of their rights and fundamental freedoms, including the right to vote. Accordingly, it is not enough for the IEBC to merely set up voter registration centres or polling stations within or around prisons. The IEBC must go further and liaise with prison authorities to facilitate the actualisation of the right of prisoners to vote (*Kituo Cha Sheria v IEBC & Another*, Nairobi High Court Constitutional Petition No. 574 of 2012). In addition, the IEBC is mandated to submit an annual report to the President and Parliament, detailing the progress in realisation of the right to vote for prisoners (s 24(2)(ba), Independent, Electoral and Boundaries Commission Act). Presently, prisoners may only vote in a presidential election or a

referendum (Regulation 39E, Elections (Registration of Voters) Regulations, 2012 as amended by the Elections (Registration of Voters) (Amendment) Regulations, 2017).

3.3.2.4 Other jurisdictions such as Canada and South Africa have also affirmed prisoners' right to vote. In the case of *Sauvé v Canada* (Chief Electoral Officer) (2002) 3 SCR 519, 2002 SCC 68, the Supreme Court of Canada rejected the government's arguments that denying penitentiary inmates the right to vote sends an 'educative message' about the importance of respect for the law to inmates and to the citizenry at large. The Court held at paragraph 41 as follows:

> *I conclude that denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than messages that enhance those values. The government's novel political theory that would permit elected representatives to disenfranchise a segment of the population finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation. That not all self-proclaimed democracies adhere to this conclusion says little about what the Canadian vision of democracy embodied in the* ***Charter*** *permits. Punitive dis-enfranchisement of inmates does not send the "educative message" that the government claims; to the contrary, it undermines this message and is incompatible with the basic tenets of participatory democracy contained in and guaranteed by the* ***Charter****.*

3.3.2.5 In *Arnold Keith August & Another v Electoral Commission & Others*, CCT 8/99 [1999] ZACC 3, the Constitutional Court of South Africa ruled in favour of the right to vote for prisoners. Regarding the special arrangements by the electoral management body to facilitate voting by prisoners and the apprehension of additional difficulties and expenses associated with the same, the Court stated as follows:

> *There are a variety of ways in which enfranchisement of prisoners could be achieved in practice. Polling stations could be set up in the prisons or special votes could be provided to prisoners. Prisoners are literally a captive population, living in a disciplined and closely monitored environment, regularly being counted and recounted. The Commission should have little difficulty in ensuring that those who are eligible to vote are registered and given the opportunity to vote, and that the objective of achieving an easily managed poll on election day is accomplished.*

3.4 Procurement of Election Technology and Materials

3.4.1 The IEBC is required to procure the technology to be deployed in elections in an open and transparent manner (Article 227 of the Constitution; s 3, Public Procurement and Asset Disposal Act, 2015; s 44(4)(a), Elections Act, 2011). Such technology must, in addition, be procured *'in consultation with relevant agencies, institutions and stakeholders, including political parties...'* (s 44(5), Elections Act, 2011). In *Republic v IEBC & 3 Others ex parte Coalition for Reforms and Democracy*, Nairobi High Court Miscellaneous Civil Application No. 637 of 2016, the Court explained the need for holding consultations before procuring election technology in the following words:

> *...the provisions of section 38 of the Political Parties Act ought to be put into motion and implemented and the Political Parties Liaison Committee activated and booted up as it were in order to avoid unnecessary tensions and suspicions between the Independent Electoral Commission (sic) and Boundaries Commission, the Registrar of Political Parties and the political parties themselves...It must be appreciated that the process of general election is as much a political process as it is legal. Perception therefore plays a not too minor role in the said process. It is therefore as much important for the process to be fair as it is to be seen as fair. It is therefore crucial that a continuous*

> *dialogue between the Commission, the Registrar of political parties and the political parties themselves be nurtured in order to avoid any suspicions that the process is not being undertaken in a free, fair and transparent [manner] and that the system being administered is not impartial, neutral, efficient, accurate and accountable. An electoral process must not only meet the constitutional and legal threshold but ought to carry with it the confidence of the electorates. This in my view can only be achieved in a process where all the players are afforded a forum at which to air their grievances collectively and individually and in my view this is where the Political Parties Liaison Committee comes in.*

3.4.2 The technology deployed in elections must be '*accessible and inclusive for all citizens, including persons with disabilities and persons with special needs, to participate in the election process*' (Regulation 4(2), Elections (Technology) Regulations, 2017). Further, the IEBC must carry out regular inspections and servicing of election technology, to ensure the serviceability, reliability and availability (Regulation 6, Elections (Technology) Regulations, 2017).

3.4.3 The IEBC secretariat cannot procure electoral materials or technology when there are vacancies in all the offices of IEBC Commissioners. The rationale for this rule is that the Commissioners must ratify the secretariat's decisions before they can be attributed to the IEBC. In *Republic v IEBC & 3 Others ex parte Coalition for Reforms and Democracy*, Nairobi High Court Miscellaneous Civil Application No. 637 of 2016, the Court explained the rationale for the rule as follows:

> *...under the Constitution and the legislation, the foundation of the powers of the Secretariat is the existence of the Commission. The Secretary and the Secretariat can only carry out the powers vested in their offices when the Commission is in place exercising its powers since they implement what the Commission has resolved upon... The outcome of the tasks undertaken by the Commission's staff must be ratified by the Commissioners if they are to be deemed as the decisions of the Commission.*

3.4.4 A person who is neither a candidate nor a tenderer in a procurement undertaken by the IEBC, and hence has no right of recourse to the Public Procurement Administrative Review Board, may move to the High Court by way of judicial review or constitutional petition if they feel that the procurement does not meet the threshold of fairness, equity, transparency, competitiveness and cost-effectiveness set out in Article 227 of the Constitution (*Republic v IEBC & 3 Others ex parte Coalition for Reforms and Democracy*, Nairobi High Court Miscellaneous Civil Application No. 637 of 2016). The basis for this rule lies in the constitutional provisions giving '*every person*' the obligation and/or right to respect, uphold, defend and institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention (Articles 3(1) and 258(1) of the Constitution).

3.4.5 Courts will not usually invoke the public interest or public policy as a basis for upholding a procurement that violates the Constitution or other applicable laws (*Republic v IEBC & 3 Others ex parte Coalition for Reforms and Democracy*, Nairobi High Court Miscellaneous Civil Application No. 637 of 2016). Consequently, they may nullify a procurement that violates the Constitution, even where the effect of such a decision is to jeopardise the holding of an election and, arguably, hurt the public interest. In *Republic v IEBC & 3 Others ex parte Coalition for Reforms and Democracy*, Nairobi High Court Miscellaneous Civil Application No. 637 of 2016, the Court explained the rationale for nullifying such a procurement (i.e., one that does not align with the public interest) in the following words:

> *There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the*

> *Constitution under Article 10 of the Constitution...whereas public interest is a factor to be considered by the Court in arriving at its decision, where the alleged public interest is not founded on any legal provision or principle and runs contrary to the Constitution and the law, such perceived public interest will not be upheld by the Court...Consequently, any alleged public policy or interest that is contrary to the rule of law cannot be upheld...Whereas the Court agrees with the IEBC that it owes Kenyans a duty to ensure that unnecessary obstacles are not permitted to prevent the IEBC from preparing and carrying out the general elections of 8th August 2017, this Court's mandate is to ensure that the elections are conducted in accordance with the Constitution and the law, and will not allow itself to be a rubberstamp for a process that is clearly flawed and whose result is unlikely to meet the constitutional and legal threshold.*

3.4.6 With regard to the question of public participation in procurement of election material, the Court of Appeal has clarified that, as a general principle, public participation is a mandatory requirement in all procurements by a public entity (*IEBC v National Super Alliance (NASA) Kenya & 6 Others,* Nairobi Civil Appeal No. 224 of 2017). The mode, degree, scope and extent of public participation is assessed on a case-by-case basis. It is critical that there be reasonable notice and reasonable opportunity for public participation, with a realistic timeframe. The absence of a legal framework for public participation is not an excuse for a procuring entity or a State organ failing to undertake public participation if required by the Constitution or law (*IEBC v National Super Alliance (NASA) Kenya & 6 Others,* Civil Appeal 224 of 2017).

3.4.7 The Court, however, stated that there are exceptions to public participation in the procurement process and one such exception relates to direct procurement. The Court, at paragraph 185 of the judgment, held as follows:

> *In our view, subject to satisfying the requirements for alternative procurement methods (being the conditions stipulated in Sections 103 and 104 of the Public Procurement and Asset Disposal Act, 2015) direct procurement is constitutional. The trial court made a finding that there must be public participation before a decision to use direct procurement is made. Our reading of Sections 103 and 104 of the Public Procurement and Asset Disposal Act, 2015 and Article 227 (1) does not impose a mandatory requirement for public participation prior to using or adopting or making the decision to adopt direct procurement. Section 103 (2) of the Public Procurement and Asset Disposal Act, 2015 does not provide for public participation as one of the conditions to be satisfied prior to adopting direct procurement.*

3.4.8 An election court may recommend the investigation and possible prosecution of persons involved in procurement irregularities, especially where such irregularities lead to the failure of the technology employed in the conduct of an election (*Raila Odinga v IEBC & 3 Others,* Supreme Court Presidential Petition No. 5 of 2013). In view of the decision of the Supreme Court in *Raila Odinga v IEBC & 2 Others*, Supreme Court Presidential Petition No. 1 of 2017, irregularities in the procurement of electoral technology and materials are not sufficient, in and of themselves, to justify the nullification of an election; the irregularities have to be shown to have affected the result.

3.5 Suitability and Eligibility of Candidates

3.5.1 *Suitability*

3.5.1.1 Article 25 of the ICCPR entitles every citizen, without distinction and without unreasonable restrictions, to participate in public affairs, to vote and be elected, and to have equal access to the public service. Any conditions which apply to the exercise of the rights protected by

Article 25 should be based on objective and reasonable criteria e.g., a higher age for election or appointment to particular offices than for exercising the right to vote. But, these rights may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable (General Comment 25, UN Committee on Human Rights para 4; and (*Ekuru Aukot v IEBC & 3 Others,* Petition 471 of 2017).

3.5.1.2 The law on suitability and eligibility of candidates for elective public offices is set out in, *inter alia,* the Constitution; Leadership and Integrity Act, 2012; Ethics and Anti-Corruption Commission Act, 2011; Elections Act, 2011; IEBC Act, 2011; Public Officer Ethics Act, 2003; and Political Parties Act, 2011. The Constitution requires persons holding public office, whether appointive or elective, to meet certain minimum thresholds of personal integrity and probity. In *Trusted Society of Human Rights Alliance v Attorney General & 2 Others,* Nairobi High Court Constitutional Petition No. 229 of 2012, the Court explained this constitutional requirement as follows:

> *Kenyans were very clear in their intentions when they entrenched Chapter Six and Article 73 in the Constitution. They were singularly aware that the Constitution has other values* such as the presumption of innocence until one is proved guilty. *Yet, Kenyans were singularly desirous of cleaning up our politics and governance structures by insisting on high standards of personal integrity among those seeking to govern us or hold public office. They intended that Chapter Six and Article 73 will be enforced in the spirit in which they included them in the Constitution. The people of Kenya did not intend that these provisions on integrity and suitability for public offices be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations. Kenyans intended that the provisions on integrity and suitability for office for public and State office[r]s should have substantive bite. In short, the people of Kenya intended that the provisions on integrity of our leaders and public officers will be enforced and implemented.*

3.5.1.3 The Court of Appeal ultimately reversed the above decision on the question of unsuitability or unfitness of a person to hold State or Public Office on grounds of lack of integrity. The Court of Appeal held that the High Court is entitled to conduct a review of appointments to State or Public Office to determine the procedural soundness as well as the appointment decision itself to determine if it meets the constitutional threshold. However, such review by the court is not an appeal over the opinion nor does it amount to a 'merit review' of the decision of the appointing body. The Court of Appeal found that the High Court misapplied the rationality test in adopting a standard of review antithetic to the doctrine of separation of powers (*Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others*, Nairobi Civil Appeal No. 290 of 2012).

3.5.1.4 A person is suitable to hold public office if there are no serious unresolved questions about his or her honesty, financial probity, scrupulousness, fairness, reputation, soundness of moral judgment or commitment to the national values enumerated in the Constitution (*International Centre for Policy and Conflict & 5 Others v Attorney General & 5 Others,* Nairobi High Court Constitutional Petition No. 552 of 2012; and *Trusted Society of Human Rights Alliance v Attorney General & 2 Others*, Nairobi High Court Constitutional Petition No. 229 of 2012). In addition, a person who has been dismissed or otherwise removed from office for contravention of the provisions of Chapter Six of the Constitution is disqualified from holding any other State office (Article 75(3) of the Constitution).

3.5.1.5 A person is eligible to hold public office, on the other hand, if he or she holds the minimum educational, technical or professional qualifications set out in the Constitution or any other applicable law. Further, a person who is convicted of an offence under the Election Offences

Act, is not eligible for election or nomination in an election for a period of five years following the date of conviction (s 24(3), Election Offences Act, 2016).

3.5.1.6 Since suitability and eligibility refer to different concepts, a person may be eligible, that is technically or professionally qualified, but unsuitable to hold public office. The mere fact that a nominee or candidate is qualified to hold a public office does not, therefore, necessarily mean that the nominee or candidate is also suitable to hold that office.

3.5.1.7 Further, the mere fact that a nominee or candidate was adjudged to be a person of integrity or suitable to hold public office at a particular date, does not preclude inquiries as to their suitability to hold public office at a subsequent date (*Godfrey Mwaki Kimathi & 2 Others v Jubilee Alliance Party & 3 Others,* Nairobi High Court Petitions Nos. 102 and 145 of 2015). Conversely, the mere fact that a nominee or candidate was adjudged as lacking integrity or unsuitable to hold public office at a particular date in the past does not necessarily bar the person from holding public office at a future date, if the circumstances have changed (*Godfrey Mwaki Kimathi & 2 Others v Jubilee Alliance Party & 3 Others,* Nairobi High Court Petitions No. 102 and 145 of 2015).

3.5.1.8 A person cannot be disqualified from participating in an election on grounds of unsuitability or ineligibility unless all possibility of appeal or review of the decision on unsuitability or ineligibility has been exhausted (Article 99(3) of the Constitution; and *Commission on Administrative Justice v John Ndirangu Kariuki & IEBC*, Constitutional Petition No. 408 of 2013; and *Republic v IEBC & Another Ex Parte Paul Karungo Thang'wa* Judicial Review No 2 of 2022 (unreported)). Moreover, a candidate cannot be ineligible or unsuitable to vie for an elective position merely because they are adversely mentioned in inconclusive reports and investigations. In *Peter Gichuki King'ara v IEBC & 2 Others,* Nyeri Election Petition No. 3 of 2013, the Court held as follows:

> *...if the basis of the Petitioner's allegations against the 3rd Respondent are the diverse reports in which her ethics, integrity and morals have been questioned, would those reports constitute sufficient grounds, in the context of Article 91(1) of the Constitution, to deny her qualification for election as a member of National Assembly? Or could the 3rd Respondent be disqualified under Article 99(2) of the Constitution from contesting for the seat of the member of National Assembly...?... it would be drastic and draconian, in the premises, to condemn the 3rd Respondent on allegations which, for all intents and purposes, amount to felonies for which she has neither been investigated nor charged...The Constitution itself frowns at such a possibility; it provides that even if the 3rd Respondent had been investigated and charged for all or any of the possible offences that could possibly ensue from those allegations, that in itself would not disqualify her candidacy for the electoral seat.*
>
> *Article 99(3) thereof suggests that she can only be disqualified if she has been convicted to serve a sentence of more than six months and all avenues for appeal or review of the conviction and sentence have been exhausted...This court cannot proceed as if the allegations on the 3rd Respondent's morals and integrity have been proved. Neither can it turn itself into an investigative agency to determine the 3rd Respondent's criminal culpability in the light of the allegations raised against her. That should be left to the investigative agencies...*

3.5.1.9 The conduct of an inquiry into the suitability and eligibility of nominees and candidates for public office is an essential requirement for the enforcement of Chapter Six of the Constitution (*International Centre for Policy and Conflict & 5 Others v Attorney General & 5 Others,* Nairobi

High Court Constitutional Petition No. 552 of 2012).

3.5.1.10 Political parties are required, during party nominations, to ensure that candidates who are nominated make a self-declaration in the manner provided by the Leadership and Integrity Act, possess qualifications to hold elective office in the Constitution and other written law, and meets any requirements that may be prescribed by the Constitution and nomination rules of the political party (Regulation 13(1), Elections (General) Regulations; and s 38H Political Parties Act 2011).

3.5.1.11 However, the ultimate responsibility for inquiring into and determining the suitability and eligibility of candidates for elective office lies with the IEBC (*Michael Wachira Nderitu & 3 Others v Mary Wambui Munene Aka Mary Wambui & 4 Others*, Nairobi High Court Constitutional Petition No. 549 of 2012; *International Centre for Policy and Conflict & 5 Others v Attorney General & 5 Others*, Nairobi High Court Constitutional Petition No. 552 of 2012; *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others,* Supreme Court Petition 7 & 9 of 2018 (consolidated); and *Okiya Omtatah Okoiti & 15 Others v The Hon. Attorney General & 7 Others*, Nairobi Petition E090 of 2022 (consolidated)). In the case of *Dennis Gakuu Wahome v IEBC & Others*, Nairobi High Court Petition No. E321 of 2022 (Johnson Sakaja Koskei), the Court held as follows:

> *[218] Deriving from the foregoing, the DRC, therefore, exercises jurisdiction over election disputes except those which arise upon the declaration of election results and the disputes which fall within the purview of the Political Parties Disputes Tribunal.*
>
> *[221] This Court, on the basis of the Constitution, the law and the binding decisions of the Supreme Court, is clear in its mind that the DRC has the jurisdiction to deal with disputes on the academic qualifications of a candidate.*
>
> *[222] The DRC must, however, ensure that the requisite standard of proof is attained depending on the nature of and the manner in which the complaint is laid before it.*

3.5.1.12 The IEBC cannot evade accountability for this responsibility by simply saying that the voters have a chance to re-vet the nominees during the election (*Godfrey Mwaki Kimathi & 2 Others v Jubilee Alliance Party & 3 Others*, Nairobi High Court Petitions No. 102 and 145 of 2015).

3.5.1.13 The IEBC also cannot cite its own capacity constraints, or the existence of other constitutional or statutory bodies, as a justification for failing to determine or make inquiries as to the suitability and eligibility of candidates for elective offices. In *Godfrey Mwaki Kimathi & 2 Others v Jubilee Alliance Party & 3 Others*, Nairobi High Court Petitions No. 102 and 145 of 2015, the Court held as follows:

> *...the duty of determining the integrity of candidates falls squarely on the shoulders of the Commission [i.e. the IEBC]. It cannot run away from this obligation by simply saying that it has no machinery to determine the integrity of the candidates. In my view, the integrity of the electoral process encompasses the integrity of the players thereat and it is the duty of the Commission to ensure that the electoral process it presides over is free, fair and transparent. Therefore, integrity of the candidates is part and parcel of the integrity of the electoral process. The Commission cannot conduct sham or mock elections simply because it does not have the machinery to undertake its legal and constitutional obligations...where an issue of integrity is properly raised before the Commission, the Commission must make a determination thereon one way or the other. It cannot shirk its responsibility by shifting the onus to other bodies.*

3.5.1.14 Nevertheless, it is not the role of the IEBC to ensure the authenticity of degree certificates,

so long as certified copies of the same are produced, and where the degree is foreign, it is accompanied by a certificate of authentication of the issuing body by the Commission for University Education (Regulation 47, Elections (General) Regulations 2012; and *Gideon Keya and Another v Wavinya Ndeti and Others*, Machakos High Court Judicial Review No. 2 of 2022).

3.5.1.15 Courts in other jurisdictions have also grappled with questions of leadership and integrity. A decision from South Africa, albeit addressing an *appointive* position, is instructive. In *Democratic Alliance v President of the Republic of South Africa & 3 Others*, 263/11 [2011] ZASCA 241, the Supreme Court of Appeal of South Africa had to make a determination on whether the person appointed by the President as the National Director of Public Prosecutions (NDPP) was a fit and proper person within the meaning of section 9(1)(b) of the National Prosecuting Authority Act, 32 of 1998. The section requires that any person to be appointed as the NDPP must be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned. The Court held:

> *It is clear that the President did not undertake a proper enquiry of whether the objective requirements of s 9(1)(b) were satisfied. On the available evidence the President could in any event not have reached a conclusion favourable to Mr Simelane, as there were too many unresolved questions concerning his integrity and experience.*

3.5.2 *Eligibility and Qualifications*

3.5.2.1 The qualifications for elective office are spelt out in the Constitution and the Elections Act. A person qualifies for nomination as a presidential candidate if they are:

(i) a citizen by birth;

(ii) registered as a voter;

(iii) qualified to stand for election as a member of Parliament;

(iv) nominated by a political party or they are an independent candidate;

(v) nominated by not less than 2000 voters from each of a majority of the counties (at least 24 counties); and

(vi) a holder of a degree from a university recognized in Kenya

(*Article 137 of the Constitution and Section 23 of the Elections Act, 2011*)

3.5.2.2 A person is disqualified from being a presidential candidate if they owe allegiance to a foreign state or they are a public officer/or acting in any state or public office, other than office of President, Deputy President or Member of Parliament (*Section 23(2) Elections Act, 2011).*

3.5.2.3 The qualifications of a Deputy President candidate are similar to those of a President *(Article 148(1) of the Constitution).* By dint of Article 148(2) of the Constitution, however, no separate election is conducted for the office of Deputy President as upon the nomination of a deputy president candidate by a presidential candidate, the two candidates are linked, and the IEBC is under a duty to declare the nominated Deputy President duly elected upon the election of the presidential candidate who nominated them.

3.5.2.4 A person is qualified to be nominated as a County Governor or Deputy Governor candidate if:

(i) They are a registered voter;

(ii) They are eligible for election as an member of County Assembly;

(iii) They hold a degree from a university recognized in Kenya; and

(iv) They are not subject to any disqualifications set out in the Constitution and Elections Act.

(*Article 180(2) of the Constitution and Section 25 of the Elections Act, 2011*)

3.5.2.5 The qualifications for nomination as a Parliamentary (National Assembly and Senate) candidate are set out at Article 99 of the Constitution and sections 22 and 24 of the Elections Act. A person seeking such nomination must:

(i) Be a registered voter;

(ii) Satisfy any educational, moral and ethical requirements prescribed by the Constitution and the Elections Act;

(iii) Be nominated by a political party; or in the case of an independent candidate, be supported by at least 1000 registered voters in the constituency (Member of National Assembly candidates) or at least 2000 registered voters in the county (Senate) candidates; and

(iv) Not be subject to the disqualifications spelt out at Article 99(2) of the Constitution and section 24(2) of the Elections Act, 2011.

3.5.2.6 A person is qualified to be nominated as a member of County Assembly if:

(i) They are registered as a voter;

(ii) They satisfy any educational, moral and ethical requirements prescribed by the Constitution and Elections Act; and

(iii) They are nominated by a political party; or if an independent candidate, they are supported by at least 500 registered voters in the ward concerned.

3.5.3 *Disqualifications*

3.5.3.1 The following are the disqualifications for candidates seeking to be nominated to contest elective office:

(i) Citizenship – Citizenship is a pre-requisite for nomination for elective office. Whereas presidential and deputy presidential candidates must be citizens by birth, candidates in parliamentary and county elections can be Kenyan citizens by either birth or registration;

(ii) Being of unsound mind;

(iii) Being an undischarged bankrupt;

(iv) Serving a sentence of imprisonment of at least 6 months;

(v) Not being a Kenyan citizen for at least the 10 years immediately preceding the election the candidate seeks to be nominated in (this does not apply to presidential and deputy presidential candidates);

(vi) Having held office as a member of the IEBC within the period of 5 years before the date of the

election the candidate seeks to be nominated in;

(vii) Being a state officer or public officer: State and public officers are, by dint of section 43(5) of the Elections Act, under a duty to resign from state/public office at least 6 months before the date of the general election. However, the President, Deputy President, Governors and their Deputies, Senators, Members of the National Assembly and Members of the County Assembly are exempted by operation of section 43(6) of the Elections Act and do not need to resign prior to elections;

(viii) Being found to have misused or abused a state or public office or contravened Chapter 6 of the Constitution (Article 75(3) of the Constitution);

(ix) Owing allegiance to a foreign state: Whereas Article 137(2) of the Constitution (as read with Article 148(1) of the Constitution) expressly list this as one of the disqualifications from nomination as a presidential/deputy presidential candidate, the Constitution is silent on the other elective positions. However, the wording of the Oaths of Office subscribed to by the elected leaders commit them to the sole allegiance of Kenya; and

(x) Direct or indirect participation in any public fundraising or harambee within 8 months preceding a general election or during a general election. However, this prohibition does not apply to candidates'/political parties' fundraising.

(*Articles 99(2), 137(2), 148(1) of the Constitution and sections 23(2), 24(2), 25(2) & 26 of the Elections Act*)

3.5.3.2 However, persons cannot be deemed disqualified pursuant to the above provisions unless all possibility of appeal or review of the relevant sentence or decision have been exhausted (*Commission on Administrative Justice v John Ndirangu Kariuki & IEBC*, Constitutional Petition No. 408 of 2013; *Republic v IEBC & Another Ex Parte Paul Karungo Thang'wa* Judicial Review No 2 of 2022 (unreported)).

> **Editorial Note**: In relation to independent candidates, the court ruled in *Free Kenya Initiative & 6 Others v IEBC & 4 Others; Kenya National Commission on Human Rights (Interested party)* Constitutional Petition E160 of 2022 that the requirement in Regulations 24(2)(c), 28(2)(c), 32(2)(c) and 36(2)(c) of the Elections (General) Regulations, 2012 requiring independent candidates to supply copies of the identity cards of their supporters alongside signatures was discriminatory as it was not required of political party candidates and it was, therefore, unconstitutional. The High Court in *John Harun Mwau v IEBC & Another,* Constitutional Petition 26 of 2013, ruled in 2013 that there was nothing arduous or discriminatory about these requirements. Moreover, the Court ruled that the requirement to provide copies of supporters' identity cards contravened Article 31 of the Constitution and the Data Protection Act. The decision of the High Court was stayed pending appeal at the time of finalising this Bench Book.

3.5.4 *Educational requirements*

3.5.4.1 Eligibility arising from educational requirements is included in Article 99(2) of the Constitution as read with section 22 of the Elections Act, 2011. Degree requirements for elective office were first introduced in 2011 with the aim of being implemented in the 2013 general elections. When section 22(1)(b) was first crafted, it required all candidates for elective office to hold a post-secondary school qualification recognised in Kenya. The term 'post-secondary qualification'

was not defined by the statute. For candidates in presidential and gubernatorial elections (including deputies), the requirement was that the post-secondary qualification take the form of a degree from a university recognised in Kenya. In *Johnson Muthama v Minister for Justice & Constitutional Affairs & Another,* Petition Nos 198, 166 & 172 of 2011 (Consolidated) – challenging sections 3(1), 22(1)(b), 22(2), 23(1)(b), 24(1)(b), 25(1)(b) and 26(1) of the Elections Act for limiting the number of people who could contest for elective office – the Court took the view that by requiring post-secondary school educational qualifications and omitting to make more explicit provisions with regard to moral and ethical qualifications required under the Constitution, Parliament had misdiagnosed the real cause of the problem in Kenya's governance: lack of leaders with integrity. At para 58, the Court – in relation to the requirements for parliamentary elections candidates – stated:

> *A requirement for a post-secondary qualification does not address the real concern of the citizenry; indeed, it violates the provisions of the Constitution by excluding many who may not, through no fault of their own, have been able to achieve post-secondary education.*

3.5.4.2 The Court found sections 22(1)(b) and section 24(1)(b) of the Elections Act 2011, which barred persons not holding a post-secondary school qualification from being nominated as candidates for elective office or for nomination to Parliament, unconstitutional.

3.5.4.3 These requirements were suspended until the 2017 elections, upon enactment of section 22(2A) of the Elections Act vide the Elections (Amendment) Act No. 48 of 2012. The educational requirements for President, Deputy President, Governor and Deputy Governor remained immediately implementable.

3.5.4.4 In *John Harun Mwau v IEBC & Another,* Constitutional Petition 26 of 2013, the petitioner challenged, *inter alia*, the constitutionality of the requirement to hold post-secondary school education and asserted that any academic qualification would be sufficient. The Court found this position untenable for two reasons. First, the nature of duties and functions to be performed by Parliament demanded higher educational qualifications, skills and exposure gained through higher education. Second, section 22 had been enacted pursuant to Article 99 of the Constitution, which envisaged the setting of an educational threshold for those who sought election to Parliament. This requirement, in the view of the Court, was neither unreasonable nor unattainable as Kenyans from all walks of life had the opportunity to gain this qualification. In the words of the Court:

> *...post-secondary education as was enshrined under the said section 22(1)(b) of the Elections Act is attainable, sufficient and constitutional. To hold otherwise would be absurd after 50 years of independence.*

3.5.4.5 This was confirmed by the Court of Appeal in *John Harun Mwau v IEBC & Another,* Civil Appeal 112 of 2014:

> *...standards in regards to education qualifications for leaders seeking positions of power and responsibility cannot be discriminatory as it cuts across parties and those who do not qualify have an opportunity to seek first of all to attain the qualifications before vying for the offices.*

3.5.4.6 In *Okiya Omtatah Okoiti & Another v Attorney General & Another,* Constitutional Petition No. 161 of

2016, the Court stated:

> *...the issue of educational qualifications in regard to the candidates for elective political offices has been put to rest by courts of co-ordinate jurisdiction. The matter has also been settled by the Court of Appeal. The issue cannot be reopened again before this court... 28. It is only important to note that the issue of educational qualifications for those contesting political offices is no longer an issue available for determination by this court.*

3.5.4.7 In 2017, section 22(1)(b) of the Elections Act was amended by the Elections Laws (Amendment) Act No 1 of 2017 to state that for both parliamentary and County Assembly elections, candidates had to hold a degree from a university recognised in Kenya. However, the same statute postponed these requirements until the next general elections after 2017. The High Court confirmed that these requirements were not applicable to any by-elections held before the 2022 general elections (*Wilfred Manthi Musyoka v Returning Officer, IEBC, Machakos County & 4 Others,* Constitutional Petition E004 of 2021)

3.5.4.8 In 2022, the 2017 amendments were challenged in two separate cases. The requirements in relation to those contesting County Assembly slots were declared unconstitutional for want of public participation in *County Assembly Forum & 6 Others v Attorney General & 2 Others,* Constitutional Petition E229, E226, E249 and 14 of 2021. Moreover, subjecting all the candidates for member of County Assembly elections to a minimum of university degrees prejudiced the rights and fundamental freedoms of those who were not able to directly acquire or afford a university degree.

3.5.4.9 Moreover, the degree requirement for candidates seeking parliamentary seats was challenged in *Paul Macharia Wambui & 10 Others v Speaker of the National Assembly & 6 Others,* Constitutional Petition 28 of 2021 and Petition E037, E065 & E549 of 2021 & E077 of 2022. Therefore, while these requirements had appeared settled and 'no longer available for determination', the provisions of section 22(1)(b)(ii) of the Elections Act were declared unconstitutional for not meeting the Constitution's limitation of rights test under Article 24, for being discriminatory contrary to Article 27, for placing unreasonable restrictions on the exercise of political rights under Article 38(3), and for failing to consider the rights of minorities and marginalised groups as stipulated in Article 56. The provision was also impugned for failure to undertake adequate public participation.

3.5.4.10 The net result of these two decisions is that only candidates for the presidential and gubernatorial elections are required to supply proof of compliance with the degree requirement before being cleared by the IEBC.

3.5.4.11 The jurisprudence of the courts was previously that where a candidate had successfully undergone a process leading to the acquisition of the qualification required under the Constitution and Elections Act, and the Commission for University Education had recognised that process, the IEBC was obligated to accept the nomination of such a candidate (*Mable Muruli v IEBC*, Petition No. 93 of 2013; and *Janet Ndago Ekumbo Mbete v IEBC & 2 Others,* Constitutional Petition 116 of 2013). However, in 2017, Regulation 47(1) of the Elections (General) Regulations was amended by Legal Notice No 72 of 2017 to specifically require, as proof of a candidate's educational qualification, 'certified copies of certificates of the educational qualification'. As a consequence, it is no longer sufficient to demonstrate completion of the process leading to acquisition of a degree. Certified copies of the degree certificate are required, and where the degree is foreign, it must be accompanied by a certificate of authentication of the issuing body

(*Walter Onchonga Mongare v Wafula Chebukati & 2 Others*, Constitutional Petition No. E318 of 2022; and *Jimi Richard Wanjigi v Wafula Chebukati & 2 Others*, Civil Appeal No E404 of 2022).

3.5.4.12 Challenges to a candidate's eligibility on the basis of educational requirements ought to be raised with the IEBC at the pre-election stage and, if this is not done, it cannot be raised before the election court. However, the supervisory jurisdiction of the High Court may still be invoked on the matter after the election (*Sammy Ndung'u Waity v IEBC & 3 Others,* Supreme Court Petition 33 of 2018; *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others,* Supreme Court Petition 7 & 9 of 2018 (consolidated)); and *Armstrong Mwandoo Kiwoi & Another v Granton Graham Samboja & 7 Others,* Voi Election Petition 1 of 2017).

3.5.4.13 However, in *Ethics and Anti-Corruption Commission v Granton Graham Samboja & Snother; Kenyatta University & Another (Interested Parties),* Constitutional Petition 382 of 2017, the High Court struck out the constitutional petition on the basis that the issue of educational qualifications ought to have been raised in an election petition, not a constitutional one. The Court did not refer to *Armstrong Mwandoo Kiwoi & Another v Granton Graham Samboja & 7 Others,* Voi Election Petition 1 of 2017, filed on the same issue and which had been struck out to allow the constitutional petition to address the issue of educational qualifications. Moreover, it also does not appear to accord with the Supreme Court's jurisprudence on this issue. The Supreme Court dicta in *Sammy Waity* is to the effect that, where such an issue is not resolved, the supervisory jurisdiction of the High Court can still be invoked after elections (*Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others,* Supreme Court Petition 7 & 9 of 2018 (consolidated)).

3.5.4.14 Where it is alleged that a candidate does not possess the requisite educational qualifications, it is incumbent upon the person alleging to adduce evidence of the same, particularly where forgery in the acquisition of the degree certificate is alleged (*Janet Ndago Ekumbo Mbete v IEBC & 2 Others,* Constitutional Petition 116 of 2013. In *Dennis Gakuu Wahome v IEBC & Others*, Nairobi High Court Petition No. E321 of 2022 (Johnson Sakaja Koskei) (unreported), the Court asserted:

> *[245] At the beginning of the proceedings before the DRC, both the legal and evidential burden of proof were on the Petitioner.*
>
> *[246] It is the Petitioner who alleged that the 4th Respondent's degree certificate from the TEAM University was falsified. The Petitioner went further and annexed a copy of the degree certificate in his disposition. Therefore, the Petitioner was in possession of the impugned degree at the institution of the case before the DRC.*
>
> *[247] Given that the Petitioner's case was based on criminal allegations on the part of the 4th Respondent relating to the degree certificate which was in the possession of the Petitioner, the evidential burden of proof called upon the Petitioner to prove that indeed the degree certificate was not genuine and that the 4th Respondent had committed various criminal acts.*
>
> *[248] It was upon the tendering of such evidence by the Petitioner that the evidential burden of proof would then shift to the 4th Respondent.*
>
> *[282] As I come to the end of this issue, I must express concern in the manner in which serious matters regarding allegations of forged academic documents are generally handled in this country. I say so noting that this is not the first case in which the High Court has declined to find a party accused of forging academic certificates culpable in non-criminal proceedings. The High Court has repeatedly stated that matters of such*

> *gravity must be handled carefully: investigations be thoroughly carried out and those culpable to be brought to book. Once that happens, then the criminal convictions can be used to mount challenges like the one before this Court.*

3.5.4.15 It is not the role of the IEBC to ensure the authenticity of degree certificates, so long as certified copies of the same are produced, and where the degree is foreign, it is accompanied by a certificate of authentication of the issuing body by the Commission for University Education (Regulation 47, Elections (General) Regulations, 2012). In *Gideon Keya & Another v Wavinya Ndeti & Others*, Machakos High Court Judicial Review No. 2 of 2022, the Court ruled:

> *[116] It is therefore clear that the powers to recognize and equate degrees, diplomas and certificates rests with the 3rd Respondent* (Commission for University Education). *In undertaking its mandate, it is required to undertake or cause to be undertaken, regular inspections, monitoring and evaluation of universities. In this case the 3rd Respondent confirmed that the institutions from which the 1st Respondent obtained her degrees and certifications are recognized.*
>
> *[117] The applicants have not cited before me any statute that compels the 2nd Respondent to make a decision as regards the recognition or equation of university degrees. They have however cited Regulation 47 of the Elections (General) Regulations, 2012....*
>
> *[118] With due respect I cannot read into the said regulation any power conferred upon the 2nd Respondent* (Independent Electoral and Boundaries Commission) *to recognize or equate university degrees. I therefore associate myself with the decision of Mrima J. in Petition E321 of 2022, Dennis Gakuu Wahome vs The Independent Electoral and Boundaries Commission and Others and find that the 2nd Respondent has no power to recognize or equate university degrees and therefore cannot be compelled to investigate the authenticity of a university degree that is already recognized by the 3rd Respondent.*

3.5.5 *Resignation of Public Servants Seeking Elective Posts*

3.5.5.1 The law regulating the participation of civil servants in politics is set out in, *inter alia*, the Constitution; Elections Act, 2011; Political Parties Act; Public Officer Ethics Act, 2003; and Leadership and Integrity Act, 2012. The thread that runs across all these laws is the restriction of civil servants from engaging in activities that may compromise the political neutrality of the public service (*Frederick Otieno Outa v Jared Odoyo Okello & 4 Others*, Supreme Court Petition No. 6 of 2014). Public servants who wish to contest for an elective position must resign from, or have vacated, the public service *at least six months* prior to the date of a general election (s 43(5), Elections Act, 2011).

3.5.5.2 A public servant who wishes to contest in a by-election, on the other hand, is required to resign from public office *within 7 days* of the declaration of a vacancy in the office that is the subject of the by-election (s 43(5A), Elections Act, 2011). The rationale for the shorter resignation period in the case of by-elections lies in the unpredictability of the circumstances (death, resignation, etc) that give rise to the need to hold a by-election.

3.5.5.3 Accordingly, Parliament cannot enact a law requiring candidates for by-elections to resign from public office long before the by-election, as such, a law would be an unreasonable and unjustifiable restriction on political rights. In *Union of Civil Servants & 2 Others v IEBC & Another*, Nairobi High Court Constitutional Petition No. 281 of 2014, the petitioners challenged a statutory requirement to resign from public service *within seven months* as a pre-condition for participating in a by-election, on the ground that the circumstances leading to a by-election

were unpredictable and the period set out in the statute was impracticable. The Court held as follows:

> *...the issue confronting me now is whether the apparent limitation of the right to enjoyment of political rights as set out in Section 43 (5) of the Elections Act, is reasonable and justifiable in the context of a by-election? I think not. I say so because as can be discerned from the provisions of Article 101 (4) of the Constitution, a by-election is conducted subject to a vacancy arising in circumstances contemplated under Article 103 of the Constitution. Taking those circumstances into account i.e. death, resignation, disqualification etc., it would be difficult to predict and foresee the possibility of a vacancy arising in Parliament or a County Assembly so that a public officer can prepare to contest in that by-election. Those circumstances are also uncertain. Despite the above uncertainties, the law as stipulated in Article 101 (4) (b) of the Constitution as stated elsewhere above, is clear that a by-election must be held within three months of a vacancy arising. How then can one say that seven months is reasonable and justifiable, when the period envisaged under Section 43(5) is longer than that stipulated under Article 101(b) of the Constitution?...I do not see any justification for denying a public officer the right to contest a vacant seat in [a] by-election if he has resigned as soon as a vacancy has occurred and that is as soon as the Speaker of either House of Parliament has given notice of the vacancy to the IEBC under Article 101(4) of the Constitution. To hold otherwise would be to promote an absurdity that was never intended by the drafters of the Constitution.*

3.5.5.4 In *Evans Gor Semelang'o v IEBC & Another*, Nairobi High Court Constitutional Petition No. 358 of 2014, the Court explained the rationale for requiring public servants to resign or vacate office as a precondition for engaging in electoral politics in the following terms:

> *...the intent behind these provisions was to lessen the considerable influence that public officers have historically yielded (sic) in public affairs which was deemed to give them an unfair advantage over others in the electoral context. While the section deals with resignation of a public officer, what must have been in contemplation was that a public officer would not vie for elective office until after six months from the date he or she ceased to hold public office, whether through resignation, retirement, expiration of a term of appointment or, as in the present case, revocation of appointment.*

3.5.5.5 There are many justifications for requiring public servants to resign as a precondition for contesting elective offices, besides the need for political neutrality of the public service. These include the need to:

i. prevent public officers from interfering with elections;

ii. maintain the dignity of public office; and

iii. prevent the deployment of public resources in election campaigns (*Evans Gor Semelang'o v IEBC & Another*, Nairobi High Court Constitutional Petition No. 358 of 2014).

3.5.5.6 The rationale for the requirement of public servants to resign as a precondition for seeking elective office lies in the need for political neutrality of the public service. Accordingly, the courts will not necessarily declare as unconstitutional statutory provisions requiring public servants to resign as a precondition for seeking elective office (*Charles Omanga & Another v IEBC & Another*, Nairobi High Court Constitutional Petition No. 2 of 2012).

3.5.5.7 The intention of the law is also to prohibit a person from holding two state offices simultaneously (*Stephen Wachira Karani v Attorney General & 4 Others,* Constitutional Petition 321 & 331 of 2017). Sections 43(5) and (6) of the Elections Act also aim at promoting, among other things, the national values and principles of good governance and integrity (*Public Service Commission & 4 Others v Eric Cheruiyot & 32 Others,* Civil Appeal 119 & 139 of 2017 (consolidated)).

3.5.5.8 To ensure that government functions are not interrupted during an election period, the requirement of resignation of state officers does not apply to the following state officers: the President, the Deputy President, a Member of Parliament, a County Governor, a Deputy County Governor and a Member of County Assembly (s 43(6), Elections Act; and *Kennedy Irungu Ngodi & Another v Mary Waithera Njoroge & 11 Others,* Petition No. E369 Of 2020). To require them to resign six months to a general election would be to reduce their term of office to four and a half years. This would create a vacuum as no by-elections can be held within that period.

3.5.5.9 However, this construction does not hold in the event of a by-election for Member of Parliament as the term of the County Assembly would still be running. A resignation would, therefore, be required if a member of County Assembly seeks to contest a parliamentary by-election (*Stephen Wachira Karani v the Attorney General & 4 Others,* Constitutional Petition 321 & 331 of 2017).

3.5.5.10 Moreover, the offices of Member of Parliament and Member of County Assembly fall vacant at the end of the term of the relevant house. This obviates the need for them to resign before the general election (*Annie Wanjiku Kibeh v Clement Kungu Waibara & Another,* Civil Appeal No. E468 of 2020). The law does not prohibit a Member of County Assembly from being nominated to vie for a parliamentary seat by a political party (*Stephen Wachira Karani v Attorney General & 4 Others,* Constitutional Petition 321 & 331 of 2017).

3.5.5.11 Recent legal developments indicate a move towards relaxation of restrictions against public servants' engagement in electoral politics. In 2017, Parliament amended the Elections Act, 2011 following the decision in *Union of Civil Servants & 2 Others v IEBC & Another,* Nairobi High Court Constitutional Petition No. 281 of 2014, by reducing the resignation period for public servants seeking to contest a by-election from 7 months to 7 days of the declaration of a vacancy (s 43(5A), Elections Act, 2011).

3.5.5.12 The Employment and Labour Relations Court subsequently declared, in *Eric Cheruiyot v IEBC & 3 Others*, Kericho Employment and Labour Relations Court Constitutional Petition No. 1 of 2017, that public servants seeking to vie for elective positions in a general election could remain in public service until the date of nominations. The Court held in part:

> *The hardship of the disqualification for public servants seeking elective positions was intended to be mitigated by parliament in its legislation as directed by Article 82 of the constitution. It was not anticipated that parliament would enhance this disqualification by coming out with legislation that is unfriendly and limiting to the enjoyment of fundamental rights by public servants. I therefore find that Section 43(5) of the Elections Act is unjustifiable, irrational, most unreasonable, oppressive and hold as such.*

3.5.5.13 However, this decision was overturned by the Court of Appeal. In *Public Service Commission & 4 Others v Eric Cheruiyot & 32 Others,* Civil Appeal 119 & 139 of 2017 (consolidated), the Court ruled that the requirement for public servants to resign six months before a general election is necessary as it ensures that the IEBC has sufficient time to undertake its processes and prevent unnecessary interruptions to the elections calendar. It, therefore, remains reasonable

and justifiable and does not violate the Constitution.

3.5.5.14 The requirement of resignation of public servants was also found to be applicable to persons seeking election as speakers of the County Assembly, the National Assembly or the Senate (*Philip K Langat v IEBC*, Constitutional Petition E317 of 2022).

3.5.6 *Challenges to Candidates Eligibility*

3.5.6.1 Generally, the courts will not entertain disputes relating to the suitability or eligibility of candidates where the parties have not exhausted the alternative dispute resolution procedures set out in the IEBC Act, 2011; Political Parties Act; Elections Act, 2011; or any other relevant law (*Michael Wachira Nderitu & 3 Others v Mary Wambui Munene Aka Mary Wambui & 4 Others*, Nairobi High Court Constitutional Petition No. 549 of 2012; *Ben Njoroge & Another v IEBC & 2 Others*, Nairobi High Court Petition No. 14 of 2013; *Josiah Taraiya Kipelian Ole Kores v Dr. David Ole Nkedianye & 3 Others*, Nairobi Election Petition No. 6 of 2013; and *Okiya Omtatah Okoiti & 15 Others v Attorney General & 7 Others*, Nairobi Petition E090 of 2022 (consolidated)).

3.5.6.2 If this is not done, it cannot be raised before the election court, but the supervisory jurisdiction of the High Court may still be invoked after the election (*Sammy Ndung'u Waity v IEBC*; and *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others,* Supreme Court Petition 7 & 9 of 2018 (consolidated)).

3.5.6.3 An election court should decline to entertain a dispute relating to the suitability or eligibility of a candidate where the petitioner has failed to refer the dispute to the IEBC (*Josiah Taraiya Kipelian Ole Kores v Dr. David Ole Nkedianye & 3 Others*, Nairobi Election Petition No. 6 of 2013). A person who is aggrieved by the IEBC's decision on the suitability or eligibility of a candidate, however, may apply to the High Court for review of the decision (*Diana Kethi Kilonzo & Another v IEBC & 10 Others*, Nairobi High Court Constitutional Petition No. 359 of 2013). Where the IEBC's decision relates to the suitability and/or eligibility of a candidate for election to the office of the President or Deputy President, however, the aggrieved person must seek its review at the Supreme Court (*International Centre for Policy and Conflict & 5 Others v Attorney General & 5 Others*, Nairobi High Court Constitutional Petition No. 552 of 2012). However, the jurisdiction of the Supreme Court can only be activated after the declaration of election results (*Isaac Aluoch Polo Aluochier v IEBC & 19 Others,* Supreme Court Petition 2 of 2013).

3.5.6.4 The principles to be applied by an election court when faced with a pre-election dispute were spelt out by the apex Court in the case of *Sammy Ndung'u Waity v IEBC & 3 Others,* Supreme Court Petition 33 of 2018. The principles are:

a. *All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT as the case may be in the first instance.*

b. *Where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, such dispute shall not be a ground in a petition to the election Court.*

c. *Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution. The High Court shall hear and determine the dispute before the elections and in accordance with the Constitutional timelines.*

d. *Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court.*

e. *The action or inaction in (d) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, even after the determination of an election petition.*

f. *In determining the validity of an election under Article 105 of the Constitution or Section 75 (1) of the Elections Act, an election court may look into a pre-election dispute if it determines that such dispute goes to the root of the election and that the petitioner was not aware or could not have been aware of the facts forming the basis of that dispute before the election.*

3.5.6.5 Where the IEBC fails to make due inquiry into the eligibility and suitability of a candidate, the aggrieved party can invoke the supervisory jurisdiction of the High Court (*Luka Angaiya Lubwayo & Another v Gerald Otieno Kajwang & Another*, Nairobi High Court Election Petition No. 120 of 2013; *International Centre for Policy and Conflict & 5 Others v Attorney General & 5 Others*, Nairobi High Court Constitutional Petition No. 552 of 2012; and *Karanja Kabage v Joseph Kiuna Kariambegu Ng'ang'a & 2 Others*, Nairobi Civil Appeal No. 301 of 2013).

3.5.6.6 This jurisdiction is not lost because an election has already taken place (*Wilfred Manthi Musyoka v Returning Officer, IEBC, Machakos County & 4 Others,* Constitutional Petition E004 of 2021). The High Court's intervention in such cases, however, is limited to ensuring that the IEBC undertakes due inquiries in accordance with the standards set out in the Constitution. The High Court cannot, in the exercise of its supervisory jurisdiction, arrogate to itself the role of conducting inquiries into the suitability and eligibility of a candidate (*Benson Riitho Mureithi v J. W. Wakhungu & 2 Others,* Nairobi High Court Petition No. 19 of 2014; and *Godfrey Mwaki Kimathi & 2 Others v Jubilee Alliance Party & 3 Others*, Nairobi High Court Petition Nos. 102 and 145 of 2015).

3.5.6.7 However, the fifth principle articulated in *Sammy Ndung'u Waity v IEBC & 3 Others,* Supreme Court Petition 33 of 2018, further gives the High Court some residual jurisdiction to be deployed, even after a cycle of EDR. In the case of *Clement Kung'u Waibara v Anne Wanjiku Kibeh & Another,* Nairobi Civil Appeal No. 431 of 2019, the Court of Appeal affirmed the position that a petition to declare a parliamentary seat vacant on the disqualification grounds set out in Article 99 of the Constitution would not be deemed as *res judicata*, even if the courts had affirmed the validity of the election. In this case, the petitioner challenged the election of the Gatundu North Constituency member of National Assembly. His petition was allowed, and the election nullified. The Court of Appeal overturned this finding and declared the MP validly elected, a decision that was affirmed by the Supreme Court.

3.5.6.8 After the Supreme Court had affirmed the election of the MP, the petitioner moved the High Court to declare her parliamentary seat vacant under Article 105(1) of the Constitution on the ground that she was not qualified to have been nominated to contest the parliamentary election; having failed to resign as a member of County Assembly prior to being nominated to contest parliamentary office. The petitioner had raised the same issue in the election petition. However, it was never determined on the merits as the election court declined jurisdiction.

3.5.6.9 While the Court of Appeal ultimately held, in *Kibeh v Waibara & Another* Civil Appeal E468 of 2020, that the petition lacked merit since, at the time of the 2017 elections, Hon. Kibeh had

ceased to be a member of the County Assembly, the term of the County Assembly having come to an end, the decision demonstrates the possibility that petitions on qualification/eligibility can still be brought outside the EDR process timelines.

3.5.7 *Emerging Issues on Eligibility and Qualifications*

3.5.7.1 There appears to be a lack of clarity on the interpretation and application of Chapter Six of the Constitution in relation to persons seeking elective positions. While Article 75(3) of the Constitution provides that a person who is removed from office for violating Articles 76, 77 and 78(2) of the Constitution is ineligible from holding any other state office, and Articles 99(2)(h) and 193(2)(g) provides for disqualifications of those found to have misused or abused any state or public office, Articles 99(3) and 199(3) provide that the disqualification does not attach until all possibility of appeal or review is exhausted (*Commission on Administrative Justice v John Ndirangu Kariuki & IEBC*, Constitutional Petition No. 408 of 2013).

3.5.7.2 The Supreme Court had been approached to render an advisory opinion in *Kenya National Commission on Human Rights v Attorney General; IEBC & 16 Others (Interested Parties),* Supreme Court Advisory Opinion Reference No. 1 of 2017. The applicant sought a purposive interpretation of Articles 38, 50, 99, 137, 180 and 193 of the Constitution – specifically in the context of the affairs of political parties – citing the apparent contradiction, lack of clarity and/or guidance in High Court and Court of Appeal decisions on the place of Chapter Six of the Constitution. More so with regard to the leadership and integrity qualification of persons offering themselves to be elected or appointed to public service and/or offices. It was asserted that due to erroneous, restrictive, conflicting, inconsistent and incoherent interpretations of the Constitution by various institutions, there was need for guidance by the Supreme Court. The applicant's concern was that, due to the resultant confused jurisprudence, the provisions of Chapter Six of the Constitution had been rendered ineffective and toothless.

3.5.7.3 The apex Court ruled that the issues framed were mainly issues of constitutional interpretation and the High Court was, therefore, the court of first instance with jurisdiction to interpret and apply the Constitution. Since two petitions had been filed in the High Court, the Court declined to exercise its advisory jurisdiction asserting:

> *[84] We find that the Applicant's averment at paragraph 13 of the Reference enumerating the alleged contradicting decisions of the Superior Courts, and at paragraph 15 of the Reference which provided that 'this Court needs to clarify the fit and proper test for leadership under Chapter Six of the Constitution in light of the conflicting and confusing case law that has built up on this issue', was an invitation to this Court to resolve the contradictory precedents.*
>
> *[85] This invitation cannot be extended to this Court while exercising its discretionary jurisdiction under Article 163 (6) of the Constitution. By its invitation therefore, the Applicant sought to create an original jurisdictional creature called 'harmonization' jurisdiction contrary to the provisions of our Constitution and the statutes.*

3.5.7.4 In 2022, the IEBC, relying on Article 75(3) of the Constitution issued a press release indicating that persons who had been removed from office were ineligible to seek elective office. In *Okiya Omtatah Okoiti & 15 Others v Attorney General & 7 Others*, Nairobi Petition E090 of 2022 (consolidated), the three-judge bench was urged to harmonise the conflicting decisions of the High Court on the interpretation of Chapter Six, including *International Centre for Policy and Conflict & 5 Others v Attorney General & 5 Others*, Nairobi High Court Constitutional Petition No. 552 of 2012, *Luka Angaiya Lubwayo & Another v Gerald Otieno Kajwang & Another*, Nairobi

High Court Election Petition No. 120 of 2013; *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others*, Nairobi Civil Appeal No. 290 of 2012; *Marson Integrated Ltd v Minister for Public Works & Another*, High Court Petition No. 252 of 2012; *Benson Riitho Mureithi v J. W. Wakhungu & 2 Others*, Nairobi High Court Petition No. 19 of 2014; *Commission on Administrative Justice v John Ndirangu Kariuki & IEBC*, Constitutional Petition No. 408 of 2013; and *Ethics and Anti-Corruption Commission v Granton Graham Samboja & Another; Kenyatta University & Another (Interested Parties),* Constitutional Petition 382 of 2017. However, since the petitions in the *Omtatah* case were general in nature, the Court declined to engage in harmonisation in the abstract. In the words of the Court at para 80:

> *Having considered the entirety of Petition Nos E090 of 2022, E168 of 2022 and E221 of 2022, we hold the view that the petitions are general in nature, raise issues without reference to concrete facts, do not allege any wrong doing against a specific person and do not have specific respondents against whom such relief may be granted. The petitions only beseech the court to pronounce itself on abstract and clearly academic questions. We reject this entreaty.*

3.5.7.5 Moreover, since eligibility issues fall within the ambit of the IEBC, the Court invited the parties to exhaust that mechanism before approaching the High Court.

3.5.7.6 In *Republic v IEBC & Another Ex Parte Paul Karungo Thang'wa*, Judicial Review No 2 of 2022 (unreported), the High Court reasserted that the right to contest elective office provided that all possibility of appeal or review had to be exhausted:

> *[70] And if the reason for refusal to clear the Exparte Applicant was disqualification under article 75 of the Constitution, it provides that a person who has been dismissed or otherwise removed from office for contravention of provisions specified in clause (2) is disqualified from holding any other state office.*
>
> *[71] It is not however disputed that the then Governor did not dismiss the Exparte Applicant following resolution by the County Assembly for him to be removed or dismissed. The Exparte Applicant ceased to hold office following impeachment of the Governor in compliance with Article 179 (7) of the Constitution which provides that if a vacancy arises in the office of County Governor the members of the County Executive Committee appointed under clause (2) (b) cease to hold office. From the foregoing it would not be right to conclude that the Exparte Applicant was removed from office.*
>
> *[72] but even if one was to consider that the Exparte Applicant was removed from office, documents have been attached to supporting affidavit which confirm that the Exparte Applicant filed appeal way before that communique was issued by the Chairman IEBC and Article 99 (3) provide that a person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence has been exhausted.*
>
> *[73] I agree with the counsel for that the Exparte Applicant that he is entitled to benefit from Article 99 of the Constitution which gives a party opportunity to exhaust appeal process if appeal has been filed challenging decision that disqualify the party from vying for a political position.*

3.5.7.7 The eligibility of a gubernatorial candidate who had been impeached but whose appeal was pending as provided for in Article 193(3) of the Constitution, was asserted in *Mike Gideon Sonko v Swalha Ibrahim Yusuf & Others*, Mombasa High Court Petition No. E027 of 2022:

> *[110] There is no gainsaying that the Petitioner was impeached on 17th December 2022 and that his Petition to the High Court and appeal to the Court of Appeal were dismissed.*

We pause here to emphasize the point that, ordinarily, a person who is impeached and removed from state office for gross violation of the Constitution is not eligible to hold any other state office. Article 75 (3) of the Constitution is explicit....

[111] It is from that standpoint that counsel for the 1st, 2nd and 3rd Respondents took the stance that the Petitioner is not only ineligible but also unsuitable to vie as a candidate for the position of Governor, Mombasa County. The Petitioner however relied on Article 193 (30 of the Constitution....

[119] A holistic approach of interpretation in essence means that the Constitution speaks as one harmonious document; and that it is not self-contradictory. Thus. Article 75, being part of Chapter 6 of the Constitution cannot be read in isolation from Article 193; granted that Article 193 (2) (g) does provide for disqualification on the basis of contravention of any of the Chapter 6 provisions. In the premises, we are persuaded that Article 193 (3) was deliberately put in place by the framers of the Constitution and by extension, Kenyans, to afford protection to any citizen who has a pending appeal or review during the pendency of such appeal or review.

[120] Indeed, in the Media Release issued by the CEO of the 3rd Respondent dated 4th June, 2022, he acknowledged, at paragraphs D that:

The Commission received a report on one aspirant who had been convicted by the Court and has since appealed the conviction. The commission reckoned that such an aspirant is protected by the provisions of Article 99 (30 and Article 193 (30 of the Constitution which stipulates that a person is not disqualified unless all possibility of appeal and review of the relevant sentence or decision has been exhausted.

[121] It is, in our considered view, discriminatory that the 3rd Respondent would, in the same breath, deny the Petitioner's candidature in the face of his pending appeal to the Supreme Court. Indeed, at paragraph 37 of the 1st Respondent's affidavit she stated that the Petitioner failed to present proof of the pending appeal in time; the implication being that had the documents been availed in time, her decision would have been different. Her averments at paragraphs 36, 37, 38, 39, 40, 41 and 42 of the Replying Affidavit sworn on 1st July, 2022 are explicit enough on this point. She confirmed that the documents were ultimately supplied on 7th June, 2022 at 4:31 pm by M/s Kirui Kamwibwa & Co. Advocates on behalf of the Petitioner. The letters are marked Annexures SIY-11 and 12 (i) to that affidavit. We also note that from Annexure SIY-12 (ii), the 3rd Respondent is the 8th Respondent in the pending Appeal No. E008 of 2022 before the Supreme Court which was scheduled for mention on 10th June, 2022. They cannot therefore feign ignorance of an appeal to which they are parties.

3.5.7.8 However, following the decision of the Supreme Court upholding the impeachment for being in compliance with the Constitution and the law in *Mike Mbuvi Sonko v Clerk County Assembly of Nairobi*, Supreme Court Petition 11(E008) of 2022 (unreported), the IEBC revoked the certificate of clearance issued pursuant to the decision of the High Court in Petition E027 above.

3.5.7.9 It remains to be seen how the conflict between Articles 75(3), 99(3) and 193(3) will be harmonised in the future to give effect to the intention of Chapter Six i.e., that the authority assigned to a state officer is a public trust to be exercised in a manner that demonstrates respect for the people, brings honour to the nation and dignity to the office, and promotes public confidence in the integrity of the office on one hand, and right to fair hearing, including review by a higher court as prescribed by law, on the other.

3.6 Nomination of Candidates

Nomination is the process through which political parties decide candidates who will represent the parties during the elections. Nomination of candidates involves both the political parties and the IEBC.

3.6.1 *Political parties*

3.6.1.1 Party nominations

3.6.1.1.1 A political party may conduct nominations using either 'direct party nomination' or 'indirect party nomination' (s 38A, Political Parties Act).

3.6.1.1.2 Direct party nomination means the process by which a political party, through its registered members, elects its candidates for an election.

3.6.1.1.3 Indirect party nomination, on the other hand, refers to the process by which a political party, through the use of delegates selected from registered members of the political party and interviews, selects its candidates for an election.

3.6.1.1.4 Only registered members of a political party, whose names appear in the certified copy of the register of its members, can participate in a political party's nominations (Section 38C, Political Parties Act). A political party that nominates a candidate for an election must, at least 14 days before submitting the party membership list to the IEBC, submit the list to the Registrar of Political Parties who shall verify the names contained therein and certify it within 7 days of its receipt (Section 28A, Elections Act, 2011). The High Court has ruled that a law requiring political parties to file a list of party members within a set time frame to a general elections, or a law requiring internal party nomination, is necessary for the integrity of the electoral process and is not unconstitutional (*Council of Governors v Attorney General & Another,* Constitutional Petition 56 of 2017; and *Maendeleo Chap Chap Party & 2 Others v IEBC & Another,* Petition 179 of 2017).

3.6.1.1.5 The restriction on party hopping during party nominations is not an unreasonable restriction of the Constitution's Article 38 rights. In *Council of Governors v Attorney General & Another,* Constitutional Petition 56 of 2017, the Court opined:

> *The provision in question advances a compelling state interest to manage the electoral process efficiently as opposed to the individual interests of petitioners who seem to be interested in looking for an opportunity to shift party allegiance after losing nominations. A law aimed at promoting the legitimate state interest in fair, honest, and orderly elections is in my view consistent with the provisions of the constitution that require elections to be credible... In my view, the challenged provision is necessary in a democratic society to ensure proper preparation and management of the electoral process. What seems to me to be important is that the pre-selection process within a political party is such that it is transparent and transparently exercised free of any taint of electoral fraud or coercion, and one in which party voters at plebiscites and voters at general elections can know with confidence that fair means produced a candidate.*

3.6.1.1.6 This position was cited with approval in *Maendeleo Chap Chap Party & 2 Others v IEBC & Another,* Petition 179 of 2017, and by a 3-judge bench of the High Court in *Salesio Mutuma Thuranira & 4 Others v Attorney General & 2 Others; Registrar of Political Parties & 4 Others (Interested Parties),* Petition E043, E057 & E109 of 2022 where the constitutionality of the Political Parties Amendment Act 2 of 2022 was challenged. The Court declined to find unconstitutional the

closing of party membership lists before nominations, which had the effect of locking out losers in party primaries from joining other political parties.

3.6.1.1.7 Every political party must submit its nomination rules and procedures to the IEBC at least six months before the nomination of its candidates (s 27, Elections Act, 2011). Also, Registrar of Political Parties is to certify the nomination rules submitted to the IEBC (s 27(1A), Elections Act, 2011). The political party must also make such rules and procedures available to its members, having special regard to members with disabilities (Regulation 6 (1)(a), Elections (Party Primaries and Party Lists) Regulations, 2017). Further, a political party's nomination rules and procedures must provide for, inter alia: (i) the procedure to be employed in party nomination of party lists for identifying candidates to stand for election in every electoral area, and (ii) an internal dispute resolution mechanism in relation to the nominations and party lists (Regulations 6(2)(a) and 27(1), Elections (Party Primaries and Party Lists) Regulations, 2017).

3.6.1.1.8 Political parties carrying out direct party nominations must post a list of its members, conspicuously within each venue, where the nominations will be held. The parties are equally required to provide election materials at each polling venue (Section 38F, Political Parties Act).

3.6.1.1.9 Parties must notify the Registrar of Political Parties of the methods they intend to use to conduct party nominations, the date and venue of the nominations as well as the persons seeking party nominations (s 38E, Political Parties Act, 2011). Parties must also apply to the Registrar for a certified copy of the party register for use in the party nominations (s 38C (3) Political Parties Act, 2011). This means that no one who is not on the party register can take part in the party nominations.

3.6.1.1.10 Political parties intending to conduct indirect party nomination must select delegates from its members, submit the list of the delegates to the Registrar of Political Parties at least 7 days before the date of the nominations, specify the date and venue of the delegates meeting, the polling process the delegates will use, and the mode of interviews (s 38G, Political Parties Act)

3.6.1.1.11 Political parties carrying out party nominations are under a duty to vet their candidates. They have to ensure that each candidate who is nominated:

(i) makes and deposits a self-declaration form in the prescribed form under the Leadership and Integrity Act, 2012;

(ii) possesses the qualifications to hold the elective office as specified in the Constitution and any other relevant written law; and

(iii) meets such other requirements as may be prescribed by the constitution and nomination rules of the political party (s 38H, Political Parties Act).

3.6.1.1.12 Where only one aspiring candidate applies for nomination to any elective post, no party nomination is required to be conducted (Regulation 16(2), Elections (Party Primaries and Party Lists) Regulations, 2017).

3.6.1.1.13 The High Court has given guidance as to what an electoral court should look out for in resolving disputes related to party primaries (now party nominations) (*Kennedy Omondi Obuya v Orange Democratic Movement Party & 2 Others*, Nairobi High Court Election Petition Appeal No. 35 of 2017). The objective of the electoral court in such disputes is defined as follows:

> *When all is said and done, in any such nomination exercise, the purpose is to determine who garnered the highest number of votes to entitle him or her to be issued with a*

nomination certificate by a political party. It is a game of numbers. Unless electoral malpractices are established, the will of the people expressed by voters must be respected.

3.6.1.1.14 Courts have no original jurisdiction in disputes relating to party primaries (now party nominations) or nomination of candidates (*Francis Gitau Parsimei & 2 Others v National Alliance Party & 4 Others* Nairobi High Court Constitutional Petition No. 356 of 2012; *Jared Odoyo Okello v IEBC & 3 Others* Kisumu High Court Election Petition No. 1 of 2013; and *Isaiah Gichu Ndirangu & 2 Others v IEBC & 4 Others*, Nairobi High Court Petition No. 83 of 2015). Accordingly, courts have determined in relation to the 2017 pre-elections disputes that the established dispute resolution structure as provided in the Political Parties Act in respect to party primaries (now party nominations) dictates that a person must approach the IDRM, the PPDT and ultimately the High Court in that order. Nomination rights can therefore only be realised within this structured process. One will not be allowed to come directly before the High Court however much they feel aggrieved (*Vincent Ngw'ono Manyisa v Wiper Democratic Party & 3 Others*, Nairobi High Court Election Petition Appeal No. 38 of 2017 at para 5).

3.6.1.1.15 Once political parties have conducted their nominations, they have 30 days to resolve all disputes arising out of their nomination processes through their IDRM processes (s 38I of the Political Parties Act; and *Hussein Weytan Mohamed Abdirahman v Deka Ali Khala & 3 Others* Civil Appeal No E326 of 2022.)

3.6.1.2 Party list nominations

3.6.1.2.1 Party list nominations are carried out forty-five days before a general election (s 35 of the Elections Act No 24 of 2011)) and the seats are allocated by the IEBC no later than 30 days after a general election (s 36(4) of the Elections Act No 24 of 2011).

3.6.1.2.2 Each party prepares a list of all the persons who would stand elected if the party were entitled to all the nominated slots in Parliament and the county assemblies (Art 90(2)(a) of the Constitution; s 34 of the Elections Act No 24 of 2011; and Reg 20(1) Elections (Party Primaries and Party Lists) Regulations 2017). Party lists must be prepared in order of priority and alternate between male and female candidates (Article 90(2)(b) of the Constitution; s 34(5), Elections Act No 24 of 2011; Regulation 20(1), Elections (Party Primaries and Party Lists) Regulations 2017).

3.6.1.2.3 Party lists for Parliament must reflect the regional and ethnic diversity of Kenya (Article 90(2)(c) of the Constitution, while party lists for county assemblies must reflect the community and cultural diversity of the county and ensure adequate representation of minorities (s 7(2) County Governments Act).

3.6.1.2.4 Party lists are only valid for one term of Parliament (s 34(7), Elections Act No 24 of 2011) and presumably, this term limit also applies to County Assembly party lists. Parties cannot include persons who have been nominated for the general election (s 34(9) Elections Act No 24 of 2011).

3.6.1.2.5 Party list slots ought to be reserved for persons who would otherwise be excluded in the first past the post elections for varied reasons. It is not open to political parties to adopt their own meaning of 'special interest' (*Commission for the Implementation of the Constitution v Attorney General & 2 Others*, Civil Appeal 351 of 2012). Therefore, including persons who are able to contest elective positions such as presidential and deputy presidential candidates in party lists amounts to an 'irrational superimposition of well-heeled individuals on a list of the disadvantage and marginalised to the detriment of the protected classes or interests'(*Commission for the Implementation of the Constitution v Attorney General & 2 others* Civil Appeal 351 of 2012).

3.6.1.2.6 While acknowledging that the term 'special interests' is not defined by the Constitution, the Court of Appeal in *Commission on the Implementation of the Constitution v Attorney General & 2 Others,* Civil Appeal 351 of 2012, ruled that whatever interpretation is given to the term, it must bear the same meaning as marginalised groups.

3.6.1.2.7 A party list should only include persons who meet the suitability and eligibility requirements for election to the relevant office, including the requirement for public officers to resign as a precondition for participating in politics. A person who is unsuitable or ineligible to be elected to an office cannot be nominated to the same office by way of a party list. In *NARC Kenya & Another v IEBC & Another*, Nairobi High Court Civil Appeal Election Petition No. 2 of 2014, the Court held as follows:

> *Section 43(5) of the Elections Act requires resignation by public officers who seek elective posts. As regards nomination of members to special seats, it is my considered opinion that Article 90 (2) of the Constitution places a threshold, that is, persons nominated and forming part of the party list should ordinarily qualify to be elected had there been availability of seats in the National Assembly, Senate or the County Assembly. The threshold thus takes us back to section 25 of the Elections Act wherein sub-section (2)(a) disqualifies a state officer or other public officer from being elected a member of a county assembly, unless such officer has resigned from office at least 7 months to the date of elections, as per section 43 (5) of the Elections Act…the impartiality of public servants is a cardinal value enshrined in Article 232 (1) (a) of the Constitution…It is my view that nominated members of a political party irrespective of whether the position is elective or nominative are active members of the said party who engages actively in party politics. A state or public officer, may not promote the principles outlined in Article 232 (1) (a) of the Constitution, if they have, in the words of Lenaola J., one leg in public service and another at the political arena. It is my considered opinion that the 2nd Respondent ought to have resigned from public service per section 43 (5) of the Elections Act. I therefore find and do hold that the 2nd Respondent was not eligible for nomination for membership of the County Assembly of Garissa under the Gender Top-Up Category.*

3.6.1.2.8 A party can also only nominate persons who are registered as voters (*Amani National Congress Party & Another v Hamida Yaroi Shek Nuri & Another,* Nairobi Election Petition Appeal No 5 of 2018 & 1 of 2017 (consolidated)).

3.6.1.2.9 A political party must comply with its nomination rules in making the party list (S 34(6), Elections Act; Regulation 55, Elections (General) Regulations 2012; Regulation 6, Elections (Party Primaries and Party Lists) Regulations, 2017) and take steps to ensure that the nomination process is not open to abuse (*NARC Kenya & Another v IEBC & Another*, Chief Nairobi Magistrate's Court Election Petition No. 12 of 2013). Parties are, therefore, required to submit a declaration of compliance with their nomination rules alongside the party list to the IEBC (Regulation 55(4) Elections (General) Regulations 2012.

3.6.1.2.10 Moreover, persons nominated by a political party must be members of the political party as at the date of the submission of the party list (s 34(8) of the Elections Act, 2011; and *Peninah Nandako Kiliswa v IEBC & 2 Others*, Nairobi Civil Appeal No. 201 of 2013). It is the role of the Registrar of Political Parties to verify party membership of those on the party list (s 34(fc), Political Parties Act No 11 of 2011).

3.6.1.2.11 Further, where there is a conflict between a political party's constitution or nomination rules and a decision of a court on the compilation of a party list, the court decision prevails (*Mary Wairimu Muraguri & 12 Others v IEBC & 5 Others*, Nyeri High Court Election Appeal No. 30 of 2014).

3.6.1.2.12 The party must also indicate the interest represented by each nominee and a nominee can only represent one interest at a time (*Aden Noor Ali v Jubilee Party & 2 Others,* PPDT Complaint 336A of 2017).

3.6.1.2.13 It is the responsibility of political parties, rather than the courts or the IEBC, to determine which of their members should be included in a party list, in which category and in what order of priority (*Moses Mwicigi & 14 Others v IEBC & 5 Others*, Supreme Court Petition No. 1 of 2015; *Peninah Nandako Kiliswa v IEBC & 2 Others*, Nairobi Civil Appeal No. 201 of 2013; *Linnet Kemunto Nyakeriga & Another v Ben Njoroge & 2 Others*, Nairobi Civil Appeal No. 266 of 2013; and *Billy Elias Nyonje v National Alliance Party of Kenya & Another,* Judicial Review 61 of 2013).

3.6.1.2.14 In other words, the IEBC has no power to ignore, re-arrange or disregard a political party's preferred priority of candidates as set out in a party list (*Linnet Kemunto Nyakeriga & Another v Ben Njoroge & 2 Others*, Nairobi Civil Appeal No. 266 of 2013; *Dubat Ali Amey v IEBC & 3 Others*, Nairobi Chief Magistrate's Court Election Petition No. 13 of 2013; *Ben Njoroge & Another v IEBC & 2 Others,* Nairobi High Court Petition No. 14 of 2013; *Aden Noor Ali v IEBC & 2 Others,* Nairobi Election Petition 11 of 2017)

3.6.1.2.15 It is the responsibility of the IEBC, however, to ensure that candidates nominated by way of party lists meet suitability and eligibility requirements set out in the Constitution and the Elections Act, 2011 (Regulation 54(5), Elections (General) Regulations 2012); (*Moses Mwicigi & 14 Others v IEBC & 5 Others*, Supreme Court Petition No. 1 of 2015; *Micah Kigen & 2 Others v Attorney General & 2 Others*, Nairobi High Court Constitutional Petition No. 268 of 2012; *National Vision Party & Another v IEBC & Another*, Makadara Chief Magistrate's Court Election Petition No. 11 of 2013).

3.6.1.2.16 The IEBC may require a political party to review and amend a party list where, after scrutiny, the IEBC believes the party list does not conform to the requirements of the Constitution, the Elections Act, 2011 or Regulations made thereunder (Regulations 21(2) and 26(2), Elections (Primaries and Party Lists) Regulations; and *Amani National Congress Party & Another v Hamida Yaroi Shek Nuri & Another* (Election Petition Appeal 5 of 2018 & 1 of 2017 (Consolidated)).

3.6.1.2.17 The IEBC is obligated to supervise the process by which parties nominate candidates for the party list nominations (*National Gender and Equality Commission (NGEC) v IEBC*, Nairobi Constitutional Petition No. 147 of 2013).

3.6.1.2.18 As such, the IEBC has power to reject non-compliant lists s 34(6A) Elections Act No 24 of 2011; and Regulation 55, Elections (General) Regulations 2012). As stated by the Supreme Court in *IEBC & 5 Others,* Supreme Court Petition 1 of 2015**:**

> *A political Party has the obligation to present Party lists to IEBC, which after ensuring compliance, takes the requisite steps to finalise the 'elections' for these special seats. In the event of non compliance by a political party, IEBC has power to reject the party list and to require the omission to be rectified, by submitting a fresh party list or by amending the list already submitted.*

3.6.1.2.19 However, the rejection of a party nominee does not invalidate the entire list (Regulation 54(6), Elections (General) Regulations 2012). The formula for allocation of the party list is published by the IEBC (Regulation 56, Elections (General) Regulations 2012).

3.6.1.2.20 Once the party list is submitted, it cannot be amended during the term of Parliament or County Assembly (s 34(10), Elections Act No 24 of 2011). However, a seat may be re-allocated where the representative of a political party:

(i) Dies;

(ii) withdraws from the party list;

(iii) Changes parties;

(iv) Resigns; or

(v) Is expelled from his/her party during the term of the representative.

3.6.1.2.21 Where re-allocation is to be done, the next candidate of the same gender in the respective party list is selected (*Lydia Mathia v Naisula Lesuuda & Another*, Civil Appeal (Application) No. 287 of 2013; and *Lydia Nyaguthii Githendu v IEBC & 17 Others,* Civil Appeal 224 of 2013). Where there are no more candidates on the same party's list, IEBC shall require the party to nominate one within 21 days (s 37(2), Elections Act, 2011).Where vacancy occurs within 3 months of a general election, it shall not be filled (s 37(3), Elections Act, 2011). Moreover, where the party fails to nominate within twenty-one days of the vacancy, the slot shall not be allocated for the remainder of the term (s 37(4) Elections Act, 2011).

3.6.1.2.22 However, where the re-allocation is necessitated by expulsion, it must be demonstrated that the party representative who is expelled was afforded fair hearing before the expulsion (*Hon Isaac Mwaura Maiga v Jubilee Party & 3 Others* Nairobi High Court Civil Appeal No. E248 of 2021).

3.6.2 *The Independent Electoral and Boundaries Commission*

3.6.2.1 The IEBC also has a role to play in the nomination of candidates. First, once political parties have completed party nominations, they should submit a list of all their selected candidates to the IEBC at least 60 days to the date of the elections (s 31, Elections Act, 2011).

3.6.2.2 On receipt of the list of political parties' candidates, the IEBC will verify the certification of the political parties' candidates, by counter checking the details of the persons in whose name the certificates of nomination were issued (s 31(3) and (4), Elections Act).

3.6.2.3 The IEBC is also duty-bound to ascertain the qualifications of the candidates nominated to vie in the elections. However, this duty does not extend to verifying the authenticity of degree certificates presented by candidates. In *Gideon Keya & Another v Wavinya Ndeti*, IEBC Dispute Resolution Committee (DRC) Complaint No. 56 of 2022, the NDRC asserted:

> *[73] We note that the main bone of contention in this dispute is the authenticity of the Respondent's degree.*
>
> *[74] Therefore, the big question would be, "does this Committee have the jurisdiction to determine the question of the authenticity of academic documents?"*
>
> *[82] During registration of candidates and insofar as verification of documents is concerned, it would be prudent to appreciate the roles of the Returning Officer.*
>
> *[83] Pursuant to Regulation 47 (1) of the Elections (General) Regulations, 2012 as amended by Legal Notice No. 72 of 2017 the role of the Returning Officer includes ascertaining the educational qualification of a candidate by receiving the pertinent academic documents during registration of candidates.*
>
> *[84] Further to the foregoing, where the body that issued the certificate is not based in Kenya, a candidate shall be required to seek authentication of the body with the Kenya*

National Examinations Council, in the case of form four certificates, or the Commission for University Education, in the case of university degree.

[85] It is not in contention that the Respondent submitted a degree certificate during registration and on the basis of the subject degree, she was cleared. The returning officer depones to this fact at paragraph 11 of her replying affidavit sworn on 14th June, 2022 and filed on 15th June, 2022 as directed by the Panel on the 14th June, 2022. What is in issue is the authenticity of the degree.

[86] A reading of Regulation 47 (1) of the Elections (General) Regulations, 2012 leads to the conclusion that all that the Returning Officer ought do is to receive a certified copy of the degree from the candidate, and if issued by a foreign university, the candidate is obligated to seek authentication of that issuing body from the Commission for University Education. As far as the veracity of the said degree is concerned, the Returning Officer does not have the capacity to investigate to establish its authenticity.

[87] Holding a degree that is not authentic borders criminal offences which the Commission is ill-equipped to handle.

[91] That the allegations made against the respondent herein disclose suspicion as to authenticity of the academic qualifications of the Respondent which squarely fall for investigation and prosecution by the Office of the Director of Public Prosecutions pursuant to a reading of Section 21 as read together with Section 13 (j) of the Elections Offences Act cited in paragraph 89 and 90 above and not the Independent Electoral and Boundaries Commission or the Returning Officer for that matter.

[92] In light of the above, it follows, therefore, that the Committee lacks the jurisdiction to hear and determine the subject Complaint.

3.6.2.4 This decision was upheld by the High Court in the case of *Gideon Keya & Another v Wavinya Ndeti and Others*, Machakos High Court Judicial Review No. 2 of 2022, in the following terms:

[116] It is therefore clear that the powers to recognize and equate degrees, diplomas and certificates rests with the 3rd Respondent (Commission for University Education). *In undertaking its mandate, it is required to undertake or cause to be undertaken, regular inspections, monitoring and evaluation of universities. In this case the 3rd Respondent confirmed that the institutions from which the 1st Respondent obtained her degrees and certifications are recognized.*

[117] The applicants have not cited before me any statute that compels the 2nd Respondent to make a decision as regards the recognition or equation of university degrees. They have however cited Regulation 47 of the Elections (General) Regulations, 2012....

[118] With due respect I cannot read into the said regulation any power conferred upon the 2nd Respondent (Independent Electoral and Boundaries Commission) *to recognize or equate university degrees. I therefore associate myself with the decision of Mrima J. in Petition E321 of 2022, Dennis Gakuu Wahome vs The Independent Electoral and Boundaries Commission and Others and find that the 2nd Respondent has no power to recognize or equate university degrees and therefore cannot be compelled to investigate the authenticity of a university degree that is already recognized by the 3rd Respondent.*

3.6.2.5 Upon completion of the party nomination process, the person seeking to be registered as a candidate must submit duly filled nomination papers, together with evidence of their

suitability and eligibility to the returning officer (Regulations 41–43, 46 and 47, Elections (General) Regulations, 2012). The Returning Officer issues a nomination certificate to the candidate upon satisfying himself that the candidate meets all applicable suitability and eligibility requirements (Regulation 51, Elections (General) Regulations, 2012). However, before presentation of nomination papers to the IEBC, a political party may substitute its candidate on any of the following grounds:

i. Death of the nominated candidate;

ii. Resignation of the nominated candidate;

iii. Incapacity of the nominated candidate; and

iv. Violation of the Electoral Code of Conduct by the nominated candidate.

(*Diana Kethi Kilonzo & Another v IEBC & 10 Others*, Nairobi High Court Constitutional Petition No. 359 of 2013).

3.6.2.6 Where the IEBC rejects a candidate nominated by a political party for not being a registered voter, or for a breach of electoral laws, the political party may substitute the candidate if it demonstrates that it was unaware of the candidate's registration status or breach of electoral laws (*Diana Kethi Kilonzo & Another v IEBC & 10 Others*, Nairobi High Court Constitutional Petition No. 359 of 2013). Such substitution of the nominated candidate should be preceded, where applicable, by a notification by the political party to the candidate sought to be substituted (s 13 Elections Act, 2011). The jurisprudence from the *Diana Kethi Kilonzo* case was used to permit Wiper Democratic Movement to substitute a candidate who had been declared ineligible as a consequence of exhausting all possibility of appeal or review in relation to his impeachment in *Wiper Democratic Movement Kenya v County Returning Officer, Mombasa County and Others*, IEBC DRC No. 136 of 2022. The IEBC DRC noted thus:

> *[11] This Committee is conscious of the ramifications of its decision in Complaint No. 127 of 2022, in that with the disqualification of the 11st Interested Party herein, the Complainant is bereft of a potential candidate for the position Governor, Mombasa County. Without urging the Complainant's case, we are of the considered view that, taking into account the purpose for which political parties exist, and given the demonstrated intention of the Complainant in fronting the 1st Interested Party as its nominee, the Complainant shall be prejudiced if the Committee was to stop at the decision in Complaint No. 127 of 2022. How then should the Committee proceed in the circumstances and in the interest of the Complainant as a political party and a cog in the democracy of this country?*
>
> *[13] From the material before the Committee, there is no accusation or allegation of any wrongdoing or contravention of any known law by the Complainant herein in the process leading to the registration of the 1st Interested Party as a candidate. Accordingly, the Complainant is utterly blameless and the Committee finds and holds that the Complaint deserves an opportunity in furtherance of its legitimate expectation which, by the decision in the Kethi Kilonzo Case (supra) is underpinned in the Constitution.*
>
> *[14] This Committee is cognizant of the fact the Complainant herein did not pray for a specific order for replacement of its nominee should the disqualification of the 1st Interested Party be upheld by the Committee.*

> *[15] However, and lest the Committee be accused of framing and issuing orders in favour of the Complaint, we note that the Complainant sought "Any other relief that the Honourable Committee shall deem fit to grant." The Committee finds and holds that this is an appropriate prayer for the Committee to issue appropriate reliefs in the circumstances of the Complaint....*

3.6.2.7 If at the end of party nominations, only one candidate is validly nominated, they are declared the winner in a declaration of no contest (Regulations 21 & 53, Elections (General) Regulations, 2012).

3.6.2.8 A nominated candidate may withdraw his or her candidature before the election by filling out a notice in the form of Form 24A and delivering it to the Returning Officer not later than three days after nomination (Regulation 52, Elections (General) Regulations, 2012).

3.6.2.9 If there were only two nominated candidates and one withdraws, the remaining candidate is declared as duly elected (Regulation 53, Elections (General) Regulations, 2012).

3.6.2.10 Political parties are bound by the two-thirds gender rule in the process of nominating candidates and the IEBC has power to reject nomination lists that do not comply with two-thirds gender rule (*Katiba Institute v IEBC,* Constitutional Petition 19 of 2017). However, the two-thirds gender rule was suspended in respect of the 2022 elections in the case of *Adrian Kamotho v IEBC*, Judicial Review Miscelleneous No. E071 of 2022 and confirmed in *Cliff Ombeta & Another v IEBC*, Constitutional Petition E211 of 2022 (consolidated).

3.6.2.11 Section 31(2) of the Elections Act, 2011, empowers the IEBC, upon request from a political party, to conduct and supervise the nomination of candidates by the political party for presidential, parliamentary or county elections. Although such statutory provisions have the potential to create an awkward situation if the IEBC is subsequently asked to resolve disputes arising from such nominations, they are not unconstitutional. In *Mugambi Imanyara & Another v Attorney General & 5 Others*, Nairobi High Court Constitutional Petition No. 399 of 2016, the Court held as follows:

> *The first petitioner fears that since the commission is also mandated to hear and determine disputes arising from the nominations, it cannot competently resolve disputes arising from a process it has presided. Unfortunately, Article 88(4) reproduced above is clear and I find nothing unconstitutional... The above being the clear provisions of the Constitution leaves one possible and viable legal option, that is, an affected party may legally object to IEBC presiding over such a dispute and seek remedy in court or alternatively, IEBC may opt to recuse itself from resolving a dispute arising from a process it has presided over.*

3.6.2.12 The involvement of the electoral management body in party nominations, especially those of the ruling party, is likely to create the perception of bias. In *William Kabogo Gitau v George Thuo & 2 Others*, Nairobi Election Petition No. 10 of 2008, the Court held as follows:

> *The petitioner, in particular, complained that the 3rd [R] respondent [i.e. the returning officer] was [also] the returning officer in the PNU nomination, which according to the [P]petitioner, he partially participated in but later withdrew on account of open bias exhibited in favour of the 1st respondent. The 3rd respondent denied participating in the PNU nomination. Having evaluated the evidence adduced in this petition in regard to that complaint, this court finds that the 3rd respondent has indeed established that he did not participate as the returning officer in the PNU nominations. However, there*

> *is evidence that many presiding officers, deputy presiding officers and polling clerks participated as electoral officials in the PNU nomination…The participation by ECK in the nomination of a political party that would later contest in the general elections was against the principles governing the conduct of elections and especially as espoused in the Code of Conduct that ECK itself promulgated prohibiting any of its officials to be associated openly with a political party. The participation by ECK in the parliamentary nomination of PNU political party was contrary to its core function of being an electoral [management] body that should be considered as independent and impartial in the conduct of elections.*
>
> *It was no wonder that the people of this nation lost faith with ECK during the subsequently conducted general elections of 2007…In the case of Juja constituency, ECK, the predecessor of the 2nd respondent, cannot absolve itself of the allegation made by the petitioner that by virtue of its participation in the PNU parliamentary nomination, an impression was created that it was partial to PNU political party during the general elections. Unfortunately for the 2nd respondent, as an electoral body that is supposed to conduct elections in a free, fair and impartial manner, any association with any of the contesting political parties, however innocent or however justifiable in the circumstances, will leave it with the tag of being partial to that political party, more so, if that political party is in power.*

3.6.2.13 Although candidates for Deputy Governor (and presumably candidates for Deputy President) are not directly elected, the position is an elective office (*Josiah Taraiya Kipelian Ole Kores v Dr. David Ole Nkedianye & 3 Others*, Nairobi Election Petition No. 6 of 2013). Moreover, since the nomination of a candidate for the office of Governor (and presumably the office of President) cannot be separated from that of the Deputy Governor, an election court can entertain disputes as to the qualification of the Deputy Governor (*Josiah Taraiya Kipelian Ole Kores v Dr. David Ole Nkedianye & 3 Others*, Nairobi Election Petition No. 6 of 2013).

3.7 Disputes arising from nominations

3.7.1 This role is shared among political parties, IEBC, PPDT, High Court and Court of Appeal.

3.7.2 At the political party level, disputes are resolved through the individual political party IDRM. Each political party's IDRM must be independent of the party leadership and other party institutions, and must conclude all disputes presented to it within 30 days from the date of nominations.

3.7.3 The IEBC is mandated to settle electoral disputes arising out of nominations but excluding election petitions and disputes subsequent to the declaration of results (Article 88(4)(e) of the Constitution). Section 74(2) of the Elections Act obligates the IEBC to resolve disputes within 10 days of their presentation.

3.7.4 Persons aggrieved by party nomination processes are required to lodge disputes at their individual parties' IDRMs and have them determined by the IDRMs before moving the PPDT, High Court and Court of Appeal (in that order) (Section 40(2), Political Parties Act). The PPDT is under a duty to determine disputes before it expeditiously and, in any event, not later than 3 months from the date of their filing (Section 41(1), Political Parties Act).

3.7.5 A person aggrieved by the decision of the IEBC NDRC may seek judicial review or activate the supervisory jurisdiction of the High Court under Article 165. It is not open to a party who seeks a review at the High Court to raise new issues that were not determined by the IEBC. In *Republic*

v IEBC Ex Parte Wavinya Ndeti, Nairobi High Court Judicial Review Application No. 301 of 2017, the High Court ruled:

> *[140] In determining this application it is important to find out the nature of the exact dispute before the Committee since this Court being a judicial review court cannot turn itself into an appellate Court and re-evaluate the evidence presented before the Committee and arrive at its decision. This Court's duty is simply restricted to examining the decision made by the Committee and the basis thereof in order to find out whether it was legal, procedural, reasonable or tainted with any other recognised impropriety that would render it unsustainable. That the parties herein were tempted to introduce fresh evidence that was not before the Committee was readily conceded by the 3rd interested party who however justified that course on what he termed as the tactics employed by the ex parte applicant...*
>
> *[146] Similarly, it is my view that it is not for this Court to investigate whether there existed other material on the basis of which an otherwise untenable decision could be sustained.*

3.7.6 Legal challenges to party lists should ideally be raised before the publication of the nominated persons in the Kenya Gazette and their assumption of the relevant office (*NGEC v IEBC*, Nairobi Constitutional Petition No. 147 of 2013). Since the manner of preparation of the party list is a matter within the exclusive jurisdiction of a political party (*Billy Elias Nyonje v National Alliance Party of Kenya & Another,* Judicial Review 61 of 2013), disputes concerning the party list are resolved by the PPDT. Such legal challenges are only to be lodged at the PPDT where the persons named in the party list *have not* assumed the relevant office.

3.7.7 Where persons included in a party list have assumed the relevant office, their nomination can only be challenged by way of an election petition (*NGEC v IEBC*, Nairobi Constitutional Petition No. 147 of 2013); *Rose Wairimu Kamau v IEBC & 3 Others,* Nairobi Civil Appeal No. 169 of 2013; *Moses Mwicigi & 14 Others v IEBC & 5 Others,* Supreme Court Petition 1 of 2015; *Vitalis Ojuang Odek v IEBC & 3 Others,* Kisumu Election Petition 1 of 2017; *Busia County Persons with Disability Network & 4 Others v IEBC & 2 Others,* Kisumu Election Petition 5 of 2017; and *Shadrack Mutua Kitili v IEBC & 17 Others,* Kitui Election Petition 5 of 2017).

3.7.8 The High Court has the jurisdiction to hear appeals from the PPDT on matters of fact and law (s 41(2), Political Parties Act).

3.7.9 The Court of Appeal has the jurisdiction to hear consequent appeals from the High Court on points of law only. The decision of the Court of Appeal is final and thus not appealable to the Supreme Court (s 41(2), Political Parties Act)

3.7.10 Notwithstanding the above, election courts have limited jurisdiction to hear nomination disputes, along the lines of the principles posed in the case of *Sammy Ndung'u Waity v IEBC Sammy Ndung'u Waity v IEBC & 3 Others,* Supreme Court Petition 33 of 2018. An election court will only look into a ground challenging a candidate's nomination if the petitioner was unaware of it and had no means of ascertaining the facts thereof. Such grounds must, however, go to the root of the election e.g., qualifications of a candidate.

3.7.11 In the preceding case, the Supreme Court, nonetheless, held that the High Court could still hear pre-election disputes in its supervisory/judicial review jurisdiction, even after the determination of election petitions.

3.7.12 Therefore, an election court should refuse to admit complaints relating to the nomination of

candidates if the petitioner was a candidate at the impugned election but failed to challenge the nomination of the successful candidate before the IEBC (*Josiah Taraiya Kipelian Ole Kores v Dr. David Ole Nkedianye & 3 Others*, Nairobi Election Petition No. 6 of 2013). An election court should also refuse to entertain a dispute on the nomination of candidates where the petitioner has referred the dispute to the IEBC but failed to seek the review of the IEBC's decision (*Sammy Ndung'u Waity v IEBC Sammy Ndung'u Waity v IEBC & 3 Others*, Supreme Court Petition 33 of 2018; *Silverse Lisamula Anami v IEBC & 2 Others*, Supreme Court Petition 30 of 2018; *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others; Ahmed Ali Muktar (Interested Party)*, Supreme Court Petition 7 of 2018; and *Jared Odoyo Okello v IEBC & 3 Others*, Kisumu High Court Election Petition No. 1 of 2013).

3.7.13 Where the IEBC refuses, neglects or otherwise fails to hear and determine a dispute relating to nomination of candidates, or makes an unlawful determination of such a dispute, the aggrieved party may invoke the supervisory jurisdiction of the High Court under Article 165 (6) of the Constitution (*Jared Odoyo Okello v IEBC & 3 Others*, Kisumu High Court Election Petition No. 1 of 2013). In *Kituo Cha Sheria v John Ndirangu Kariuki & Another* Nairobi High Court Election Petition No. 8 of 2013, the Court held as follows:

> *If for example, by negligence or otherwise, a non-citizen was nominated for election and elected, it would be perfectly be in order for the court to right the wrong.* ***In Luka Lubwayo and another v Gerald Otieno Kajwang and another*** *Nairobi Petition 120 of 2013, the court found that where IEBC had failed to exercise its mandate under statute, the High Court could intervene. Article 105 1 (a) seems to widen the scope of the court in a petition to determine whether a person has been* ***validly*** *elected as a member of [P]arliament. The question of validity may encompass the clearance to run.*

3.7.14 Where the IEBC rejects a candidate nominated by a political party for not being a registered voter, or for a breach of electoral laws, the political party may substitute the candidate if it can demonstrate that it was unaware of the candidate's registration status or breach of electoral laws (*Diana Kethi Kilonzo & Another v IEBC & 10 Others*, Nairobi High Court Constitutional Petition No. 359 of 2013).

3.8 Political Campaigns

3.8.1 *Electoral Code of Conduct*

3.8.1.1 Candidates for elective offices must abide by the Electoral Code of Conduct in their political campaigns (s 110, Elections Act, 2011). Players in the electoral process must give every candidate a fair chance to canvass support by all legitimate and legal means (*Wavinya Ndeti v IEBC & 4 Others*, Nairobi High Court Petition No. 4 of 2013). Moreover, the electorate cannot be said to have been given the chance to vote for a candidate of their choice, if the players engage in unfair political campaigns (*Jared Odoyo Okello v IEBC & 3 Others*, Kisumu Election Petition No. 1 of 2013).

3.8.1.2 An unfair political campaign, e.g., one characterised by unfounded or malicious propaganda, therefore, will result in the nullification of the affected election. In *William Odhiambo Oduol v IEBC & 2 Others*, Kisumu Election Petition No. 2 of 2013, the successful candidate's campaign team forged and superimposed the portrait of the presidential candidate of a rival political coalition on the petitioner's campaign posters. The Court made the following finding and nullified the election:

> *To sum up, the ODM campaign machine ran a dirty campaign during the gubernatorial*

> *election in Siaya County. Everything was done to depict the petitioner as a candidate who was running against the grain. The elections (sic) were constantly being bombarded with malicious propaganda against him. The propaganda was beyond what was ordinarily expected from opponents in an election campaign. When this was not considered enough, forged posters sprung up late in the campaign showing, falsely, that the petitioner was supporting the Jubilee candidacy, and not ODM or Raila. From the evidence, the County was basically an ODM and Raila zone. I find that the propaganda that the petitioner was supporting Uhuru and Ruto was not only offensive but also a blow below the belt, as it were. Taken together with the election offences as outlined in the foregoing, one cannot say that a fair chance was given to the petitioner to campaign, or that the electors were given a fair chance to pick a candidate of their choice. To put it bluntly, the campaign was not free and fair. The campaign was perverted to the extent that it fundamentally compromised the integrity of the election.*

3.8.1.3 It is not an unfair campaign for the leader of a political party to urge voters to elect only candidates vying on the political party's ticket (*Jared Odoyo Okello v IEBC & 3 Others*, Kisumu Election Petition No. 1 of 2013). A political party or its leader does not, therefore, breach the Electoral Code of Conduct by urging electors to adopt the so called '*six-piece*' approach to voting (in the *six-piece* approach, voters are urged to cast all their ballots for the six elective offices in a general election in favour of one party). Accordingly, courts cannot nullify an election merely because the leader of a political party that enjoys fanatical support in a particular county or constituency urged electors to adopt the '*six-piece*' approach to voting, even if such a campaign inevitably disadvantages candidates running on the tickets of rival political parties (*Jared Odoyo Okello v IEBC & 3 Others*, Kisumu Election Petition No. 1 of 2013).

3.8.1.4 Mere boasts, crudities, vulgarities, strong language and exaggerations, typical of political exchanges, do not constitute unfair campaign practices unless they are shown to have undermined the free exercise of the electors' will (*Wavinya Ndeti v IEBC & 4 Others*, Nairobi High Court Election Petition No. 4 of 2013). This also applies to promises by an aspirant that the aspirant's election would lead to development (*Wavinya Ndeti v IEBC & 4 Others*, Nairobi High Court Election Petition No. 4 of 2013).

3.8.1.5 The exploitation of an electorate's vulnerability in a manner that makes them so beholden to a candidate as to take away the electorate's free will, however, may lead to a finding of undue influence and vitiate the election. In *Gideon Mwangangi Wambua & Another v IEBC & 2 Others*, Mombasa High Court Election Petition No. 4 of 2013, the successful candidate used his private foundation as a channel for giving cheques to needy people and other acts of 'generosity'. The Court found and held as follows:

> *where a candidate takes advantage of the electorates vulnerability to secure their votes in a manner that makes the electorates beholden to him, that in my view may justify the nullification of the elections results since the results will not be a reflection of the exercise of the free will of the electorates...In this case the Constituency in question is a remote Constituency with high levels of illiteracy, high poverty levels with inadequate infrastructure not to mention lack of adequate water...There was*
>
> *overwhelming evidence that the 2nd respondent in this case made certain promises to the electorates during his campaign rallies and initiated certain projects. He issued cheques to needy students in the Constituency and this fact was confirmed by his own driver...Whereas the said actions might have been undertaken in his capacity as a director of Mwashetani Foundation, the distinction was clearly lost to the electorates...*
>
> *The 2nd respondent took a calculated risk in choosing his campaign rallies as the*

avenues to articulate the objectives of the Foundation. He ought to have clearly demarcated the boundaries between the actions of the Foundation and his individual actions as a candidate for the National Assembly seat for Lunga Lunga Constituency.

By not so doing the 2nd respondent blurred the vision of the electorates into having an impression that the acts of "generosity" engendered by the Foundation were actually acts of the 2nd respondent. In those circumstances, it cannot be said that the people of Lunga Lunga Constituency did exercise their free will in voting for the 2nd respondent as their representative in the National Assembly. I therefore find that the results of the elections of Lunga Lunga Constituency did not meet the criteria under Article 81(e)(ii) of the Constitution that election system must comply with the principle of free and fair election which are free from improper influence.

3.8.1.6 The primary responsibility for resolving disputes relating to political campaigns lies with the IEBC (Rule 6(e), (f) and (g), Electoral Code of Conduct). This does not, however, preclude an election court from considering or annulling an election based on candidates' conduct during the campaign period. However, the election court can only do so within the limited scope spelt out by the Supreme Court in the case of *Sammy Ndung'u Waity v IEBC Sammy Ndung'u Waity v IEBC & 3 Others*, Supreme Court Petition 33 of 2018, where the Supreme Court established the following guiding principles:

(i). All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT as the case may be in the first instance.

(ii). Where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, such dispute shall not be a ground in a petition to the election Court.

(iii). Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution. The High Court shall hear and determine the dispute before the elections and in accordance with the Constitutional timelines.

(iv). Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court.

(v). The action or inaction in (d) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, even after the determination of an election petition.

(vi). In determining the validity of an election under Article 105 of the Constitution or Section 75 (1) of the Elections Act, an election court may look into a pre-election dispute if it determines that such dispute goes to the root of the election and that the petitioner was not aware or could not have been aware of the facts forming the basis of that dispute before the election.

3.8.2 *Election Campaign Finance Regulation*

3.8.2.1 Another element of political campaigns is election campaign financing regulation. Regulation of campaign financing is one of the constitutional mandates of the IEBC (Article 88(4)(i) of the Constitution). The Election Campaign Financing Act (Act 42 of 2013) is still awaiting full operationalisation through regulations, which were not adopted by Parliament either for the 2017 or 2022 elections. The Act is also hampered in its effectiveness by the fact that it only seeks to regulate campaign financing during the gazetted campaign period, thus excluding from its scope any funds raised before, which form the bulk of the funds raised for campaigns.

3.8.2.2 As part of its role of levelling the electoral playing field, Kenyan electoral law also makes it an offence to use public resources for campaigns (s 14, Election Offences, 2016). The IEBC is empowered to require an account from candidates who are members of Parliament, Governors, Deputy Governors or members of County Assemblies of the facilities which are in their custody, by virtue of their office, and to impound any resources improperly used during campaigns (s 14(7), Election Offences Act). It is noteworthy that the statute does not require an account from presidential candidates who are seeking re-election or deputy presidents seeking to ascend to the presidency, thus creating an accountability gap (*Raila Odinga v IEBC & 2 Others,* Supreme Court Presidential Petition 1 of 2017). Despite the clear ban, the continued use of state resources during campaigns is well documented, with acts such as the launch of government projects, use of government vehicles, use of chiefs as campaign agents, and distribution of relief food during campaigns being witnessed.

3.8.2.3 Regulation of campaign spending is crucial for precluding the use of illicit money to corrupt the political process. Failure to regulate the use of state resources during elections, taken together with the lack of an operational campaign financing regime, allows a few individuals to influence the electoral process. Thus increasing the high stakes nature of elections and increasing the propensity towards violence. The injection of funds in campaigns by wealthy individuals also carries with it an expectation that their interests would be protected through *quid pro quo* corruption, and it, therefore, facilitates state capture by a minority elite.

3.8.2.4 The Election Campaign Financing Act anticipates the gazetting of spending limits which delimit how much a candidate, political party or referendum committee may spend during the expenditure period, including the limit for media coverage (s 18, Election Campaign Financing Act, 2013). The Act also empowers the IEBC to make Regulations to give effect to the Act, which must be tabled before Parliament before they are adopted.

3.8.2.5 Parliament, in declining to adopt Regulations in 2017, indicated that there was need to revise the formula used by the IEBC to set spending limits as well as the process of reporting under the Act, which required reporting on campaign spending by both candidates and political parties. It was argued that requiring candidates of political parties to report duplicated the obligation to submit party audited reports to the Office of the Registrar of Political Parties. In 2021, it also declined to pass the Regulations, ostensibly because the IEBC had tabled them late in the day.

> **Editorial Note:** *Katiba Institute & 3 Others v IEBC & 3 Others,* Constitutional Petition E540 & E546 of 2021, sought a declaration that the Regulations contemplated by Article 88(4)(i) of the Constitution, in relation to election campaign financing, did not require Parliamentary approval since they were constitutional instruments rather than statutory instruments. However, the High Court ruled that the making of regulations and rules was enabled by the provisions of sections 5, 12, 18, 19 and 29 of the Election Campaign Finance Act, and, therefore, the Regulations

were statutory instruments requiring Parliamentary approval. Moreover, by dint of section 5A of the Election Campaign Financing Act, public consultations were required before tabling the draft regulations in Parliament and where it was not carried out, an explanatory note was to accompany the Regulations when forwarded to Parliament. Since no explanatory note was availed and no justification was offered by the IEBC for the failure to carry out public consultations, the Regulations did not pass constitutional and legislative muster for want of public participation and Parliament acted within its mandate in revoking the 2020 Regulations. Section 29(1) of the Election Campaign Financing Act, which required Election Campaign Financing Regulations to be tabled in Parliament before publication in the Kenya Gazette, was also considered contrary to Article 10 and 88 of the Constitution. In relation to contribution limits, spending limits and authorised expenditures, the Court ruled that once public engagement on these was carried out, there was no need to transmit the limits to Parliament for approval.

CHAPTER 4

RESOLUTION OF PARLIAMENTARY AND COUNTY ELECTION PETITIONS

RESOLUTION OF PARLIAMENTARY AND COUNTY ELECTION PETITIONS

4.1 The Petition

4.1.1 *Pleadings*

4.1.1.1 Generally, every election petition must conform to the mandatory requirements set out in the Elections Act, 2011, and the relevant procedural rules (the Elections (Parliamentary and County Elections) Petition Rules, 2017.

4.1.1.2 A party intending to challenge the validity of an election, must move the Court through an election petition (Article 87 of the Constitution.) The Election Petition and the response to the election petition constitute the main pleadings in EDR (*Benjamin Ogunyo Andama v Benjamin Andola Andayi & 2 Others,* Kakamega Election Petition No. 8 of 2013).

4.1.1.3 The purpose of the pleadings is to give the adversary a fair notice of the case of the party filing the pleadings. Parties to an election petition are bound by their pleadings (*Ferdinand Ndung'u Waititu v IEBC & 8 Others*, Nairobi Election Petition No. 1 of 2013; and *Benjamin Ogunyo Andama v Benjamin Andola Andayi & 2 Others,* Kakamega Election Petition No. 8 of 2013).

4.1.1.4 An election court will not permit a petitioner to prove complaints which are not set out in the election petition, unless a request for amendment is made and allowed by the court (*Benjamin Ogunyo Andama v Benjamin Andola Andayi & 2 Others,* Kakamega Election Petition No. 8 of 2013). Although there is no clear authority on the point, presumably, the rule equally applies to respondents in EDR, with the result that a respondent cannot adduce evidence or adopt a line of defence not set out in the response to the election petition.

4.1.1.5 The rule that binds parties to their pleadings has a bearing on the scope of the judgment and reliefs that flow from an election court. An election court will not base its decision on unpleaded matters merely because the parties have adduced evidence in respect of such matters (*Ferdinand Ndung'u Waititu v IEBC & 8 Others,* Nairobi Election Petition No. 1 of 2013; *Jared Odoyo Okello v IEBC & 3 Others,* Kisumu Election Petition No. 1 of 2013; *Raila Odinga v IEBC & 2 Others,* Supreme Court Election Petition 1 of 2017; and *Robinson Simiyu Mwanga & Another v IEBC & 2 Others* Kitale High Court Election Petition No. 1 of 2017- Ruling No. 4 on scrutiny of votes).

4.1.1.6 An election court may base its decision on an unpleaded issue, however, where it appears from the course followed at the trial that the parties had left the issue to the court for determination (*Odd Jobs v Mubia* [1970] EA 476; *Clement Kung'u Waibara v Bernard Chege Mburu & 2 Others,* Nairobi Civil Appeal No. 205 of 2011; and *Justice Kalpana Rawal v Judicial Service Commission & 3 Others,* Civil Appeal 1 of 2016).

4.1.1.7 Although parties are bound by their pleadings, the jurisdiction of an election court is partly inquisitorial in nature (*Hassan Abdalla Albeity v Abu Chiaba & Another*, Malindi Election Petition No. 9 of 2013). The rule that parties are bound by their pleadings does not, therefore, preclude an election court from inquiring into and determining whether a disputed election was conducted in accordance with the Constitution and relevant laws. Accordingly, an election court may consider any matter relevant to the validity of an election, irrespective of whether such matter was pleaded (*Hassan Abdalla Albeity v Abu Chiaba & Another*, Malindi Election Petition No. 9 of 2013). An election court, however, can decline to entertain an unpleaded issue if the making of a decision on the issue would occasion prejudice to a party (*Hassan Abdalla Albeity v Abu Chiaba & Another*, Malindi Election Petition No. 9 of 2013).

4.1.1.8 Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides that every election petition must state:

- the name and address of the petitioner;
- the date when the election in dispute was conducted;
- the results of the election, if any, and however declared;
- the date of the declaration of the results of the election;
- the grounds on which the petition is presented; and
- the name and address of the advocate, if any, for the petitioner which shall be the address for service.

4.1.1.9 Further, every election petition must:

- be signed by the petitioner or by a person duly authorised by the petitioner;
- be supported by an affidavit by the petitioner containing the grounds on which relief is sought and setting out the facts relied on by the petitioner; and
- be in such number of copies as would be sufficient for the court.

4.1.2 *Import of Rule 8 on Form and Content of the Petition*

4.1.2.1 There are two conflicting schools of thought on the failure to comply with Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 on the form and content of a petition. The first school of thought holds that the requirements set out in Rule 8 are not mere technical requirements, limited to procedural form and content of election petitions, but that the requirements are substantive to the extent that they go to the root of the issues before an election court (*M'Nkiria Petkay Shen Miriti v Ragwa Samuel Mbae & 2 Others*, Meru Election Petition No. 4 of 2013; *Jimmy Mkala Kazungu v IEBC & 2 Others*, Mombasa Election Petition 9 of 2017; *Mbaraka Issa Kombe v IEBC & 3 Others,* Malindi High Court Election Petition No. 10 of 2017; *Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others,* Nairobi Election Petition No. 4 of 2013; and *Mwamlole Tchappu Mbwana v IEBC & 4 Others* Mombasa Election Petition Number 5 of 2017).

4.1.2.2 Furthermore, each Rule should be read individually and collectively. In *Mbayi Sayeed Omsiritsa v Nancy Iyadi & 2 Others,* Kakamega Election Petition Appeal No 2 of 2017, the Court held that declaration of results and the date of declaration of results are required in both the petition (Rule 8(1)(c) and (d)) and the supporting affidavit (Rule 12(2)(c) and (d)).The Court held that Rule 8(1)(c) and (d) of the Rules are distinct but related to Rule 12(2)(c) and (d).

4.1.2.3 Courts may, therefore, properly dismiss or strike out, and often dismiss or strike out, election petitions which do not comply with prescribed mandatory requirements (*Ismail Suleman & 9 Others v Returning Officer Isiolo County & 2 Others,* Meru Election Petition No. 2 of 2013; *Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others,* Nairobi Election Petition No. 4 of 2013).

4.1.2.4 Courts that subscribe to this school of thought strike out or dismiss election petitions that do not conform to the rules relating to:

- the contents of an election petition (*Jimmy Mkala Kazungu v IEBC and 2 Others*, Mombasa Election Petition 9 of 2017, where the results were contained in the affidavit but not in petition; *Mbaraka Issa Kombe v IEBC & 3 Others,* Malindi High Court Election Petition No. 10 of 2017, where the results and the date of declaration were not disclosed; *Michael Gichuru v Hon. Rigathi Gachagua & 2 Others*, Nyeri High Court Election Petition 2 of 2017 on the failure to particularise the date of declaration; and *Mwamlole Tchappu Mbwana v IEBC & 4 Others,* Mombasa Election Petition Number 5 of 2017 where there was a failure to state the results as declared and date of declaration);

- the affidavit in support of the election petition (*M'Nkiria Petkay Shen Miriti v Ragwa Samuel Mbae & 2 Others*, Meru Election Petition No. 4 of 2013; and *David Wamatsi Omusotsi v Returning Officer Mumias-East Constituency & 2 Others,* Kakamega Election Petition 9 of 2017); and

- the petitioner's witness affidavits (*Bernard Kibor Kitur v Alfred Kiptoo Keter & IEBC,* Eldoret High Court Election Petition 1 of 2017, where affidavits were filed out of time).

4.1.2.5 On the other hand, it is argued that the post-2010 constitutional dispensation requires that substantive justice be done and 'unless a petition is so hopelessly defective that it cannot communicate all the complaints and prayers of the petitioner, the court should ensure that the petition is heard and determined on merit' (*Martha Wangari Karua v IEBC & 3 Others,* Nyeri Election Petition Appeal No 1 of 2017; *Samwel Kazungu Kambi v Nelly Ilongo & 2 Others,* Malindi Election Petition 4 & 5 of 2017; *Washington Jakoyo Midiwo v IEBC & 2 Others,* Siaya Election Petition 2 of 2017). The Court of Appeal in the *Martha Karua* appeal asserted:

> *The jurisprudence from our courts in interpretation of the Constitution has been to avoid summary dismissal of Petitions and that power could only be exercised as a last resort where the petition is demonstrated to be hopeless or disclosing no reasonable cause of action. Another important factor, the trial court was bound to consider, was the strength and weakness of the Petition before striking out the Petition. We have noted that the trial court did not address its mind to the strength and weakness of the petition and responses filed by the parties. That primary duty was not carried out before arriving at the decision striking out the Petition. The trial court termed the Petition as hopeless without any basis and consideration. We therefore think the conclusion by the trial judge that the Petition was hopeless was draconian, drastic and unjustified.*

4.1.2.6 However, the Court of Appeal reiterated that its reasoning should not be taken to mean that a petition could never be struck out for a procedural infraction. It was still open to an election court to strike out a petition for non-compliance where it went to the root of the dispute.

> *We are not saying that an election court cannot strike out a Petition at all. Far from it. There may be instances where the procedural infraction goes to the root of the dispute. There are instances when an election Petition may be irredeemably defective, like when it is filed outside the Constitutional or statutory timeframes. It is for the court to determine whether a particular candidate was eligible to contest the election, having met the Constitutional and statutory requirements, and that the voting and the declaration of results were conducted in accordance with Article 86 of the Constitution.*
>
> (*Martha Wangari Karua v IEBC & 3 Others,* Nyeri Election Petition Appeal No 1 of 2017)

4.1.3 Applicability of Article 159(2)(d) of the Constitution

4.1.3.1 The jurisprudence of the election courts in 2013 was to the effect that the invocation of Article 159(2)(d) of the Constitution would not necessarily salvage an election petition, which does not comply with the requirements set out in Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. In *Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others*, Nairobi Election Petition No. 4 of 2013, the Court held as follows:

> *...the provisions of Rule 10 and others aforestated [now Rule 8] are not mere technical requirements. If they are technical in so far as they are procedural and spell out the form and content of intended petitions, they nevertheless, at the same time, are substantive and go to the root and substance of issues and matters prescribed upon... in the circumstances and for the reasons discussed above, the Petitioner's application seeking amendment...is hereby refused and dismissed...The end result is that the said petition must be and is hereby struck out, with costs to the Respondents.*

4.1.3.2 However, the Supreme Court in *Hon. Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*, Petition 5 of 2014, held:

> *A Court dealing with a question of procedure, where jurisdiction is not expressly limited in scope – as in the case of Articles 87(2) and 105(1)(a) of the Constitution – may exercise a discretion to ensure that any procedural failing that lends itself to cure under Article 159, is cured. We agree with learned counsel that certain procedural shortfalls may not have a bearing on the judicial power (jurisdiction) to consider a particular matter. In most cases procedural shortcomings will only affect the competence of the cause before a Court, without in any way affecting that Court's jurisdiction to entertain it. A Court so placed, taking into account the relevant facts and circumstances, may cure such a defect; and the Constitution requires such an exercise of discretion in matters of a technical character.*

4.1.3.3 As a result, the court may invoke Article 159(2) and exercise discretion in order to ensure the administration of justice and excuse procedural technicalities that may hamper administration of justice. This discretion to excuse non-compliance with the rules depends on the weight given to the level of non-compliance, on a case-to-case basis. The test is whether the infraction would cause injustice on the other party or give the non-compliant party an unfair advantage, or if the non-compliance is curable or goes to the root of the petition.

4.1.3.4 The rationale for the discretion lies in the constitutional and statutory objective of administering electoral justice without undue regard to technicalities of procedure (Article 159(2)(d) of the Constitution; s 80(1)(d) of the Elections Act, 2011; Rule 4(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017; *Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others*, Nyeri Civil Appeal No. 38 of 2013; and *Nuh Nassir Abdi v Ali Wario & 2 Others*, Mombasa Election Petition No. 6 of 2013).

4.1.3.5 Although the courts have the power to strike out an election petition for non-compliance with Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, the general judicial view is that the summary dismissal of cases is a drastic and draconian step, to be taken sparingly and only in the clearest of cases where the defect is incurable (*D.T. Dobie & Company (Kenya) Limited v Muchina* [1982] KLR 1).

4.1.3.6 Indeed, election courts have discretion, pursuant to Article 159(2)(d) of the Constitution, to excuse minor or trivial deviations from the above and other mandatory requirements (*Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 Others*, Nairobi Election Petition No. 11 of 2013). In *Raila Odinga v IEBC & 3 Others*, Supreme Court Petition No. 5 of 2013, the Supreme Court held that:

> *The essence of that provision [Article 159(2)(d) of the Constitution] is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course.*

4.1.3.7 The High Court in *Mbayi Sayeed Omsiritsa v Nancy Iyadi & 2 Others,* Kakamega Election Petition Appeal No 2 of 2017, at para 28 summarised the principles to be considered in determining an allegation of non-conformity with the Rules as follows:

i. *The provisions of Rule 8(1) of the Elections Rules are mandatory.*

ii. *It is of utmost importance for parties in an election petition to comply with the election rules.*

iii. *The provisions of the constitution and the Elections Act override the Election Rules.*

iv. *Where there is non-conformity with election rules, an election court has discretion to excuse the infraction.*

v. *The court could only dismiss a case for non-conformity with the rules when the infraction complained of has caused prejudice to the other*

vi. *In that case it must be demonstrated that the infraction complained of goes to the root of the dispute that is before court.*

vii. *The court can dismiss a case for non-conformity with the election rules in a proper case.*

viii. *The court should place substantive justice over procedural considerations, especially where the infraction is curable, employed sparingly and as a last resort.*

4.1.3.8 In *Mbayi Saeed*, the Court opined that, although the Petitioner had failed to declare the results and the date of the declaration in the petition, he had nonetheless stated the same in the supporting affidavit as required by Rule 12(2) of the Rules, and, as a result, the non-conformity with Rule 8(1)(c) and (d) was not fatal or prejudicial to the respondent.

4.1.3.9 However, in *Joel Makori Onsando & 2 Others v IEBC & 3 Others,* Kisii High Court Election Petition 3 & 7 of 2017 (consolidated), the Court ruled that non-compliance with Rule 8, by referring to parties in the petition who were not cited as respondents and failing to enjoin the Deputy Governor as a party, were defects that could not be cured under Article 159(2)(d) or by amendment.

4.1.3.10 A petitioner who seeks the nullification of an election must plead with specificity the grounds upon which they seek an annulment of an election, as failure to do so puts the respondent(s) at a disadvantage of not knowing the petitioner's case (*Charles Oigara Mogere v Christopher Mogere Obure & 2 Others*, Petition No. 9 of 2013).

> **Editorial Note:** While the Election Petition Rules provide in Rule 9 that the IEBC is a respondent to every election petition, the Rules are silent on joinder

of Deputy Governors where the election of a Governor is challenged. Rule 2 defines a respondent to include 'every person whose election is complained of'. Since no separate election is conducted for deputy governor as the person nominated by the Governor-elect is automatically declared Deputy Governor-elect, by construction, they essentially become 'a person whose election is complained of'.

Whereas the majority of the cases in which this was an issue revolved around the failure to cite the Deputy Governor in a petition challenging the election of a Governor, there were instances where the Court had to rule on the failure by a petitioner to cite the party whose election was challenged. Two approaches were taken by election courts. The first category of courts elected to proceed with the hearing of the petition, notwithstanding the non-joinder of the Deputy Governor, ruling that the petitions were not fatal for non-joinder of an interested party (*Baridi Felix Mbevo v Musee Mati & 2 Others*, Kitui Election Petition Appeal 1 of 2018; *Sumra Irshadali Mohammed v IEBC & Mawathe Julius Musili,* Nairobi High Court Election Petition 2 of 2017; *Wavinya Ndeti & Another v IEBC & 2 Others,* Machakos Election Petition 1 of 2017; *Kithinji Kiragu v Martin Nyaga Wambora & 2 Others*, Embu Election Petition No. 1 of 2013; *Hassan Omar Hassan & Another v IEBC & 2 Others,* Mombasa Election Petition 10 of 2017; *Lesirma Simeon Saimanga v IEBC and Others*, Nyahururu Election Petition No. 1 of 2017).

The second approach taken by election courts is to strike out the petition on the basis that the Deputy Governor is elected and not nominated, that the right to fair hearing for such persons would be violated as having come to office by election, the only way to remove them was by and election petition. Thus, in this second category, failing to join Deputy Governors in the petition therefore rendered the petition fatally defective (*Mwamlole Tchappu Mbwana v IEBC & 4 Others,* Mombasa Election Petition Number 5 of 2017; *Samwel Kazungu Kambi v Nelly Ilongo & 2 Others,* Malindi Election Petition 4 & 5 of 2017; *Joel Makori Onsando & 2 Others v IEBC & 3 Others,* Kisii High Court Election Petition 3 & 7 of 2017 (consolidated); and *James Kirimi Karubiu v IEBC & Another,* Kerugoya Election Petition 3 of 2017).

Further authorities

1. *Caroline Mwelu Mwandiku v Patrick Mweu Musimba & 2 Others,* Machakos Election Petition 7 of 2013

2. *Wavinya Ndeti v IEBC & 4 Others,* Machakos Election Petition 4 of 2013

3. *William Kinyanyi Onyango v IEBC & 2 Others,* Nairobi Election Petition Appeal No 2 of 2013

4. *Thomas Matwetwe Nyamache v IEBC & 2 Others*, Kisii Election Petition 8 of 2017

4.2 The Response to the Petition

4.2.1 A respondent who wishes to oppose a parliamentary or county election petition must file a response within 7 days of being served with the petition and serve within 7 days of filing the Response (Rule 11((1) & (4), Elections (Parliamentary and County Elections) Petitions Rules, 2017). The response must substantially be as in Form 4, set out in the Schedule to the Elections (Parliamentary and County) Petitions Rules, 2017. A Respondent who does not file a response will not be allowed to participate in the proceedings (Rule 11 (8) Elections (Parliamentary and County Elections) Petitions Rules, 2017). In *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others, Election Petition Appeal 2 of 2018*, the Court of Appeal evaluated the decision of the respondent to file a Replying Affidavit instead of a response. The Court ruled that failure to comply with Rule 11(8) of the Election Petition Rules was 'a grave default that would have entitled, nay required, the learned judge to exclude the appellant from the proceedings as a party'.

4.2.2 Rule 11 of the Elections (Parliamentary and County Petitions) Rules, 2017 provides for the Rules relating to the response to the petition as follows:

i. *The respondent may file a response, it is not mandatory. In the event a respondent has not filed a response, (s)he should not be allowed to act or appear as a party:*

ii. *The response must be filed within 7 days of being served with the Election petition;*

iii. *There must be as many copies as there are parties to the Election Petition;*

iv. *The Response must be served within 7 days of filing, unless directed otherwise by Court;*

v. *The response must be in relation to each claim in the petition; and*

vi. *Respondents may file a joint response.*

4.2.3 Where the petitioner claims that they or any other candidate, as opposed to the respondent, was validly elected, the response must state the facts upon which the respondent relies to prove that the petitioner, or that other person, was not duly elected.

4.3 Witness Affidavits

4.3.0 Rules 8(4)(b) and 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, require the parties to file, **together** with the election petition or response to the election petition, affidavits sworn by the parties, and all witnesses the parties intend to call at the trial.

4.3.1 Every witness affidavit must:

(i) state the substance of the evidence of the witness; and

(ii) be served on all the parties to the election petition.

4.3.2 Rule 12(14) provides that all witness affidavits used in EDR must in addition to the Election Rules, comply with the provisions of the Oaths and Statutory Declarations Act and Order 19 of the Civil Procedure Rules, 2010.

4.3.3 Failure to file a supporting affidavit is fatal to a petition: it is not a procedural technicality as the affidavit contains the evidence a party wishes to rely on (*Patrick Ochieno Abachi &*

6 Others v Kenya Anti-Corruption Commission, Nairobi Constitutional Petition 615 of 2008). Furthermore, the supporting affidavit must be filed contemporaneously with the petition, to allow the respondent(s) to be aware of the case against them and the requisite time to respond. Where substitution is allowed, the substituted petitioner stands in the same position as the original petitioner, and may be allowed to file supplementary affidavits, so long as he/she does not raise new issues, as this would advance a new case which would be different from the original petitioner's case and hamper resolution of the petition within the constitutional timelines (*Bernard Kibor Kitur v Alfred Kiptoo Keter & Another*, Supreme Court Petition No. 27 of 2018).

4.3.4 A witness who fails to file an affidavit as required under Rules 12(8) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, will not be allowed to give evidence without leave of the court. The court will not usually grant such leave unless the party in default offers sufficient reasons for the failure to file a witness affidavit as required under the rules.

4.3.5 Once filed, the affidavits form part of the record of the election court and become the deposing witnesses' respective evidence for purposes of examination-in-chief (*Nuh Nassir Abdi v Ali Wario & 2 Others,* Mombasa Election Petition No. 6 of 2013). A witness who swears an affidavit is liable to be cross-examined by the adversary of the party who calls him/her as a witness and any other party to the election petition, and may be re-examined by the party who calls him/her as a witness.

4.3.6 Although affidavits are not usually deemed to be pleadings, the affidavit in support of an election petition and any documents annexed thereto are deemed to be part of the petition and, therefore, part of the pleadings in the case (*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others,* Supreme Court Petition No. 2B of 2014; and *Ferdinand Ndung'u Waititu v IEBC & 8 Others,* Nairobi Election Petition No. 1 of 2013).

4.3.7 Accordingly, it is erroneous for an election court to refuse to consider the contents of the affidavit in support of an election petition, or documents annexed to such an affidavit, on the ground that they do not form part of the pleadings (*Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others,* Nyeri Civil Appeal No. 38 of 2013). Although there is no clear authority on the point, this rule presumably extends to the respondent's affidavit, with the result that the respondent's affidavit and any documents annexed thereto form part of the response to the election petition.

4.3.8 The affidavit cannot annex or adduce the affidavit of the other witnesses. Each affidavit should be independent, and, in the event the affidavit annexes another witnesses' affidavit, such evidence of the witnesses is deemed testimony of the main deponent and as such the witnesses cannot be examined on it. In *Raila Odinga & 3 Others v IEBC & 4 Others,* Supreme Court Petitions 5, 3 and 4 of 2013, the Supreme Court expunged from record such affidavits which were put in as annexures of the petitioner's affidavit. It stated:

> *The Petitioner has used an unusual way of availing the affidavits as annexures or evidence as there were various further affidavits filed through the affidavit in reply which were not independent affidavits filed to stand on their own evidence in the particular proceedings. Such affidavits evaded payment of the filing fees and their probative value was questionable. The affidavits and the supporting affidavit of the petitioner are not commissioned. The affidavits are thereby struck out and expunged from the record.*

4.3.9 Affidavits must be drawn in the first person (Order 19 Rule 5 of the Civil Procedure Rules, 2010). Despite the singular form of the first person being '*I*' and the plural form '*We*', only a single person can swear an affidavit.

4.3.10 An affidavit sworn by two or more persons may be deemed incurably defective and struck out. In *Thomas Malinda Musau & 2 Others v IEBC & 2 Others*, Machakos Election Petition No. 2 of 2013, the Court explained the rationale for this rule as follows:

> *The affidavit dated 18th March, in support of the Petition, is deponed by three petitioners jointly ... It is apparent that some averments are peculiar to individual deponents. This means that the averments deponed do not belong to other deponents who have appended their signatures thereon. The averments clearly show that not all deponents have the same perception or belief. When it comes to cross-examination it may create some difficulty and/or embarrassment. This may result into an injustice being done because there will be frustration on the part of the party cross-examining ... Order 19 of the Civil Procedure Rules requires an affidavit to be drawn in first person form. Allowing a plural affidavit like the one deposed herein will be doing an injustice to the Respondents. The mischief cannot be cured by Article 159 (2) (d) of the Constitution... The joint affidavit deponed by the Petitioners herein...is hereby struck out. They are however granted leave to file a compliant affidavit in support of the Petition within three days. Corresponding leave is granted to the Respondents to file responses thereto if need be within three (3) days.*

4.3.11 Nonetheless, even though the joint affidavit is deemed irregular, this does not necessarily invalidate it and the Court may excuse such procedural requirements (*Geoffrey Githinji Mwangi v Jubilee Party & 9 Others,* Nanyuki Magistrates Court Petition 1 of 2017).

4.3.12 The affidavit must be commissioned by a Commissioner for Oaths in accordance with sections 4 and 8 of the Oaths and Statutory Declarations Act. Failure to comply with such requirement is deemed fatal to the affidavit. In *David Wamatsi Omusotsi v Returning Officer Mumias-East Constituency & 2 Others,* Kakamega Election Petition 9 of 2017, the Court struck out supporting affidavits for being stamped by a firm of advocates instead of a Commissioner for Oaths. In its dictum, the Court held that a document stamped by a person other than a Commissioner for Oaths is a foreign document and not an affidavit capable of supporting a petition or adducing evidence.

4.3.13 A further or supplementary affidavit that introduces new evidence and/or grounds, beyond those pleaded in the petition, is liable to be struck out. The rationale for this rule is that allowing such an affidavit to stand would be tantamount to introducing new evidence through the back door. In *Benjamin Ogunyo Andama v Benjamin Andola Andayi & 2 Others*, Kakamega Election Petition No. 8 of 2013, the Court explained the rule in the following words:

> *The further affidavits as per the court order, were only meant to clarify or amplify the specific complaints raised under paragraph 12 of the petition, which gives the particulars of the election dispute. They were not meant to materially change the position of the petition. Since the contents of the said further affidavits raise disputes or complaints not contained in paragraph 12 of the petition, if they are allowed to stand, they will have the effect of materially changing the position of the petition. It is therefore my finding that the four further affidavits filed by the petitioner do not comply with the pre-conditions for leave granted by the court to file the same, and they have to be struck out.*

4.4 Filing and Service of Election Petitions

4.4.0 Time, in principle and applicability, is a vital element in the electoral process (*Mary Wambui Munene v Peter Gichuki King'ara & 2 Others*, Supreme Court Petition 7 of 2014). Thus, to subvert uncertainty, election petitions are subject to constitutionally set timelines.

4.4.1 Parliamentary and County election petitions *must be filed within 28 days* of the declaration of the results of the election (Article 87(2) of the Constitution; s 76(1)(a) of the Elections Act, 2011).

4.4.2 The 28-day period starts running from the date of declaration of the election results, i.e., the day the returning officer issues a certificate of election to the successful candidate (*Mary Wambui Munene v Peter Gichuki King'ara & 2 Others*, Supreme Court Petition No. 7 of 2014; *Anami Silverse Lisamula v IEBC & 2 Others*, Supreme Court Petition No. 8 of 2014; and *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others*, Supreme Court Petition No. 10 of 2013).

Filing and Service of Petition outside the Prescribed Period

4.4.1.1 A petition filed outside the prescribed constitutional and statutory period is null ab initio (*Mary Wambui Munene v Peter Gichuki King'ara & 2 Others*, Supreme Court Petition No. 7 of 2014). Consequently, the election court has no jurisdiction to entertain such a petition (*Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*, Supreme Court Petition No. 5 of 2014). Courts have no jurisdiction to entertain a parliamentary or county election petition filed before the declaration of the results (*Thuo Mathenge v Nderitu Gachagua & 2 Others*, Nyeri Election Petition No. 1 of 2013).

4.4.1.2 In *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others*, Supreme Court Petition No. 10 of 2013, the Court in para 72 summarised the law as follows:

(a) declaration of results is the aggregate of the requirements set out in the various election forms and involving various officials;

(b) in parliamentary and county elections:

(i) the mandate to declare election results rests with the Returning Officer;

(ii) the instrument used to declare is the certificate of election (in Form 38) awarded to the successful candidate; and

(iii) publication in the Kenya Gazette is merely meant to inform the public as to the persons elected.

(c) the electoral process terminates upon declaration of results at which point the jurisdiction to challenge the election results shifts from the IEBC to the election courts.

4.4.1.3 Parliamentary and county election petitions *must be served within 15 days* of filing the petition (s 76(1)(a) of the Elections Act, 2011). The service of an election petition is a fundamental step in the EDR process (*Rozaah Akinyi Buyu v IEBC & 2 Others*, Kisumu Civil Appeal No. 40 of 2013).

4.4.1.4 The service of an election petition may be done directly on the respondent or by advertisement in a newspaper with national circulation (Article 87(3) of the Constitution).

4.4.1.5 Service on the IEBC may additionally be effected by delivery of the election petition at the head office or such other office as the IEBC may notify (Rule 9(b) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017).

4.4.1.6 Service by way of advertisement must comply with the prescribed format and contain all the prescribed information (Rule 10(3) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017).

4.4.1.7 There is emerging jurisprudence on alternative modes of service including through mobile phones and social communication networks such as *WhatsApp*. While service is ordinarily to be effected in personal form, the approach to allow alternative modes 'helps to avoid spurious applications which allege non-service and insist on personal delivery rather than awareness'. This is because the only purpose and essence of service is to bring the proceedings to the attention of an affected party and nothing more (*Macharia Patrick Mwangi v Mark Ndungu Nganga & Another,* Nairobi High Court Election Petition No. 20 of 2017). Similarly, while dealing with an appeal from a decision by the PPDT, the High Court was, in the case of *Chama Cha Mashinani & 2 Others v Beatrice Chebomui,* Nairobi High Court Election Petition Appeal No. 44 of 2017, called upon to make a determination on whether the PPDT was right to allow substituted service through the mobile phone communication application known as *WhatsApp*. The court, while accepting that service through *WhatsApp* was proper, however clarified that such a mode of service must be accepted with caution. The cautionary measures include ensuring that there is sufficient evidence to show that the mobile number used belonged to the person intended to be served. At para 9 of the decision the court stated as follows:

> *I have already stated that there is no dispute that the 3rd Appellant was served by WhatsApp. There is no dispute that the email address and or the mobile number used belong to the 3rd Appellant. The dispute before this court emanate (sic) from nomination processes by political parties where time is of extreme essence therefore the court in the circumstances is ready to accept various modes of service but with caution as alluded hereinabove. For the above reasons, I am satisfied that the 3rd Appellant was properly served but she chose not to avail herself before the Political Parties Disputes Tribunal to argue her case.*

Consequences of Non-Service

4.4.2.1 Failure to serve an election petition in the prescribed manner and within the prescribed time, or at all, is a fatal mistake (*Rozaah Akinyi Buyu v IEBC & 2 Others,* Kisumu Civil Appeal No. 40 of 2013; and *Charles Kamuren v Grace Jelagat Kipchoim & 2 Others,* Election Petition (Eldoret) No. 1 of 2013).

4.4.2.2 The dictum of the Court of Appeal in *Rozaah Akinyi Buyu v IEBC & 2 Others,* Kisumu Civil Appeal No. 40 of 2013 illustrates this point:

> *Service of the Petition upon the respondents was a fundamental step in the electoral process and resolution of disputes arising therefrom. Failure to serve the petition upon the respondents went into the root of the petition and the petition could not stand when there was failure to serve the same.*

4.4.2.3 In *Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 Others,* Machakos Election Petition No. 8 of 2013, the Court explained the importance of service in EDR as follows:

> *Although the regime of service of election petitions has been liberalised, the requirement of service was not dispensed with. Service of the petition is still a requirement under*

the Constitution, the Act and the Rules. Without service, the opposite party is denied the opportunity to defend the case. Service is an integral element of the fundamental right to a fair hearing which is underpinned by the well-worn rules of natural justice. As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against him. Elementary justice demands that a person be given full information on the case against him and given reasonable opportunity to present a response... Any pleading filed and not served on the opposite party has no legal force. It cannot be dealt with by the court and no lawful order can be drawn from it...Failure to serve a petition is a matter that goes to the very core of the proper and just determination of the petition and cannot be wished away...service of the petition is a mandatory requirement and a petition that has not been served cannot proceed for hearing as the respondent is denied the opportunity to contest the facts in the petition.

Mere knowledge of existence of a petition by the respondent can neither cure want of service nor discharge the burden of service imposed on the petitioner by the law... service of the petition is not a mere procedural requirement that can be dispensed with but is a mandatory requirement that must be complied with...It is not a mere technicality that can be swept aside by application of the provisions of Article 159 (2) (d) and the overriding objective set out in rules 4 and 5 of the Rules. Unless waived by the respondent, service must be effected as it is an essential and mandatory step and an affected party is entitled to apply to the court to strike out the petition for want of service.

4.5 Security for Costs

4.5.1 Section 78 of the Elections Act, 2011 requires a petitioner to deposit security for the payment of costs *within 10 days* of filing the election petition.

4.5.2 The prescribed amounts for purposes of this requirement are:

(i) *five hundred thousand shillings, in the case of a petition against a member of Parliament or a county governor; or*

(ii) *one hundred thousand shillings, in the case of a petition against a member of a county assembly.*

4.5.3 The purpose of the requirement to deposit security for costs is to discourage frivolous or vexatious litigants from challenging the results of an election, which diverts scarce judicial resources from more deserving court business (*Esposito Franco v Amason Kingi Jeffah & 2 Others*, Nairobi Civil Appeal No. 248 of 2008; and *Tom Onyango Agimba v IEBC & 2 Others,* Milimani High Court Election Petition 18 of 2017). The other purpose of the requirement is to provide recompense to respondents, who are often constrained to incur expenses in defending hopeless and unsuccessful election petitions.

4.5.4 Section 78(3) of the Elections Act, 2011 provides that:

*Where a petitioner does not deposit security as required by this section, or if an objection is allowed and not removed, **no further proceedings shall** be heard on the petition and the respondent **may** apply to the election court for an order to dismiss the petition and for the payment of the Respondent's costs.*

4.5.5 Thus, as per the aforesaid section 78(3), payment of security of costs within the prescribed time is an essential prerequisite for the hearing of election petitions. However, there are two prevailing views on the consequences of the failure to comply with this requirement.

4.5.6 The first view is that the requirement to deposit security for costs is not a mere procedural requirement capable of being excused as a matter of judicial discretion, and that failure to deposit the security within the prescribed time is fatal to the election petition (*Said Buya Hiribae v Hassan Dukicha Abdi & 2 Others*, Mombasa Election Petition No. 7 of 2013; *Kumbatha Naomi Cidi v County Returning Officer, Kilifi & 3 Others*, Malindi Election Petition No. 13 of 2013; and *Simon Kiprop Sang v Zakayo K. Cheruyot & 2 Others*, Nairobi Election Petition No. 1 of 2013).

4.5.7 The second view is that while the depositing of security for costs is an essential prerequisite for the hearing of an election petition, the time within which this must be done is a procedural requirement and, accordingly, courts have a discretion to enlarge the time for depositing the security (*Fatuma Zainabu Mohamed v Ghati Dennitah & 10 Others*, Kisii Election Petition No. 6 of 2013; *Charles Maywa Chedotum & Another v IEBC & 2 Others*, Kitale Election Petition No. 11 of 2013). The Court in *Samwel Kazungu Kambi & Another v Nelly Llongo County Returning Officer, Kilifi County & 3 Others,* Malindi Election Petition 4 & 5 of 2017(consolidated), opined as follows:

> *[25.] Sub-sections (2) and (3) of Section 96 leaves no doubt as to the fact that unless a deposit of security for costs is made within ten days from the date of presenting the referendum petition, the petition shall be struck out. Unlike Section 96(2) and (3) which commands the striking out of a referendum petition if no security for costs is deposited, Section 78(3)* ***puts an election petition in comatose if no security for costs is deposited****. My understanding is that an election petition can be revived,* ***with the leave of the court****, upon payment of the security deposit so long as the period for hearing the petition has not lapsed. Nothing would have been easier for Parliament than to use the language used in Section 96 in Section 78 if the intention was to completely take away the discretion of an election court to enlarge time. I therefore agree with Edward M. Muriithi, J that if sufficient cause is shown, an election court has jurisdiction to extend the time for depositing security for costs in an election petition.*

4.5.8 In *Charles Ong'ondo Were v Joseph Oyugi Magwanga & 3 Others*, Homa Bay Election Petition No. 1 of 2013), the court explained the rule as follows:

> *I would have found favour with this position [i.e. dismissal of the petition] were it not for the provisions of s. 78 (3) of the Elections Act which presumes that the court may exercise discretion in favour of a petitioner who has not deposited the security and against who an objection has been raised. It is only once the objection is not removed that no further proceedings can be taken. Here even before the objection had been taken the deposit had been paid so there will be no issue of removing the objection. For that reason, this court shall on this occasion save the petition by not allowing the preliminary objection and the Notice of Motion which both sought its dismissal on the issue of the deposit.*

4.5.9 An election court will not strike out an election petition for failure to comply with the requirement for depositing security for costs where it appears that the court registry has been accepting deposits of amounts smaller than that which is prescribed under the law and the petitioner has paid that smaller amount within the time prescribed for depositing security for costs (*Jonas Misto Vincent Kuko v Wafula Wekesa & Another*, Kitale Election Petition No. 9 of 2013).

4.5.10 Where there are two or more petitioners, only a single deposit of security for costs needs to be made (*Thomas Malinda Musau & 2 Others v IEBC & 2 Others*, Election Petition (Machakos) No.

2 of 2013). The rationale for this rule is that any other approach would unreasonably impede access to justice and dissuade persons with a common interest from filing a joint petition with a view to cutting costs. Further, the legal requirement to deposit security for costs is met where the payment is made by way of cash, a banker's cheque or any other conventional way known or recognised in the normal banking or payment processes (*Esposito Franco v Amason Kingi Jeffah & 2 Others*, Nairobi Civil Appeal No. 248 of 2008). In *Rotich Samuel Kimutai v Ezekiel Lenyongopeta & 2 Others*, Nairobi Civil Appeal No. 273 of 2003, the Court of Appeal held as follows:

> *Parliament could not have intended that all election petitioners must carry into the court registry bank coins or banknotes to the value of Kshs.250,000/= with all the attendant security risks. It would otherwise have provided for "ready money" which is the definition of "cash". In Re Collings [1933] Ch. 920, it was held that "money" in its strict legal sense included money on deposit or current account at a bank". And one of the ways such money may be withdrawn and paid out to another person is by way of a cheque, which by definition is a written order to a bank to pay the stated sum from the drawer's account. If the cheque is not honoured, then there would obviously be no payment. In our view a deposit made upon the filing of an election petition towards security for costs in the form of cash, banker's cheque or personal cheque is sufficient compliance with the provisions of the section, unless in the case of a personal cheque it be shown that the practice of the Court is not to accept personal cheques, in which case payment has to be made in cash or by Banker's cheque.*

4.5.11 Further, in *Rozaah Akinyi Buyu v IEBC & 2 Others*, Kisumu Civil Appeal No. 40 of 2013, the Court held as follows:

> ***The respondents' complaint that the said deposit was not a payment because there was endorsed on the deposit slip the words "*CHEQUES WILL BE GIVEN VALUE WHEN PAID",** cannot in our respectful opinion have any legal basis. The legal requirement was to pay the requisite deposit by a way known or recognized in the normal banking or payment processes, and a payment by bankers cheques made within the 10-day period required by law was a good and proper payment.

4.5.12 A petitioner who is represented by an advocate cannot rely on misleading advice from the court registry or judicial staff as a justification for failing to comply with the law on depositing security for costs. In *Esposito Franco v Amason Kingi Jeffah & 2 Others*, Nairobi Civil Appeal No. 248 of 2008, the Court of Appeal ruled as follows:

> *We have carefully examined the evidential material on record and in the end, we are left in no doubt that the advocate seized of the matter on behalf of the petitioner was clueless about the provisions, and therefore the requirements of Section 21 of the Act and Rule 12 thereunder. The expectation that he should have been advised by the court clerks on the law and procedure instead of offering that advice to them is as baffling to us as it was to the learned Judge of the superior court. It would not matter in the circumstances how long he wanted to take in cross-examining those clerks. We cannot therefore blame the Judge in surmising that the advocate either misread the law or was ignorant of it, or alternatively he did not have the deposit at all.*

4.5.13 However, the Court will not strike out a petition where the security for costs is paid in time, but the official receipt is issued at a later date, due to any delays occasioned by the Court Registry (*Seth Ambusini Panyako v IEBC & 2 Others*, Kakamega High Court Election Petition No. 14 of 2017).

4.6 Pre-Trial Conference and Directions

4.6.1 The pre-trial conference must be held within 7 days of receipt of the last response to the petition (Rule 15, Elections (Parliamentary and County Elections) Petitions Rules, 2017).

4.6.2 Rule 15 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 requires election courts to do the following during the pre-trial conference:

- frame contested and uncontested issues in the petition;
- analyse methods of resolving contested issues;
- consider consolidation of petitions in cases where more than one petition is filed with respect to the same election;
- deal with all interlocutory applications and decide on their expeditious disposal;
- confirm the number of witnesses the parties intend to call;
- give an order for furnishing further particulars;
- give directions for the expeditious disposal of the suit or any outstanding issues;
- give directions as to the place and time of hearing the petition;
- give directions as to the filing and serving of any further affidavits or the giving of additional evidence;
- limit the volume or number of pages of any copies of documents that may be required to be filed; or
- make such other orders as may be necessary to prevent unnecessary expenses and to ensure a fair and effectual hearing.

4.6.3 Many interlocutory applications may ensue, and often do, from the pre-trial conference and directions.

4.7 Interlocutory Applications and Reliefs

4.7.7.1 Generally, interlocutory applications relating to an election petition must be filed before the commencement of the trial of the election petition (Rule 15(1)(c), Elections (Parliamentary and County Elections) Petitions Rules, 2017; and *Mable Muruli v Wycliffe Ambetsa Oparanya & 3 Others*, Kakamega Election Petition No. 5 of 2013).

4.7.7.2 Notwithstanding the above, a party may bring an interlocutory application after commencement of the trial where it is demonstrated that the nature of the interlocutory application is such that *it could not have been brought before the commencement of the trial* (Rule 15(2), Elections (Parliamentary and County Elections) Petitions Rules, 2017). This is, therefore, a matter of judicial discretion. However, the said discretion must be exercised cautiously to prevent inordinate delays with the aim of delaying trial.

4.7.1 Requests for Particulars

4.7.1.1 An election court may direct a petitioner to furnish the respondents with further particulars of the allegations set out in the petition (Rule 15(1)(e), Elections (Parliamentary and County Elections) Petitions Rules, 2017). This is usually done at the pre-trial conference, where the court lays ground rules for achieving the expeditious, fair and efficient disposal of the election petition. The election court may make an order for the furnishing of further particulars *suo moto* or upon application by any party to the election petition.

4.7.1.2 The purpose of an order for the furnishing of particulars is to clarify issues. It is not the purpose of the order to regularise or salvage an incompetent election petition, e.g., one that does not cover all the mandatory informational requirements (*John Michael Njenga Mututho v Jayne Njeri Wanjiku Kihara & 2 Others*, Nakuru Civil Appeal No. 102 of 2008, cited with approval in *Ismail Suleman & 9 Others v Returning Officer Isiolo County & 2 Others*, Meru Election Petition No. 2 of 2013).

4.7.1.3 It is on this premise that the party must be aware of the full case before it. It is not meant to provide a leeway for adduction of evidence under the guise of request for particulars.

4.7.1.4 The request must also not be used to burden a party with unreasonable demands for various pieces and aspects of evidence before the hearing. In *Elizabeth Ongoro Amollo v Francis Kajwang Tom Joseph & 2 Others* Nairobi Election Petition 5 of 2017, the election court relied on the case of *John Kiarie v Beth Mugo & Others,* Nairobi Election Petition 13 of 2008 in stating that:

> *...the respondent cannot request for the adduction of evidence under the guise of making a request for particulars...a request for particulars was not meant to be avenue for a respondent to challenge the legality of the petition without the court having the benefit of hearing the complaints raised thereof....*
>
> *..the court is entitled to decipher the phrase 'where necessary' to mean that request for particulars will be allowed only in situations where it is exhibited that the request is or is for something, certain, compulsory, inevitable, obligatory, requisite or urgent. In all other situations where the request for particulars itself does not or the demands it makes do not exhibit those characteristics, the court need not exercise its discretion to allow such requests.*

4.7.2 Amendment of Pleadings

4.7.2.1 An election petition filed in time and based on allegations of election offences may be amended *with the leave of the election court* (s 76(4), Elections Act, 2011).

4.7.2.1 The application for leave to amend pleadings must be made and granted within the time prescribed for challenging the relevant election, i.e., *within 28 days* of the declaration of the results of the election (s 76(4), Elections Act, 2011; *IEBC & 2 Others*,_Kabarnet, Election Petition No. 1 of 2017; *Ismail Suleman & 9 Others v Returning Officer Isiolo County & 2 Others*, Meru Election Petition No. 2 of 2013; and *Charles Nyaga Njeru v IEBC & Another*, Chuka Chief Magistrates Court Election Petition No. 1 of 2013).

4.7.2.3 An amendment does not extinguish the previous pleading(s); it merely makes the document more accurate or to be in tandem with the changing circumstances of the case (*Gerald Iha Thoya*

v Chiriba Daniel Chai & IEBC, Malindi Election Petition Appeal 1 of 2018).

4.7.2.4 The election court has no jurisdiction to allow an amendment if the proposed amendment would have the effect of changing the nature and character of the petition. The courts, therefore, disallow any proposed amendment that seeks to introduce fresh and new evidence (*Abdiwahab Sheikh Osman Hathe v Mohamed Ali Sheikh & 3 Others,* Garissa Magistrate's Court Election Petition No. 1 of 2017).

4.7.2.5 The courts may allow amendments to correct inadvertent errors and omissions at any stage of EDR proceedings, including appellate stages, where the amendment would not occasion prejudice to any party (*Musa Cherutich Sirma v IEBC & 2 Others*, Kabarnet Election Petition No. 1 of 2017; and *Ramadhan Seif Kajembe v Returning Officer, Jomvu Constituency & 3 Others*, Mombasa Election Petition No. 10 of 2013).

4.7.2.6 The courts do not, however, allow amendments which seek or purport to cure a fatal defect in an election petition, e.g., failure to comply with prescribed mandatory requirements such as an omission to file an affidavit in support of a petition or votes garnered by candidates (*Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others*, Garissa Election Petition No. 4 of 2013; *Ismail Suleman & 9 Others v Returning Officer Isiolo County & 2 Others*, Meru Election Petition No. 2 of 2013; and *Gerald Iha Thoya v Chiriba Daniel Chai & IEBC,* Malindi Magistrates' Court Election Petition No. 2 of 2017).

4.7.2.7 Further, the courts will not allow an application for amendment where such an application is no more than a fishing expedition for evidence (*Musa Cherutich Sirma v IEBC & 2 Others*, Kabarnet Election Petition No. 1 of 2017; and *Charles Nyaga Njeru v IEBC & Another IEBC & Another*, Chuka Election Petition No. 1 of 2013).

4.7.2.8 Previously, courts held that the amendment of a pleading extinguishes the previous pleading. For instance in *Lambeshua Reuben Moriaso Ole v Kool Julius Ole & 3 Others*, Narok Senior Resident Magistrate's Court Election Petition No. 1 of 2013, the petitioner filed an amended election petition but sought to rely on the affidavits filed in the original petition. The Court ruled as follows:

> *It is settled law that the filing of an amended pleading extinguishes the earlier pleading. Therefore, by filing the present Amended Petition the original Petition became extinct as a dodo. It would be untenable in law, as the Petitioner sought to do, to rely both on the original Petition and the Amended [P]etition. If the Court was to permit this position, the Court would end up with a bicephalous [P]etition in its hands; a strange creature unknown to the election regime and law but probably known in Greek Mythology as Orthros: a two-headed canine beast whose mythical role ended prematurely when Hercules clobbered it out of existence. A two-headed [P]etition? Not in the Kenya election law and regime.... A Petition could not be complete without an affidavit in support of the Petition; there are also no witness Affidavits. Rule 10 (3) (b) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 [now Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017] is couched in mandatory terms and this was not complied with. With that omission, the Petition failed to attain the minimum basic threshold of law disclosing sufficient facts and grounds for granting the reliefs sought...*

4.7.2.9 However, in departing from this position, the High Court in *Gerald Iha Thoya v Chiriba Daniel Chai & Another*, Malindi Election Petition Appeal No. 1 of 2018, held that in determining whether an amendment extinguishes a previous one depends on whether the amendment is successful or aborted. The Court opined:

> *...firstly, an amended petition must stand on the original petition in order to have some legitimacy especially if the amendment is filed outside the statutory time for filing election petition. ..secondly... an amendment is a change or addition designed to improve a document. In amending a pleading, a party is just making the document more accurate or to be in tandem with the changing circumstances of the case. It does not amount to repealing a document. An amendment does not therefore entirely sweep away the previous pleading.*

4.7.2.10 Consequently, in the event an amendment is disallowed, or the amended petition is struck out, the original petition is not obliterated (*Robinson Simiyu Mwanga & Another v IEBC & 2 Others,* Kitale High Court Election Petition 1 of 2017). Where, after striking out of amendments, the original petition remains capable of being heard, the Court should hear and determine the petition on its merits. In so holding, the Court in *Gerald Iha Thoya v Chiriba Daniel Chai & Another*, Malindi Election Petition Appeal No. 1 of 2018 stated that:

> *Once the court struck out the amended petition it ought to have reverted to the original petition. There was no void left by the striking out of the amended petition as the original petition had not been withdrawn and was capable of being heard...*

4.7.2.11 An amended petition must be supported by an affidavit. The petitioner need not swear a fresh affidavit, the petitioner may use the previous affidavit in support of the amended petition, if there is no new issue that has been introduced (*Gerald Iha Thoya v Chiriba Daniel Chai & Another*, Malindi Election Petition Appeal No. 1 of 2018).

4.7.2.12 Where an amendment is unprocedurally effected without leave of the court, the pleading will be struck out (*Sila Samuel Mulwa v IEBC & 3 Others,* Malindi High Court Election Petition 11 of 2017).

4.7.3 *Further Affidavits and Additional Evidence*

4.7.3.1 An election court has discretion to allow the filing of further affidavits and admit new or additional evidence (Rule 15(1)(h), Elections (Parliamentary and County Elections) Petitions Rules, 2017; *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others*, Supreme Court Petition No. 18 of 2014; and *Raila Odinga v IEBC & 3 Others*, Supreme Court Petition No. 5 of 2013).

4.7.3.2 An application for adduction of new and additional evidence must be made within 28 days of the declaration of the results of the election where the new or additional evidence, if it were to be admitted and acted upon, would have the effect of amending the election petition (see Section 76 (4) of the Elections Act, 2011).

4.7.3.3 An election court will not grant an application for the adduction of new or additional evidence where the grant of such an application will prejudice the other parties to the dispute or undermine the constitutional imperative of timely resolution of electoral disputes (*Raila Odinga v IEBC & 3 Others*, Supreme Court Petition No. 5 of 2013).

4.7.3.4 In *Raila Odinga v IEBC & 3 Others*, Supreme Court Petition No. 5 of 2013, the Supreme Court gave the following guidelines for determining applications for the filing of further affidavits and admission of new or additional evidence:

> *i. the admission of additional evidence is not an automatic right. Instead, the election court has a discretion on whether or not to admit the evidence;*

ii. *further affidavits must not seek to introduce massive evidence which would, in effect, change the nature of the petition or affect the respondent's ability to respond to the said evidence;*

iii. *the parties to an election petition should strive to adhere to the strict timelines set out in EDR laws; and*

iv. *admission of new evidence must not unfairly disadvantage the other parties to an election petition.*

4.7.3.5 Leave may be granted to file further evidence either in addition to existing evidence or entirely new evidence if it assists the court in the just disposal of the matter (*Wavinya Ndeti v IEBC & 4 Others,* Nairobi High Court Petition No. 4 of 2013). Discretion may be exercised in favour of an applicant provided that it will not prejudice the opposing side (*Habil Nanjendo Bushuru v IEBC & 3 Others,* Kakamega High Court Election Petition 8 of 2017; *Ahmed Abdulahi Mohamad & Another v Hon. Mohamed Abdi Mohamed,* Nairobi High Court Election Petition 14 of 2017 (consolidated with Garissa High Court Election Petition 3 of 2017); and *Apungu Arthur Kibira v IEBC & 2 Others*, Kakamega High Court Election Petition 6 of 2017). To establish the nature, extent and context of the proposed further evidence, a party should annex the proposed affidavits (*Ahmed Abdulahi Mohamad & Another v Hon. Mohammed Abdi Mahamud & 2 Others,* Nairobi High Court Election Petition No. 14 of 2017).

4.7.3.6 Leave will not be granted where the additional evidence introducing new and distinct complaints requiring responses and further replies by the petitioners would change the nature of the petition and may impact on the EDR timelines (*Benjamin Ogunyo Andama v Benjamin Andola Andayi & 2 Others*, Kakamega Election Petition No. 8 of 2013; *Robinson Simiyu Mwanga & Another v IEBC & 2 Others,* Kitale High Court Election Petition 1 of 2017; and *Albeity Hassan Abdalla v IEBC & 2 Others,* Malindi High Court Election Petition 8 of 2017), or where such evidence was available at the time of filing (*Robinson Simiyu Mwanga & Another v IEBC & 2 Others,* Kitale High Court Election Petition 1 of 2017), or where it will only act as a fishing expedition and serve to expand the petition (*Michael Gichuru v Hon. Rigathi Gachagua & 2 Others,* Nyeri High Court Election Petition No. 2 of 2017).

4.7.3.7 Finally, further affidavits may not be filed without leave of court or after hearing has closed, irrespective of their relevance (*Joseph Obiero Ndiege v Orange Democratic Party & Another*, Nairobi High Court Election Petition Appeal No. 19 of 2017).

4.7.4 *Withdrawal of Election Petitions and Substitution of Petitioners*

4.7.4.1 Because elections petitions are inherently suits in the public interest, they cannot simply be withdrawn at the instance of the petitioner, or even on the consent of the parties (*Peter Gatirau Munya v IEBC, Meru County Returning Officer & Kiraitu Murungi,* Meru Election Petition 6 of 2017). An election petition can only be withdrawn *with the leave of the election court* (Rule 21(1), Elections (Parliamentary and County Elections) Petitions Rules, 2017). Further, a petitioner wishing to withdraw an election petition must:

- file an application for withdrawal of the petition, in Form 5 set out in the Schedule to the Elections (Parliamentary and County Elections) Petitions Rules, 2017;
- file an affidavit stating the grounds on which the petition is intended to be withdrawn;
- serve the application and the affidavit on the respondent(s); and

- publish, in a newspaper of national circulation, a notice of his intention to withdraw the petition.

4.7.4.2 Once the notice of intention to withdraw an election petition is published, any person desirous of prosecuting the petition may apply to the election court to be substituted as a petitioner. There is no specific format of an application for substitution prescribed by the Rules, meaning that oral applications are permissible (*Bernard Kibor Kitur v Alfred Kiptoo Keter & IEBC,* Eldoret Election Petition 1 of 2017). The registrar must notify any such person of the time and place for the hearing of the application for withdrawal of the election petition (Rule 23, Elections (Parliamentary and County Elections) Petitions Rules, 2017).

4.7.4.3 The grant of an application to withdraw is discretionary, but a petitioner ought not be compelled to prosecute the petition against his will (*Dickson Daniel Karaba v Kibiru Charles Reubenson & 2 Others,* Kerugoya Election Petition 4 of 2017). An election court should not allow an application to withdraw where it is actuated by collusion, undue influence, political backroom dealing or malice, thereby compromising the public interest (*Ahmed Abullahi Amin & Another v Abass Sheikh Mohamed & 2 Others,* Garissa Election Petition 8 of 2013). The affidavit in support of the application must contain a declaration that there has been no agreement or undertaking entered into in relation to withdrawal of the petition (Rule 21(6), Elections (Parliamentary and County Elections) Petitions Rules, 2017; *Peter Gatirau Munya v IEBC, Meru County Returning Officer & Kiraitu Murungi,* Meru Election Petition 6 of 2017; *Mwamlole Tchappu Mbwana v IEBC & 7 Others,* Election Petition Appeal 4 of 2018; and *Dickson Daniel Karaba v Kibiru Charles Reubenson & 2 Others,* Kerugoya Election Petition 4 of 2017).

4.7.4.4 Where the withdrawal application is actuated by a lawful agreement, the agreement should be disclosed to the court in the affidavit supporting the application (Rule 21(7), Elections (Parliamentary and County Elections) Petition Rules, 2017). It is not sufficient to allege that a petitioner had been compromised to withdraw the petition, proof of this fact must be supplied to successfully oppose a withdrawal application (*David K. Ole Nkedianye v Joseph Jama Ole Lenku & 4 Others,* Kajiado Election Petition 2 of 2017).

4.7.4.5 Since the goal of the substitution of petitioners is to enable the Court to reach an effectual and complete determination of the questions or issues arising in the proceedings (*Mwamlole Tchappu Mbwana v IEBC & 7 Others,* Mombasa Election Petition Appeal 4 of 2018), the petition must be capable of being taken over by another petitioner. Petitions which do not comply with mandatory provisions – such as payment of security for costs – are not suitable for substitution (*Bariu M'Limunyi v IEBC & 2 Others,* Meru Election Petition 4 of 2017).

4.7.4.6 Where the original Petitioner has complied with the procedure for withdrawal under Rule 21(3), and there is no expression of interest to take over the petition, the application to withdraw will ordinarily be allowed (*James Kingangir Naikola v IEBC & Another,* Narok High Court Election Petition No. 5 of 2017; *Adow Mohamed Abakar v Hon Mohamed Abdi Mohamed & 2 Others,* Nairobi Election Petition 3 of 2017; *Jimale Mohamed Abdullahi v IEBC & 2 Others,* Garissa High Court Election Petition No. 8 of 2017; *Mohamed Mahamud Ali v IEBC & 2 Others,* Mombasa Election Petition 7 of 2017). However, it is the duty of the court to ensure that a petition does not terminate if there is a suitable substitute (*Mohammed Ibrahim Abdi v IEBC & 2 Others,* Nairobi Election Petition 7 of 2017; and *Dickson Daniel Karaba v Kibiru Charles Reubenson & 2 Others,* Kerugoya Election Petition 3 of 2017).

4.7.4.7 On the other hand, where an application for withdrawal is made and not prosecuted, and neither is the notice of intention to withdraw published, the petition ought to be struck out (*Japhet Muroko and Another v IEBC & Others,* Nairobi Election Petition 23 of 2017; and *Nathif Jama Adan*

v Ali Bunow Korane & 2 Others Garissa Election Petition 2 of 2017).

4.7.4.8 Suitability of substitute petitioners is demonstrated by sufficient interest in the election, drawn from residency and registration as a voter in the electoral area (*Mohamed Mahamud Ali v IEBC & 2 Others,* Mombasa Election Petition 7 of 2017).

For a somewhat different reasoning see *David K. Ole Nkedianye v Joseph Jama Ole Lenku & 4 Others,* Kajiado Election Petition 2 of 2017.

4.7.4.9 Past conduct in relation to the petition may also be relevant in determining suitability as a substitute petitioner (*Dickson Daniel Karaba v Kibiru Charles Reubenson & 2 Others,* Kerugoya Election Petition 3 of 2017). Persons applying to be substitute petitioners ought to demonstrate how they will be prejudiced by the withdrawal of the petition.

4.7.4.10 The application for substitution ought to be considered after the application for withdrawal has been heard (*Nathif Jama Adan v Ali Bunow Korane & 2 Others,* Garissa Election Petition 2 of 2017; *Mohamed Mahamud Ali v IEBC & 2 Others,* Mombasa Election Petition 7 of 2017), unless the notice of intention to withdraw has already been published (*Ezekiel Okondo Ochieku v IEBC & 2 Others*, Kisii Election Petition 10 of 2013).

4.7.4.11 Upon substitution, the substituted petitioner stands in the same position as the original petitioner, and may be allowed to file supplementary affidavits, so long as he/she does not raise new issues, as this would advance a new case which would be different from the original petitioner's case and hamper resolution of the petition within the constitutional timelines (*Bernard Kibor Kitur v Alfred Kiptoo Keter & Another*, Supreme Court Petition No. 27 of 2018).

4.7.4.12 The election court may, by an order, direct that the security deposited on behalf of the original petitioner be retained as security for any costs that may be incurred by the substituted petitioner, or require that the substituted petitioner pay, within three days of the order of substitution, security for costs before proceeding with the petition (Rule 24(3) and (4) Elections (Parliamentary and County Elections) Petitions Rules, 2017).

4.7.4.13 There is no right to be substituted in an election appeal that is withdrawn (*Mwamlole Tchappu Mbwana v IEBC & 7 Others,* Election Petition Appeal 4 of 2018).

4.7.5 *Scrutiny and Recount*

4.7.5.1 General

4.7.5.1.0 The request for recount and scrutiny is anchored on the right to access information held by the state (Article 35 of the Constitution; section 4 of the Access to Information Act, 2016; section 27 of the IEBC Act, 2011; and *Raila Amolo Odinga & Another v IEBC & 2 Others,* Presidential Election Petition No. 1 of 2017).

4.7.5.2.0 The law on scrutiny and recount of votes is set out in sections 80(4)(a) and 82 of the Elections Act, 2011 as read with Rules 28 and 29 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.

4.7.5.3.0 Although the terms '*scrutiny*' and '*recount*' are often used together, interchangeably, and petitioners often pray for '*scrutiny and recount*' of the votes cast at an election, the two remedies are conceptually different.

4.7.5.4.0 A recount is limited to establishing the number of votes garnered by the candidates and the tallying of such votes (*Justus Gesito Mugali M'mbaya v IEBC & 2 Others*, Kakamega Election Petition No. 6 of 2013).

4.7.5.5.0 Scrutiny, on the other hand, goes beyond the simple question of the number of votes garnered by the candidates and extends to the question of the validity of such votes (*Justus Gesito Mugali M'mbaya v IEBC & 2 Others*, Kakamega Election Petition No. 6 of 2013; and Halsbury's laws of England, at 12:454, defines 'scrutiny' as *'a court supervised forensic investigation into the validity of the votes cast in an election'* (1990, Fourth Edition, LexisNexis)).

4.7.5.6.0 Consequently, there is no room for examination of electoral misconduct in a recount (*Justus Gesito Mugali M'mbaya v IEBC & 2 Others*, Kakamega Election Petition No. 6 of 2013). Although scrutiny and recount are conceptually different, the conduct of a scrutiny inevitably entails the conduct of a recount. The converse, however, is not true.

4.7.5.7.0 Consequently, the rationale for scrutiny is two-fold. First, that it is only the valid votes that confer an electoral advantage over a candidate in an election, hence the need to establish the validity and number of the valid votes a candidate garnered (the quantitative aspect). Second, that an election can be impugned based on electoral malpractices, misconduct and non-compliance with the law (qualitative aspect).

4.7.5.2 Principles of Scrutiny and Recount

4.7.5.2.1 In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition 2B of 2014, the Supreme Court gave the following guiding principles at para 153 on applications for scrutiny and recount:

a. *The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.*

b. *The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order* ***on its own motion*** *for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.*

c. *The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.*

d. *Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules [2013] [now Rule 29(4) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017].*

4.7.5.2.2 The Supreme Court in *Raila Odinga 2017* (at para 51) went further and provided criteria for an application for recount, relying on the Indian Supreme Court case of *Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & Anr*, Civil Appeals Nos. 5710-5711 of 2012, where it held as follows:

(i) *The court must be satisfied that a prima facie case is established;*

(ii) *The material facts and full particulars have been pleaded stating the irregularities in counting of votes;*

(iii) *A roving and fishing inquiry should not be directed by way of an order to re-count the votes;*

(iv) *An opportunity should be given to file objection; and*

(v) *Secrecy of the ballot should be guarded.*

4.7.5.2.3 The order of recount can be passed only if the petitioner sets out his/her case with precision, supported by averments of material facts. The Court will not allow an application for recount or scrutiny unless the same has been specifically pleaded in the petition. Where there is no supporting evidence, or the evidence is contrary to the averments in the petition, the application would fail (*Raila Odinga 2017*; *IEBC & Another v Stephen Mutinda Mule & 3 Others,* Civil Appeal No. 219 of 2013).

4.7.5.2.4 As earlier stated, an election court may make an order for scrutiny on its own motion. In *Phillip Mukwe Wasike v James Lusweti Mukwe & 2 Others*, Bungoma Election Petition No. 5 of 2013, it was held that the purpose of a *suo moto* order for scrutiny is to:

(1) *assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.*

(2) *assist the court in determining the valid votes cast in favour of each candidate.*

(3) *assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process.*

(see also *Robinson Simiyu Mwanga & Another v IEBC & 2 Others*, Kitale Election Petition No. 1 of 2017)

4.7.5.2.5 Even where the order is made on the application of a party, it must be demonstrated that the grant of the order will establish the sovereign will of the people and that there is sufficient factual basis laid in the petition for the grant of the order (*Mohamed Mahamud Ali v IEBC & 2 Others,* Mombasa High Court Election Petition 7 of 2017; *Apungu Arthur Kibira v IEBC & 2 Others,* Kakamega High Court Election Petition 6 of 2017; *Michael Gichuru v Hon. Rigathi Gachagua & 2 Others,* Nyeri High Court Election Petition 2 of 2017; and *Joseph Oyugi Magwanga & Another v IEBC & 3 Others,* Homa Bay Election Petition 1 of 2017).

4.7.5.2.6 It is not open to the petitioner to make a generalised prayer for scrutiny. They must specify the polling stations in respect of which scrutiny is needed and lay the foundation for the grant of scrutiny for each polling station (Rule 29(4), Elections (Parliamentary and County Elections) Petition Rules 2017; *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2014; *Albeity Hassan Abdalla v IEBC & 2 Others,* Malindi High Court Election Petition 8 of 2017; and *Annie Wanjiku Kibeh v Clement Kungu Waibara &*

Another, Nairobi Civil Appeal 20 of 2018).

4.7.5.2.7 Although the petitioner must generally establish a basis before the grant of an order for scrutiny or recount, such an order may be made without establishing a basis where the margin of victory or loss is narrow (*Charles Ong'ondo Were v Joseph Oyugi Magwanga & 3 Others*, Homa Bay Election Petition No. 1 of 2013). The narrower the margin of victory or loss, the higher the likelihood that the court would order scrutiny or recount without requiring the petitioner to first establish a basis for such an order (*Charles Ong'ondo Were v Joseph Oyugi Magwanga & 3 Others*, Homa Bay Election Petition No. 1 of 2013). Even where the margin of victory is wide, scrutiny and recount may still be ordered if it would facilitate the expeditious disposal of the election petition (*Hassan Ali Joho v Hothan Nyange & Another*, Mombasa Election Petition No. 1 of 2005).

4.7.5.2.8 An order for scrutiny or recount will usually be made where there are several errors, alterations and/or omissions on Forms 35 and 36 (now Forms 35B and 36B of the Elections (General) Regulations, 2012) (*Joseph Obiero Ndiege v IEBC & 2 Others,* Migori Election Petition 1 of 2017; Migori Election Petition No. 1 of 2017; *Richard Kalembe Ndile & Another v Patrick Musimba Mweu & 2 Others*, Machakos Election Petitions Nos. 1 and 7 of 2013). It will be more readily made in such cases if, in addition, the margin of votes between the returned candidate and the runners-up is narrow (*Richard Kalembe Ndile & Another v Patrick Musimba Mweu & 2 Others*, Machakos Election Petitions Nos. 1 and 7 of 2013).

4.7.15.2.9 An Application for scrutiny and recount may be made before, during or at the end of the trial of an election petition (*Nicholas Kiptoo Arap Salat v IEBC & 7 Others*, Supreme Court Petition No. 23 of 2014; *Hassan Mohamed Hassan & Another v IEBC & 2 Others*, Garissa Election Petition No. 6 of 2013). The Supreme Court in *Munya* stated:

> *The right to scrutiny and recount of votes in an Election Petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules 2013. Consequently, any party to an Election Petition is entitled to make a request for a recount and /or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.*

4.7.5.2.10 Nevertheless, the court must exercise caution where the application is made after evidence is fully adduced, to prevent a petitioner from using the application to cure gaps exposed during the trial (*Robson Simiyu Mwanga & Another v IEBC & 2 Others,* Kitale Election Petition No. 1 of 2017). The reasons for the grant of an order of scrutiny should therefore be recorded (*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2014; *Aziz Mohamed Karisa vs IEBC & 3 Others,* Malindi Election Petition 7 of 2017).

4.7.5.2.11 Where a petitioner desires to lodge a request for information, such an application should be made simultaneously with a request for scrutiny and/or recount. If only an application for information and/or preservation of evidence is sought, it ought to be dispensed with before pre-trial. Although filed at the interlocutory stage, the application for scrutiny should be heard after the evidence has been tendered (*Samwel Kazungu Kambi v Nelly Ilongo & 2 Others,* Malindi Election Petition 4 & 5 of 2017; *Jackton Nyanungo Ranguma v IEBC & 2 Others,* Kisumu Election Petition 3 of 2017; *Edward Tale Nabangi v James Lusweti Mukwe & 2 Others,* Bungoma Election Petition 1 of 2017).

4.7.5.2.12 It is not the purpose of an order for scrutiny and recount to unearth new evidence or unpleaded matters upon which an election could possibly be nullified (*Raila Amolo Odinga & Another v*

IEBC & 2 Others, Presidential Petition No. 1 of 2017; *Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 Others,* Nairobi Election Petition Appeal 6 of 2018; *Gideon Mwangangi Wambua & Another v IEBC & 2 Others*, Mombasa Election Petition No. 4 of 2013; *Peter Gichuki King'ara v IEBC & 2 Others*, Nyeri Election Petition No. 3 of 2013 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2014; *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others*, Supreme Court Petition No. 4 of 2014). In *Peter Gichuki King'ara v IEBC & 2 Others*, Nyeri Election Petition No. 3 of 2013, the Court held as follows:

> *The law on scrutiny and recount that I have addressed hereinbefore suggests that scrutiny and recount in a [P]etition such as the present one is not...a gambling exercise that sets the court to rummaging through the ballot boxes to see whether any scintilla of evidence of electoral malpractice or irregularity can be found. If the Petition is based on any particular electoral malpractice or irregularity that would warrant scrutiny or recount of votes, the malpractice or irregularity must be pleaded and the evidence of such malpractice must be laid out or established prior to an order for scrutiny or recount; the court must be satisfied that, on the basis of the evidence before it, it is necessary to call for a scrutiny and recount, if not for anything else, to confirm the truth of that particular evidence. Asking the court for a scrutiny or recount where there is no evidence or basis for such an exercise would be more or less [like] engaging the court on a mission of searching for evidence where none exists, a practice that would not only be prejudicial to the respondents but would also be deprecatory in a legal system that believes in fair and impartial administration of justice.*

Therefore, a party desiring to raise new issues can only do so by way of amendment of the petition (*Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 Others,* Nairobi Election Petition Appeal 6 of 2018)

4.7.5.2.13 There are three judicial views on the practical consequences of the rule that it is not the purpose of an order for scrutiny and recount to unearth new evidence or unpleaded matters upon which an election could possibly be nullified. The first is that where scrutiny or recount reveals unpleaded electoral malpractices or irregularities, but the petitioner fails to prove the allegations pleaded in the petition, the court may properly dismiss the election petition (*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2014). The second is that where scrutiny reveals irregularities other than those that were pleaded, any party may pose questions upon such new findings and the election court may make findings on the effect of such irregularities on the declared results (*Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others*, Supreme Court Petition No. 4 of 2014; *Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 Others* Nairobi Election Petition Appeal 6 of 2018). The third is that an election court cannot turn a blind eye on serious electoral malpractices or irregularities exposed by scrutiny or recount merely because such malpractices or irregularities were not pleaded, for to do so would be a negation of constitutional principles on resolution of electoral disputes (*Musikari Nazi Kombo v Moses Masika Wetangula & 2 Others*, Election Petition No. 3 of 2013).

4.7.5.2.14 However, unpleaded irregularities can be considered where the court, in exercise of its discretion, orders, *suo motu*, a scrutiny, recount or re-tally. If irregularities other than those that were pleaded are unearthed, the court may rely on them in making its final determination of the petition, provided the parties are availed an opportunity to pose questions concerning the new findings (*Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 Others,* Nairobi Election Petition Appeal 6 of 2018).

4.7.5.2.15 As to the import of the scrutiny report prepared upon the grant of an order of the court, a scrutiny report will not lead to an election court nullifying the result unless it can be shown that there is a reversal of the candidate who had been declared as the winner (*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2014).

4.7.5.2.16 Moreover, it is not open to the court to order scrutiny and then make no reference to the report in determining the petition, particularly where the decision is to annul the election (*Cyprian Awiti & Another v IEBC & 3 Others,* Supreme Court Petition 17 of 2018; *Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 Others,* Nairobi Election Petition Appeal 6 of 2018). The impact of the scrutiny exercise is a material consideration in the determination of the petition and without this assessment, a decision to nullify the election cannot be supported. According to the Supreme Court in *Clement Kungu Waibara v Annie Kibeh & Another,* Supreme Court Petition 24 of 2018, at para 52:

> *In view of such considerations, we are in agreement with the Appellate Court's standpoint that the trial Court ought to have ascertained whether the irregularities revealed by the process of scrutiny, did affect the outcome of the election. It was clearly inapposite to settle the dispute on the basis of any conjecture, however logical.*

4.7.5.2.17 An appellate court whose jurisdiction is limited to *matters of law only* cannot undertake or make an order for scrutiny and recount, as this would entail delving into matters of fact (*Peter Gichuki King'ara v IEBC & 2 Others*, Nyeri Civil Appeal No. 31 of 2013). However, the failure to make reference to a scrutiny report is a question of law that the appellate court ought to make a determination on, particularly where the findings of the trial judge are not supported by the scrutiny report (*Cyprian Awiti & Another v IEBC & 3 Others,* Supreme Court Petition 17 of 2018).

4.7.5.2.18 An appellate court will not ordinarily interfere with the exercise of the trial court's discretion to grant of an order of scrutiny unless it can be demonstrated that there was no basis for the grant of the order (*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others,* Supreme Court Petition 2B of 2014; *Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 Others,* Election Petition Appeal 6 of 2018; *Annie Wanjiku Kibeh v Clement Kungu Waibara & Another,* Nairobi Civil Appeal 20 of 2018).

4.7.5.2.19 Further, an appellate court cannot remit or direct a trial court to undertake scrutiny and recount after the expiry of the period during which the latter court is required to hear and determine the dispute (*Robinson Simiyu Mwanga & Another v IEBC & 2 Others,* Kitale Election Petition No. 1 of 2017*; Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*, Supreme Court Petition No. 5 of 2014).

> **Editorial Note:** The process of scrutiny and the documents that guide the process – from the grant of an order of scrutiny to the preparation of the report – are annexed as an Appendix to this Bench Book.

4.7.6 *Conservatory Orders, Stay of Proceedings and Related Reliefs*

4.7.6.1 Under statutory amendments enacted in 2016, the filing of an appeal against the final judgment and decree of a High Court sitting as an EDR court results in the automatic stay of the certificate of election results until the appeal is heard and determined (s 85A(2), Elections Act, 2011). This means that it is not necessary to file an application for conservatory orders or stay pending appeal from such final judgments and decrees.

4.7.6.2 However, for appeals from the Magistrate's Court, the decision of the court does not operate as a stay of the certificate of the election court certifying the results of that election until the appeal is heard and determined. This means that for such appeals, a specific application for stay must be made.

4.7.6.3 The concept of '*deferred and sequential*' jurisdiction of appellate courts in EDR, discussed in Chapter 2 of this Bench Book, leads to the conclusion that the automatic stay of proceedings, introduced by the 2016 amendments, does not apply to interlocutory decisions of an election court. Previously, the prevailing jurisprudence was that a court which had appellate jurisdiction in EDR could entertain and grant an application for conservatory orders, stay of proceedings and similar reliefs pending the filing, hearing and determination of an appeal (*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Civil Application No. 5 of 2014; *Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 Others*, Supreme Court Civil Application No. 18 of 2014; *George Mike Wanjohi v Steven Kariuki*, Supreme Court Civil Application No. 6 of 2014).

4.7.6.4 In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Civil Application No. 5 of 2014, it was held that an appellate court could grant applications for conservatory orders, stay of proceedings and similar reliefs pending the filing and determination of an appeal where:

- the intended appeal is arguable and not frivolous;
- the intended appeal would, if eventually successful, be rendered nugatory; and
- it is in the public interest to grant an injunction, conservatory order, stay of proceedings or similar relief.

4.7.6.5 Nonetheless, in *Samwel Kazungu Kambi v Nelly Ilongo, the Returning Officer, Kilifi County & 2 Others*, Malindi Election Petition 4 &5 of 2017, the Court juxtaposed the above authorities in light of the 2016 amendments to the Elections Act, leading to the conclusion that the jurisdiction of the appellate court is deferred and consequential, can only be taken up upon final determination. Dismissal of an election petition at the interlocutory stage is a final determination. Therefore, the Appellate court has jurisdiction to hear an appeal against such dismissal.

4.7.7 *Recusal of Judges and Magistrates*

4.7.7.1 Article 50 of the Constitution entitles every person to have any dispute that can be resolved by application of the law heard by an impartial and independent court or tribunal. The presiding officer(s) of a court or tribunal must have the characteristics of *inter alia* independence, impartiality, integrity, propriety, even-handedness, competence and diligence (*Judicial Code of Conduct;* and *Bangalore Principles of Judicial Conduct*). The constitutional requirement of an impartial and independent court or tribunal is an indispensable component of the right to a fair trial. Moreover, the right to a fair trial is absolute, which means it cannot be limited (Article 25(c) of the Constitution).

4.7.7.2 The right to a fair trial cannot be guaranteed where reasonable or fair-minded persons would think there was actual bias or apprehend the likelihood of bias on the part of the judge or magistrate (*Kalpana H. Rawal v Judicial Service Commission & 2 Others*, Nairobi Civil Appeal No. 1 of 2016). Judges and magistrates, therefore, should recuse themselves from presiding over a dispute if the circumstances of the case are such that reasonable or fair-minded persons would think there was actual bias or apprehend the likelihood of bias.

4.7.7.3 The test for considering applications for the recusal of a judge or magistrate is an objective one. It is one of reasonable apprehension of bias, i.e., whether a reasonable or fair minded and informed observer, having considered the facts, would conclude that there is a real possibility that the judge or magistrate would be biased (*Kalpana H. Rawal v Judicial Service Commission & 2 Others,* Nairobi Civil Appeal No. 1 of 2016).

4.7.7.4 The burden of establishing bias lies on the person alleging its existence. The standard of proof in this regard is high, with the result that allegations of real likelihood or probability of bias on the part of a judge or magistrate must be demonstrated (*Kalpana H. Rawal v Judicial Service Commission & 2 Others,* Nairobi Civil Appeal No. 1 of 2016). An application for recusal which is based merely on suspicion, therefore, will not succeed *(Kalpana H. Rawal v Judicial Service Commission & 2 Others,* Nairobi Civil Appeal No. 1 of 2016).

4.7.7.5 A judge or magistrate must recuse himself/herself where actual bias on their part is established, e.g., where a judge or magistrate is a party to the suit or has a direct financial or proprietary interest in the outcome of the case (*Kalpana H. Rawal v Judicial Service Commission & 2 Others,* Nairobi Civil Appeal No. 1 of 2016). The rationale for the automatic disqualification and recusal in such situations is that bias is presumed to exist where a judge or magistrate is a party to the suit or has a direct financial or proprietary interest in the outcome of the case.

4.7.7.6 In *Republic v Malindi Land and Environment Court ex parte Japheth Noti Charo & 2 Others,* Nairobi High Court Miscellaneous Civil Application No. 167 of 2014, the Court at para 12 outlined the appropriate procedure in applications for recusal as follows:

- counsel for the applicant seeks a meeting in chambers with the judge or magistrate in the presence of the opponent;
- the grounds upon which recusal is sought are put to the judge or magistrate who is given an opportunity to respond to them; and
- should the judge or magistrate refuse to recuse themselves, the applicant, if he/she so wishes, makes a formal application for recusal in open court.

4.7.7.7 The rationale behind the requirement for making the application in chambers first is to mitigate against the risk of unnecessarily maligning the integrity of the judge or magistrate by rushing to open court without full facts (*Republic v IEBC & Another ex parte Coalition for Reforms and Democracy (CORD),* Nairobi High Court Miscellaneous Civil Application No. 648 of 2016). Further, applications for recusal should be made at the earliest opportunity possible, as doing it late in the proceedings unnecessarily creates the risk of perception of bias (*Moijo Matavia Ole Keiwua v Chief Justice of Kenya & 6 Others,* Nairobi Civil Appeal Application No. 202 of 2005).

4.7.7.8 Beyond our borders, the Constitutional Court of South Africa in the case *President of the Republic of South Africa & Others v South African Rugby Football Union & Others,* CCT 16/98 [1999] ZACC 9, developed the test for bias. In an application for recusal of five of the ten justices on the grounds that they would be biased against the applicant, the Constitutional Court stated as follows:

> *It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not*

> *bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.*

4.8 The Trial

4.8.0 The trial of parliamentary and county election petitions must be completed *within six* months of the date of filing the petition (Article 105(2) of the Constitution and sections 75(2) and 85, Elections Act, 2011). Rule 20 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 requires the hearing of election petitions to be conducted uninterrupted and on a day-to-day basis until they are concluded. The election court must send the parties a notice of the date, time and place fixed for the trial of an election petition (Rule 18(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017). The notice must be issued *at least 7 days* prior to the date fixed for the trial of the election petition (Rule 18(2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017).

4.8.1 *Examination of witnesses*

4.8.1.1 Rule 12(12) and (13) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 stipulate that witness affidavits shall form the deponent's examination-in-chief and that every witness shall be examined in chief and cross-examined during the trial.

4.8.1.2 The rationale for allowing the examination-in-chief in EDR to take the form of affidavits instead of *viva voce* evidence lies in the constitutional objective of timely resolution of electoral disputes (*Nuh Nassir Abdi v Ali Wario & 2 Others,* Mombasa Election Petition No. 6 of 2013; and *Gideon Mwangangi Wambua & Another v IEBC & 2 Others*, Mombasa Election Petition No. 4 of 2013). In *Ramadhan Seif Kajembe v Returning Officer, Jomvu Constituency & 3 Others,* Mombasa Election Petition No. 10 of 2013, the Court cited the following dictum from the Court of Appeal of Uganda in *Badda & Another v Mutebi* [2008] 2 EA 42 on the rationale for replacing examination-in-chief with affidavit evidence:

> *the learned trial Judge adopted an irregular procedure by allowing witnesses to give evidence in-chief on their affidavits when they should have been merely cross-examined to test their veracity. This defeated the purpose of the rule by wasting a lot of time. It is further astonishing that all counsel for each party acquiesced in this irregularity.*

4.8.1.3 Although sub-rule 13 refers to witnesses being examined in-chief then cross-examined, witnesses must confine themselves to what they have deponed in their affidavits. In the case of *Mohamed Ali Mursal v Saadia Mohamed & 2 Others*, Garissa Election Petition No. 1 of 2013, the High Court upheld an objection raised on this ground and ruled that:

> *If the situation were to be left fluid I doubt whether the determination of election disputes would be as fast as the law contemplates. This is because new matters would crop up every now and then whenever a witness takes to the witness box. This*

> *would have the effect of the other party seeking time to consult, seek instructions and prepare for rebuttal of the new evidence thereby derailing the proceedings. In my view this is what the electoral law is trying to address.*

4.8.1.4 The Elections (Parliamentary and County Elections) Petitions Rules, 2017 (and their predecessors) do not in any way limit section 146(2) of the Evidence Act on the scope of cross-examination in EDR (*Ferdinand Ndung'u Waititu v IEBC & 8 Others*, Nairobi Civil Appeal No. 324 of 2013). It is a serious misdirection, therefore, for an election court to restrict the scope of cross-examination to the matters set out in the witness affidavits (*Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others*, Nyeri Civil Appeal No. 38 of 2013; and *Ferdinand Ndung'u Waititu v IEBC & 8 Others*, Nairobi Civil Appeal No. 324 of 2013). Moreover, an election court that unreasonably curtails a litigant's right of cross-examination might open itself to the charge of bias or breach of the right to a fair trial. In *Ferdinand Ndung'u Waititu v IEBC & 8 Others*, Nairobi Civil Appeal No. 324 of 2013, the Court of Appeal explained the scope of cross-examination in EDR as follows:

> *the learned Judge fell into and proceeded on the basis of the rather elementary error that cross examination should be confined to matters that arose in examination-in-chief which in this case is the evidence deposed to in the witness affidavits. This cannot be correct. The law, as I perceive it, is that so long as a matter is relevant and admissible, a question can be led on it in cross- examination. Indeed, I would offer that the potency and genius of cross examination lies in the ability to bring up truths that the witness may have carefully tried to shield from view by a sanitized form of deposition or examination-in-chief. This is the true meaning and intent of section 146 (2) of the Evidence Act, Cap 80 and, with tremendous respect to the learned Judge, he had absolutely no basis for concluding that the wide scope the provision portends has no application or needs to be constricted in election petitions. There is no constitutional, statutory or practical basis for such a view and I hold that the learned Judge misdirected himself to the extent that cross-examination in electoral disputes should be any less potent or important than in any other proceedings.*

4.8.1.5 Rule 11(8) of the Elections (Parliamentary and County Elections) Petition Rules, 2017, however prohibits a party that has failed to file a response from participating in proceedings. The Supreme Court, in the case of *Christopher Odhiambo Karan v David Ouma Ochieng & 2 Others,* Supreme Court Petition 36 of 2018, held that a person, who had been disallowed, by the election court from participating in the proceedings for failing to file a response, cannot claim violation of their right to fair trial. The Supreme Court ruled as follows:

> *From the foregoing analysis, it is evident that cross-examination plays an important role in a party's right to fair hearing. However, in the present case, the trial Court, in its ruling delivered on 21st November, 2017, disallowed the Appellant from participating in the hearing of the petition on the basis of Section 11(8) of the Election Petition Rules, which is coached in the following terms:*
>
> ***"A respondent who has not filed a response to a petition as required under this rule shall not be allowed to appear or act as a party in the proceedings."***
>
> *... We have already discussed the legal effect of Rules 11(1) and 11(8) of the Election Petition Rules 2017 in disposition of election petitions that they have the same impact as the parent Act which originates from Article 87 of the Constitution. Article 50(2) of the Constitution on the right to challenge evidence through cross-examination does not operate in a vacuum, it operates with other laws to give the greatest effect. We note in that context that the superior courts were aware of the Constitution provisions under Article, 20(3), 25(c) and 50 before arriving at their decision. We see no reason for faulting their interpretation and application of the Constitution in this petition.*

4.8.1.6 Although the affidavit of a witness who fails to turn up for cross-examination remains part of the record of the election court, little weight can be attached to the evidence contained therein (*Nuh Nassir Abdi v Ali Wario & 2 Others*, Mombasa Election Petition No. 6 of 2013; *Ramadhan Seif Kajembe v Returning Officer, Jomvu Constituency & 3 Others*, Mombasa Election Petition No. 10 of 2013; and *Justus Gesito Mugali M'Mbaya v IEBC & 2 Others*, Kakamega Election Petition No. 6 of 2013). In *Josiah Taraiya Kipelian Ole Kores v Dr. David Ole Nkedianye & 3 Others*, Nairobi Election Petition No. 6 of 2013, the Court held as follows:

> *I now turn to the issue of the Petitioner failing to testify. I find fault with the Petitioner's argument that there is no rule in law or evidence that requires verbal evidence for an affidavit to be deemed credible. In my opinion, an election petition is no ordinary suit and the facts deponed therein must be interrogated. Such interrogation can only be done by testing the evidence through cross-examination of the deponent. Failure to attend court for the testing of such allegations in such a deposition makes the Affidavit to be just that, mere allegations. It is evidence without any probative value. In my view therefore, it was imperative for the Petitioner to have testified during the hearing of this Petition given that he was responsible for its institution and had made adverse claims against the Respondents. On the day he was supposed to testify, he sought and found comfort in a trip to South Africa and sought to have his Affidavit admitted without cross-examination. That won't do. The allegations remained just that, bare allegations not proved.*

4.8.1.7 However, the parties may, by consent, accept not to cross-examine the deponents of affidavits but shall have the deponent's evidence admitted as presented in the affidavits (Rule 12(13), Elections (Parliamentary and County Elections) Petition Rules 2017).

4.8.2 *Adjournments*

4.8.2.1 An election court is required to conduct the trial of an election petition on a day-to-day basis until the trial is concluded (Rule 20(1), Elections (Parliamentary and County Elections) Petitions Rules, 2017; and Rule 22(1), Court of Appeal (Election Petition) Rules, 2017). The court, however, may adjourn the trial for sufficient reason. Courts cannot adjourn the trial of an election petition for more than five days (Rule 20(2) of the Elections (Elections (Parliamentary and County Elections) Petitions Rules, 2017; and Rule 22(2) of the Court of Appeal (Election Petition) Rules, 2017).

4.8.2.2 Where the judge or magistrate hearing an election petition is incapacitated by illness or any other cause, the Chief Justice must appoint another judge or magistrate to continue and conclude the trial of the petition (Rule 20(3), Elections (Parliamentary and County Elections) Petitions Rules, 2017). The new judge or magistrate is obliged to continue the proceedings from where the predecessor had left (Rule 20(4), Elections (Parliamentary and County Elections) Petitions Rules, 2017). There is no room, therefore, for applications for restarting the trial of an election petition *de novo* upon the change of the judge or magistrate hearing the petition. The rationale for this rule lies in the constitutional objective of timely resolution of electoral disputes.

4.8.3 *Evidential Matters*

4.8.3.1 Electronic Evidence

4.8.3.1.1 The law on the admissibility of electronic evidence is set out in sections 78A and 106A to 106I of the Evidence Act. Generally, electronic evidence will only be admitted if it meets safeguards and conditions set out in these sections (*Coalition for Reforms and Democracy (CORD) & Another v Republic of Kenya & Another*, Nairobi High Court Constitutional Petition

No. 628 of 2014; and *Republic v Mark Lloyd Steveson*, Kiambu High Court Criminal Revision No. 1 of 2016). The safeguards and conditions set out in sections 78A and 106A to 106I of the Evidence Act seek to ensure the authenticity and reliability of such evidence (*Republic v Mark Lloyd Steveson*, Kiambu High Court Criminal Revision No. 1 of 2016; and *Millitonic Mwendwa Kimanzi Kitute v IEBC & 2 Others*, Kitui Election Petition No. 1 of 2017).

4.8.3.1.2 In *William Odhiambo Oduol v IEBC & 2 Others*, Kisumu Election Petition No. 2 of 2012, the Court accepted the following submission on the need and rationale for a cautious approach to electronic evidence:

> *electronic evidence presents unique characteristics which necessitate careful treatment. First, while alterations on [a] physical document are often immediately visible on its face, this is not the case with electronic material. An electronic document can be, and is often, modified in the process of collecting it as evidence. A common example occurs when a file or application is opened, or copied from one computer into another or into an external hard drive. Changes which are not often immediately visible occur. Second, compared with physical or other forms of exhibit evidence electronic evidence is relatively more difficult to detect and trace the signs of tampering. It can be changed or manipulated much more easily than paper or other forms of evidence without having any obvious trace of such alteration.* ***Third, computer equipment runs on an artificial intelligence which receives, interprets and applies human commands. This artificial intelligence has been known to go awry. System crashes, viruses, and/or botnets often occur, compromising the integrity of the material captured, preserved or presented using a computer. Finally, the capturing, preserving and presenting of evidence in electronic form requires a measure of technical knowledge in the operation of the electronic equipment.***

4.8.3.1.3 Although the courts often strictly enforce the rules relating to the admissibility of electronic evidence, an election court may excuse non-compliance with those rules where the electronic evidence is relevant and objections to its admissibility are based on merely technical grounds (*Mable Muruli v Wycliffe Ambetsa Oparanya & 3 Others*, Kakamega High Court Election Petition No. 5 of 2013). Moreover, a court may, in the interest of justice, and as a matter of discretion, give a litigant an opportunity to rectify a breach of the rules relating to the admissibility of electronic evidence. In *Nonny Gathoni Njenga & Another v Catherine Masitsa & Another*, Nairobi High Court Civil Case No. 490 of 2013, for instance, the Court allowed a party to cure an omission to include the certificate envisioned by section 106B(4) of the Evidence Act instead of excluding the electronic evidence in question.

4.8.3.1.4 In the case of *Samwel Kazungu Kambi v Nelly Ilongo the Returning Officer, Kilifi County & 2 Others*, Malindi Election Petition 4 & 5 of 2017, the High Court summarised the provisions of section 106B of the Evidence Act as follows:

> *Under Section 106B, for an electronic record to meet the standards for production as an exhibit, the computer should be demonstrated to have been under the control of a particular person during the relevant period. The information ought to have been fed into the computer in the ordinary course of the activities that need to be proved. There is also need to establish that at the material time the computer was operating properly but in case of any defect it should not have been to the extent that it would affect the electronic record or its accuracy. Another condition is that the electronic record should be derived from information fed into the computer in the ordinary course of the activities in question.*

4.8.3.1.5 There is no prescribed format for the certificate envisioned by section 106B(4) of the Evidence Act (*County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others*, Kisumu Civil Appeal No. 17 of 2015). The requirement for the certificate will be met where a person in a responsible position in relation to the operation of the relevant electronic device or the management of the relevant activities (whichever is appropriate) swears an affidavit that sufficiently addresses the matters referred to in section 106B(2) and (4) of the Evidence Act (*County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others*, Kisumu Civil Appeal No. 17 of 2015).

4.8.3.1.6 India has a similar certification procedure of electronic evidence prescribed in its Evidence Act. In spite of this requirement, judicial practice had for a long time led to the acceptance of electronic evidence without authentication. In overruling this practice (which had been solidified by earlier Supreme Court decisions), the Supreme Court of India redefined the evidentiary admissibility of electronic records to correctly reflect the letter of their Evidence Act in requiring authentication. In this EDR matter, the petitioner had sought to rely on electronic evidence and the Supreme Court in its decision emphasised the need to protect the *credibility* and *evidentiary value* of electronic evidence since it was more susceptible to tampering and alteration (*Anvar P.K. v P.K Basheer & Others*, (2014) 10 SCC 473; and T Karia, A Anand & Bahaar Dhawan 'The Supreme Court of India re-defines admissibility of electronic evidence in India').

4.8.3.1.7 The Supreme Court of India further noted that owing to such susceptibility and without proper safeguards, a trial based on proof of electronic records could lead to a travesty of justice (*Anvar P.K. v P.K Basheer & Others*, (2014) 10 SCC 473; and T Karia, A Anand & Bahaar Dhawan 'The Supreme Court of India re-defines admissibility of electronic evidence in India').

4.8.3.2 Burden of Proof

4.8.3.2.1 Section 2(1) of the Evidence Act provides that the Act applies to all judicial proceedings in or before any court other than the Kadhi's Court, and arbitral tribunals. Sub-section (2) of the provision states that the Act equally applies to affidavits presented to any Court.

4.8.3.2.2 Section 107 and 109 of the Evidence Act impose the burden of proving any fact on the person who asserts it or wishes the court to believe in its existence.

Legal Burden

4.8.3.2.3 The legal burden of proof in EDR lies on and remains with the petitioner throughout the case (*Opitz v Wrzenewskyi* [2012] 3 SCR 769; and *Raila Odinga v IEBC & 3 Others,* Supreme Court Petition No. 5 of 2013). In *Raila Odinga v IEBC & 2 Others,* Supreme Court Presidential Petition No. 1 of 2017, the Supreme Court summarised this position as follows:

> *Thus a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds "to the satisfaction of the court." That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.*

4.8.3.2.4 The rationale for this rule is that the petitioner is the one who seeks relief from the court and, in particular, the nullification of an election (s 107(1) of the Evidence Act; and *Raila Odinga v IEBC & 3 Others,* Supreme Court Petition No. 5 of 2013).

Evidential Burden

4.8.3.2.5 The evidential burden of proof in EDR initially lies upon the party bearing the legal burden (i.e., the petitioner). The evidential burden, however, may shift, and often shifts, between the parties as the weight of evidence given by either side during the trial varies. In the case of *Raila Odinga v IEBC & 2 Others,* Supreme Court Presidential Petition No. 1 of 2017, the Supreme Court held that:

> *Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant throughout a trial" with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting" and "its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.*

4.8.3.2.6 Generally, the evidential burden will shift to the respondent once the petitioner proves sufficient evidence to warrant impugning an election, if not controverted *(Raila Odinga v IEBC & 2 Others,* Supreme Court Presidential Petition No. 1 of 2017*).*

4.8.3.2.7 Although the burden of proof in EDR lies on the petitioner, an election court is not bound to decide an election petition only on the petitioner's evidence (*Ramadhan Seif Kajembe v Returning Officer, Jomvu Constituency & 3 Others,* Mombasa Election Petition No. 10 of 2013). An election court must consider the *totality of the evidence* adduced by all the parties (*Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others*, Nyeri Civil Appeal No. 38 of 2013).

Exceptions on the burden of proof

4.8.3.2.8 Section 112 of the Evidence Act provides an exception to the general rule on burden of proof. Where a particular fact is specially within the knowledge of a party, the burden of proof rests on him.

4.8.3.2.9 However, this proposition, being an exception, does not discharge the petitioner from his/her burden of proving the petition. The Supreme Court, in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition 2B of 2014**,** cautioned against invoking section 112 of the Evidence Act without considering section 107 first. The Court held:

> *The learned Judges of Appeal invoked the provisions of Section 112 of the Evidence Act to attribute the evidential burden to the 2nd respondent...*
>
> *Section 112 of the Evidence Act is not to be invoked without regard to the preceding sections, especially Section 107 (1) and (2) of the same Act...*
>
> *...Section 112 of the Evidence Act, on which the learned Judges of Appeal placed reliance, is an exception to the general rule in Section 107 of the same Act. Section 112 was not meant to relieve a suitor of the obligation to discharge the burden of proof.*

4.8.3.3Standard of Proof

4.8.3.3.1 The High Court, in *Hassan Mohamed Hassan & Another v IEBC & 2 Others*, Garissa Election Petition No. 6 of 2013, understood 'standard of proof' in EDR as referring to the extent the Petitioner is to go to sufficiently persuade the election court to interfere with the election results declared in favour of the candidate who scored victory. The court further observed

that section 83 of the Elections Act, 2011 lays down the standard of proof required in election petitions in Kenya.

4.8.3.3.2 Section 83(1) stipulates:

> *A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that*
>
> *a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and*
>
> *b) the non-compliance did not substantially affect the result of the election.*

4.8.3.3.3 Section 83(2) provide that:

> *Pursuant to section 72 of the Interpretation and General Provisions Act (Cap. 2), a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead.*

4.8.3.3.4 The above provisions were enacted in 2017, vide the Election Laws (Amendment) Act No. 34 of 2017, with the effect that the previous disjunctive 'section 83 test' was purported to be replaced with a conjunctive test thus requiring petitioners to prove both limbs, i.e., that the election was conducted in violation of the Constitution and written law and that non-compliance with the law affected the result of the elections.

4.8.3.3.5 The Amendment was declared unconstitutional in *Katiba Institute & 3 Others v Attorney General & 2 Others*, Nairobi Petition No 548 of 2017. The High Court held:

> *[t]here was no constitutional compulsion or rational (sic) in amending section 83 of the Act to remove the disjunctive word 'or' and introduce the conjunctive word 'and' so that only where there are failures in complying with the constitution and election laws and they substantially affected the results should an election be annulled. Removing the twin test for annulling faulty election results negates the principles of electoral system in the Constitution. And allowing such an amendment would be to ignore constitutional principles in our transformative Constitution that there should be free, fair, transparent and accountable elections.*

4.8.3.3.6 No legislative amendment was introduced to align section 83 with the decision of the Court, nor was an appeal preferred against the decision of the Court. Reference may, therefore, be made to similar situations where an amendment was declared unconstitutional to ascertain the effect of the declaration of unconstitutionality.

4.8.3.3.7 In *Senate & 2 Others v Council of County Governors & Others,* Petition 25 of 2019 [2022] KSC 7 KLR, where the amendment to section 91(f) of the County Governments Act was declared unconstitutional, the Supreme Court ruled that the effect of the declaration of unconstitutionality was to restore the previously worded section 91(f) of the County Governments Act (para 14). Similarly, in the case of *Attorney-General & 2 Others v David Ndii & 79 Others,* Supreme Court Petition 12 of 2021 (consolidated with petitions 11 and 13 of 2021), the Supreme Court addressed the issue of the quorum of the IEBC in light of the amendments to paragraph 5 of the Second Schedule to the IEBC Act, which were also declared unconstitutional in the *Katiba case*. The majority of judges endorsed the position taken in the *Senate case* that the effect of an amendment being declared unconstitutional is to restore the status quo before the amendment.

4.8.3.3.8 In light of the above jurisprudence of the Supreme Court, by parity of reasoning, the declaration of invalidity of the amendment to section 83 had the effect of restoring the section as it stood before Election Laws (Amendment) Act 34 of 2017. The test of invalidity thus remains a *disjunctive* rather than a *conjunctive* test, as affirmed in *Raila Odinga v IEBC & 2 Others,* Supreme Court Presidential Election Petition 1 of 2017.

4.8.3.3.9 The implication of section 83, it has been determined, is that unless the irregularities or malpractices proved by the petitioner are such that they actually interfere with the free choice of the voters, the court will not be willing to interfere with the existing voter's choice (*Raila Odinga v IEBC & 2 Others,* Supreme Court Presidential Election Petition 1 of 2017). This is also in tandem with Lord Denning's proposition, noted here in part, that 'if the Election was so conducted that it was substantially in accordance with the law as to Elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the result of the Election' (*Morgan v Simpson* [1974] 3 All ER 722).

4.8.3.3.10 Generally, the standard of proof required in EDR is higher than the civil standard of balance of probabilities, but lower than the criminal standard of proof beyond all reasonable doubt (*Raila Odinga v IEBC & 3 Others*, Supreme Court Petition No. 5 of 2013; and *Raila Odinga v IEBC & 2 Others,* Supreme Court Presidential Election Petition 1 of 2017).

4.8.3.3.11 There is an exception to this rule. A party who alleges the commission of election offences must prove such offences beyond reasonable doubt (*Raila Odinga v IEBC & 3 Others*, Supreme Court Petition No. 5 of 2013; *Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others*, Supreme Court Petition No. 12 of 2014; and *Raila Odinga v IEBC & 2 Others,* Supreme Court Presidential Election Petition 1 of 2017). In the case of *Alfred Nganga Mutua & 2 Others v Wavinya Ndeti & Another*, Supreme Court Petitions 11 and 14 of 2018, the Supreme Court held:

> *It is now settled law in this country, (see **Raila 2013** and many authorities following it as well as Section 107(1) of the Evidence Act), that the burden of proof lies upon the party alleging a fact to prove it to the required standard. It is also settled law, (see **Raila 2017**) that the standard of proof of any election offence or quasi criminal conduct is that of beyond reasonable doubt.*

4.8.3.3.12 The rationale for this exception is that election offences are penal in nature and subject to prosecution by the Director of Public Prosecution once an election court finds that there is reason to believe that an election offence was committed (sections 21 and 22, Election Offences Act, 2016). Where election offences are alleged, the evidence must be specific, satisfactory, definitive, cogent and certain.

4.8.3.3.13 Before 2016, the courts required petitioners seeking to nullify an election on the ground of election offences to prove the offences beyond reasonable doubt (*Raila Odinga v IEBC & 3 Others*, Supreme Court Petition No. 5 of 2013; *Frederick Otieno Outa v Jared Odoyo Okello & 4 Others,* Supreme Court Petition No. 6 of 2014; and *Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others*, Supreme Court Petition No. 12 of 2014).

4.8.3.3.14 The courts often gave two justifications for this rule. First, the *quasi-criminal nature* of election offences and the attendant penal consequences made the ordinary civil standard of proof inappropriate. Secondly, the proof of election offences results in curtailment of the convicted person's political rights, by way of debarment from nomination or election for a specified period (section 24(3), Election Offences Act, 2016). The court also had power to make a finding during the hearing of an election petition as to whether an election offence had been committed and issue a certificate to this effect under section 87(1) of the Elections

Act (*George Aladwa Omwera v Benson Mutura Kang'ara & 2 Others,* Nairobi High Court Petition 4 of 2013; *Abdinasir Yasin Ahmed & 2 Others v Ahmed Ibrahim Abass & 2 Others,* Garissa High Court Petition 9 of 2013)

4.8.3.3.15 Following amendments to the law in 2016 vide section 21 of the Election Laws (Amendment) Act 36 of 2016, several changes were introduced to section 87. Firstly, it is no longer mandatory to make a report concerning electoral malpractices of a criminal nature, the court only puts forward an opinion as to whether an election offence '*may have occurred*' (section 87(1) of the Elections Act, 2011) and transmits it to the DPP. Such reports were made in *Mohamed Mahamud Ali v IEBC & 2 Others,* Mombasa High Court Election Petition No.7 of 2017; *Clement Kungu Waibara v Annie Wanjiku Kibeh & Another,* Kiambu Election Petition 1 of 2017; *Timamy Issa Abdalla v IEBC & 3 Others,* Malindi High Court Election Petition 3 of 2017; *Arthur Papa v Oku Edward Kaunya & 2 Others,* Busia High Court Election Petition 2 of 2017; and *Julius Makau Malombe v Charity Kaluki Ngilu & 2 Others,* Machakos Election Petition 4 of 2017.

4.8.3.3.16 As such, an election court should exercise caution and circumspection in determining the validity of an election, bearing in mind that there is a further process contemplated by law to determine whether a person is guilty of an election offence (*Julius Makau Malombe v Charity Kaluki Ngilu & 2 Others,* Machakos Election Petition 4 of 2017; *Bernard Kibor Kitur v Alfred Kiptoo Keter & IEBC,* Eldoret High Court Election Petition 1 of 2017).

4.8.3.3.17 Secondly, section 87 read together with section 22 of the Election Offences Act 37, 2016 affirm prosecutorial discretion and, while the prosecutor is mandated to direct the conduct of an investigation, they make their own assessment as to whether to commence prosecution (s 87(3) Elections Act).

4.8.3.3.18 Thirdly, the prosecution of election offences is time-bound, with the DPP mandated to commence prosecution within a year of the election to which the offence relates, and where a section 87 report is made, proceedings must be commenced within twelve months of the date of the final judgment (s 22 Election Offences Act).

4.8.3.3.19 The phrase '*may have occurred*' as used in section 87(1) of the Elections Act, 2011 suggests that the courts should use the civil standard of proof in determining whether such malpractices have affected the validity of an election.

4.8.3.3.20 It is also not necessary for the persons who are alleged to have committed electoral malpractices to be joined in the election petition. As asserted by Ngugi J in *Clement Kungu Waibara v Annie Wanjiku Kibeh,* Kiambu Election Petition 1 of 2017, at para 29:

> *What this development means is that an election Court can no longer make a finding that a person has committed an election offence during the hearing of an election dispute. All that the Court can do is to refer a finding to the DPP for further investigations. This, in my view, lessens the need to have a party against whom the Court may ultimately find to have propagated an electoral malpractice which is criminal in nature to be a necessary party in the election Petition.*

4.8.3.3.21 While, previously, the Supreme Court had ruled that the proof of an election offence against the successful candidate would automatically result in the nullification of the election, regardless of its impact on the result of the election (s 80(4)(b) of the Elections Act, 2011; *Frederick Otieno Outa v Jared Odoyo Okello & 4 Others,* Supreme Court Petition No. 6 of 2014; *Karanja Kabage v Joseph Kiuna Kariambegu Ng'ang'a & 2 Others,* Nairobi Civil Appeal No. 301 of 2013), it declined to nullify an election in *Bernard Kibor Kitur v Alfred Keter & IEBC,* Supreme

Court Petition 27 of 2018, asserting that while there was sufficient evidence of unlawful campaigns, it was not substantial enough to nullify an election. Courts, however, may allow an election petition even where the misconduct, irregularity or malpractice proved by the petitioner does not amount to an election offence (*Ali v Gethinji* [2008] 1 KLR (EP) 215; and *Raila Odinga v IEBC & 2 Others,* Supreme Court Presidential Election Petition 1 of 2017).

4.8.3.3.22 Further, the proof of a single act of bribery by or with knowledge and consent or approval of the successful candidate or the successful candidate's agents, however insignificant the act may be, is sufficient to invalidate an election (s 80(4)(b), Elections Act, 2011). Once bribery is proved, an election court is not at liberty to weigh its impact on the result of the election or allow any excuse whatever the circumstances may be (*Halsbury's Laws of England*, Fourth Edition, Vol. 15 at p. 534; and *Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others, Supreme* Court Petition No. 12 of 2014).

4.8.3.3.23 For this reason, the allegations of bribery must be proved by clear and unequivocal evidence (*Wilson Mbithi Munguti Kabuti & 5 Others v Patrick Makau King'ola & Another*, Machakos Election Petition No. 9 of 2013; *Arthur Papa v Oku Edward Kaunya & 2 Others,* Busia High Court Election Petition 2 of 2017; *Peter Odima Khasamule v IEBC & 2 Others,* Busia High Court Election Petition 4 of 2017; *Samwel Kazungu Kambi v Nelly Ilongo and 2 Others,* Malindi Election Petition 4 of 2017; *Joseph Oyugi Magwanga & Another v IEBC & 3 Others,* Homa Bay Election Petition 1 of 2017; *Peter Odima Khasamule v IEBC & 2 Others,* Busia High Court Election Petition 4 of 2017; and *Kennedy Moki v Rachel Kaki Nyamai & 2 Others,* Kitui Election Petition 2 of 2017). In *Twaher Abdulkarim Mohamed v Mwathethe Adamson Kadenge & 2 Others*, Malindi High Court Election Petition Appeal No. 1 of 2014, the Court (citing Halsbury's Laws of England) summarised the law on bribery in the following words:

> *Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by its agents, however insignificant that act may be, is sufficient to invalidate the election, the judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be such, such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason, clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive. Bribery, however, may be implied from the circumstances of the case, and the court is not bound by the strict practice applicable to criminal cases, but may act on the uncorroborated testimony of an accomplice…The court has always refused to give any exhaustive definition on the subject, and has always looked to the exact facts of each case to discover the character of the transaction. A corrupt motive must in all cases be strictly proved. A corrupt motive in the mind of the person bribed is not enough. The question is as to the intention of the person bribing him. Where the evidence as to bribery consists merely of offers or proposals to bribe, stronger evidence will be required….A general conversation as to a candidate's wealth and liberality is not evidence of an offer to bribe. General evidence may, however, be given to show that what the character of particular acts has presumably been.*

4.8.3.3.24 Mere suspicion is not enough, and neither is the confession of the person alleged to have been bribed (*Arthur Papa v Oku Edward Kaunya & 2 Others,* Busia High Court Election Petition 2 of 2017). To succeed in invalidating an election based on the commission of the offence of bribery, not only must there be proof to the required standard, but the evidence must also demonstrate a relationship between a candidate and the offender and the impact of the offence on the election (*Arthur Papa v Oku Edward Kaunya & 2 Others,* Busia High Court Election Petition 2 of 2017; *Julius Makau Malombe v Charity Kaluki Ngilu & 2 Others,* Machakos Election Petition 4 of 2017; *Joseph Oyugi Magwanga & Another v IEBC & 3 Others,* Homa Bay

Election Petition 1 of 2017). It must be demonstrated that money was given to influence voters or to manipulate them to vote in favour of a candidate (*Samwel Kazungu Kambi v Nelly Ilongo and 2 Others,* Malindi Election Petition 4 & 5 of 2017; *Levi Simiyu Makali v Koyi John Waluke & 2 Others,* Bungoma Election Petition 4 of 2017).

4.8.3.3.25 Where electoral violence is alleged, it must widespread, be capable of being traced to the respondents and it must have affected the voting and subsequent election results (*Benson Maneno v Jacob Machekele & Others,* Malindi Election Petition No. 14 of 2013; *Kajembe v Nyange and Others* [2008] 2 KLR 1; *Lenno Mwambura Mbaga & Another v IEBC & Another,* Malindi Election Petition No. 1 & 3 of 2013; *Joho v Nyange & Another* (No 4) (2008) 3KLR ; *Justus Gesito Mugali M'mbaya v IEBC & 2 Others,* Kakamega Election Petition No. 6 of 2013; *Arthur Papa v Oku Edward Kaunya & 2 Others,* Busia High Court Election Petition 2 of 2017; *Levi Simiyu Makali v Koyi John Waluke & 2 Others,* Bungoma Election Petition 4 of 2017).

4.8.3.3.26 Where the alleged election offence takes the form of a traditional oath, the authenticity of the oath or its compliance with applicable traditional or cultural requirements is irrelevant (*Elima v Ohare & Another* [2008] 1 KLR (EP) 771).

4.9 Judgments and Reliefs

4.9.1 Section 75(2) of the Elections Act, 2011 empowers the courts to grant '*appropriate relief*' upon the conclusion of the trial of an election petition. Such relief may include:

(i) a declaration of whether the candidate whose election is questioned was validly elected;

(ii) a declaration of which candidate was validly elected; or

(iii) an order as to whether a fresh election will be held or not.

4.9.2 An election court is required, besides pronouncing judgment, to issue a certificate as to the validity of the impugned election (s 86(1), Elections Act, 2011). The certificate should be forwarded to the speaker of the National Assembly or the Senate in the case of a parliamentary election petition and the Speaker of the relevant County Assembly in the case of a county election petition.

4.9.3 It should be noted that the list of reliefs set out at section 75(2) of the Elections Act is merely illustrative. Election courts usually grant many other reliefs besides those set out in the section, including recount, scrutiny, award of costs and nullification of elections.

4.9.4 An election court may order the IEBC to issue a certificate of election to a candidate if upon a recount the winner is apparent and that winner is not found to have committed an election offence (s 80(4), Elections Act, 2011). The petitioner need not have specifically pleaded or prayed to be declared duly elected for such an order to be issued. In *Richard Kalembe Ndile & Another v Patrick Musimba Mweu & 2 Others*, Machakos Election Petitions Nos. 1 and 7 of 2013, the Court in para 107 explained the rule as follows:

> *Closely related to the 2nd petitioner's argument is the argument...that the 1st petitioner ought to have specifically pleaded that he seeks to be declared the duly elected member of Parliament. In my view, this is not necessary. Once the issue of recount was pleaded and allowed upon application, the consequences of such recount are to be dealt with by the court. In this case, section 80(4) empowers the court to declare a winner once the conditions therein are satisfied. A pleading seeking to be declared the winner is unnecessary since section 80(4) itself specifies that such a declaration is one of the consequences of a recount.*

4.9.5 Although section 80(4) of the Elections Act, 2011 empowers an election court to direct the IEBC to issue a certificate of election to an apparent winner, the court may nullify the election instead. The order of nullification will be preferred to the order of declaring an apparent winner where there is a serious doubt as to whether the apparent winner was the candidate elected by the voters. Moreover, a plain reading of section 80(4) of the Elections Act, 2011 indicates that the power of an election court to order the IEBC to issue a certificate of election to an apparent winner is *discretionary*.

4.9.6 Further, courts will nullify an election, instead of ordering the IEBC to issue a certificate of election to an apparent winner, where scrutiny or recount reveals multiple errors or irregularities that impinge on the integrity and credibility of the election (*Richard Kalembe Ndile & Another v Patrick Musimba Mweu & 2 Others*, Machakos Election Petitions Nos. 1 and 7 of 2013). The rationale for this approach is that it would be impossible to ascertain the will of the people or the apparent winner in such cases. In *Ramadhan Seif Kajembe v Returning Officer, Jomvu Constituency & 3 Others*, Mombasa Election Petition No. 10 of 2013, the Court at para 47 held as follows:

> *The Constitution has given the court jurisdiction to hear the election petition and the court is expected by all the laws, to determine that the process of election has been free, fair and transparent and that the court must give effect to the tenets of the Constitution, rule of law, electoral laws and regulations made thereunder and if the court finds that the electoral process was badly flawed and that the process so undertaken could affect the results of the election as declared, the court should not hesitate to declare the election as null and void. Therefore, whereas elections are about numbers, where despite a finding that the [R]espondent won the election the court is of the view that an election was conducted so badly that it was not sufficiently in accordance with the laws relevant to an election it would still be declared void as the court cannot shut its eyes to such illegal acts which although cannot affect the result of the election, nonetheless clearly revealed that the election was not conducted in accordance with the law. An election is a process encompassing several activities from nomination of candidates through to the final declaration of the duly elected candidate. If any one of the activities is flawed through failure to comply with the applicable law, it affects the quality of the electoral process, and subject to the gravity of the flaw, it is bound to affect the election results. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. If the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless, if there was a breach of the rules or a mistake at the polls and it did affect the result, then the result is vitiated.*

4.9.7 In *Richard Kalembe Ndile & Another v Patrick Musimba Mweu & 2 Others*, the Court cited the holding of the Court of Appeal in *James Omingo Magara v Manson Oyongo Nyamweya & 2 Others*, Kisumu Civil Appeal No. 8 of 2010, as a justification for refusing to declare an apparent winner upon recount:

> *It is true that on the scrutiny and recount of the votes, the appellant still had the largest number of votes. But as I have pointed out that was not all the learned [trial] Judge was supposed to go by though it was an important consideration to bear in mind...*
>
> *The scrutiny and recount of the votes by the learned Judge disclosed numerous irregularities, among them unsigned and, therefore, unauthenticated Forms 16A, three missing ballot boxes, broken ballot seals and many others set out in the learned Judge's judg[e]ment. In my view these irregularities could not have been cured under section 28 of the National Assembly and Presidential Election Act. That section cannot be used to cover a situation where even the source of the votes in the ballot boxes cannot be conclusively determined. Again, to use that section to cover the disappearance of ballot boxes, irrespective of the number of the ballot papers in the missing boxes, would simply amount to encouraging vandalism in the electoral process. Our experiences in Kenya following the 2007 elections part of which we are discussing herein, show us that no Kenyan, whether as an individual or as part of an institution, ought to encourage such practices. Section 28 cannot be used to white-wash all manner of sins which may occur during the electoral process and for my part I have no doubt that Parliament did not design the section for the purpose of covering serious abuses of the electoral process.*

4.9.8 An election court should exercise caution and restraint in applying section 80(4) of the Elections Act, 2011, so that it declares a winner in the clearest of circumstances that leave no doubt as to what the will of the voters on the material polling day was. Without caution and restraint, the election court would run the risk of disenfranchising voters by substituting the will of the electorate with that of itself and imposing a leader on the electorate.

Nullification of Elections

4.9.9 Section 83 of the Elections Act, 2011, provides that no election shall be declared to be void because of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election. In *Kithinji Kiragu v Martin Nyaga Wambora & 2 Others*, Embu Election Petition No. 1 of 2013, the Court adopted the following definition of the phrase '*affect the result of the election*' for purposes of section 83 of the Elections Act, 2011:

> *the word result means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proven irregularities the contest seems much closer than it appeared to be when first determined.*
>
> *But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.*
>
> (See the Tanzanian case of *Mbowe v Elilifoo* [1967] EA 240 for the origin of this definition)

4.9.10 In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2014, the Court summarised the law on nullification of elections as follows (at para 216 to 219):

> *(i) an election should be conducted substantially in accordance with the principles of the Constitution, as set out in Articles 81(e) and 86;*

(ii) if it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities;

(iii) where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated;

(iv) procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election;

(v) If, for instance, there are counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial Court would not be justified, merely because [of] such shortfalls, to nullify such an election;

(vi) a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election; and

(vii) examples of irregularities of a magnitude that would [be deemed to] affect the result of an election are not closed.

4.9.11 An election should not be annulled except on cogent and ascertained factual premises (*Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others*, Supreme Court Petition No. 4 of 2014**)**. This means an election court should ascertain the actual effect of any proved or admitted errors or irregularities on the result of the election as opposed to assuming or speculating on the effect of such errors or irregularities on the result of the election. In *Peter Gichuki King'ara v IEBC & 2 Others*, Nyeri Civil Appeal No. 31 of 2013, the Court of Appeal gave the following general guidelines on the considerations to be made before the annulment of an election:

i. whether there had been substantial compliance with the law and principle;

ii. the nature, extent, degree and gravity of non-compliance;

iii. whether the irregularities complained of adversely affected the sanctity of the election; and

iv. after taking into account all the foregoing factors, whether the winning majority would have been reduced in such a way as to put the victory of the winning candidate in doubt.

4.9.12 As is evident from the foregoing, there are multiple criteria for nullification of elections. Besides the one set out above, courts have developed the following additional criteria for the nullification of elections:

- an election must be nullified if the invalid or rejected votes are equal to or outnumber the winner's plurality (Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Supreme Court Petition No. 2B of 2014; and Opitz v Wrzenewskyi [2012] 3 SCR 769);

- if an election is conducted so badly that it is not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result is affected or not (Morgan v Simpson [1975] 1 QB 151);

- if an election is so conducted as to be substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls if that breach of the rules or mistake did not affect the result (Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Supreme

Court Petition No. 2B of 2014; Morgan v Simpson [1975] 1 QB 151; Nana Addo Dankwa Akufo-Addo & 2 Others v John Dramani Mahama (Writ J1/6/2013)). Procedural or administrative irregularities and other errors occasioned by human imperfection are not enough, by and of themselves, to vitiate an election;

- even where an election is conducted substantially in accordance with the law as to elections, the election is vitiated if there is a trivial breach of the rules or mistake at the polls that affects the result (Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Supreme Court Petition No. 2B of 2014; Rozaah Akinyi Buyu v IEBC & 2 Others, Kisumu Election Petition No. 3 of 2013; and Morgan v Simpson [1975] 1 QB 151);

- Statutory forms setting out election results are vital documents in the election process as the credibility of an election is rated based on their accuracy. If the irregularities noted on such forms are grave, the court may conclude that the election was not transparent, free and fair. However, if the irregularities noted on such forms have no effect or substantial effect on the result, there would be no proper basis for nullifying the election (John Lokitare Lodinyo v Mark Lomunokol & 2 Others, Bungoma Election Petition No. 4 of 2013, Raila Odinga v IEBC & 2 Others, Supreme Court Presidential Election Petition of 2017);

- An election is a process that must be seen to be free and fair and the fact that a person achieved the highest number of votes upon scrutiny and/or recount is not necessarily decisive of the outcome of an election petition. Even where the returned candidate got the highest number of votes, the court is obliged to consider the quality of the election and see whether it comports with the principles of elections set out in Article 81 of the Constitution (Richard Kalembe Ndile & Another v Patrick Musimba Mweu & 2 Others, Machakos Election Petitions Nos. 1 and 7 of 2013; Republic v IEBC & 3 Others ex parte Coalition for Reforms and Democracy, Nairobi High Court Miscellaneous Civil Application No. 637 of 2016; James Omingo Magara v Manson Oyongo *Nyamweya & 2 Others*, Kisumu Civil Appeal No. 8 of 2010);

- An election will not usually be annulled because of mere administrative errors. To warrant annulment, administrative errors must go to the root of the election and undermine the integrity of the electoral process (*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2014; and *Opitz v Wrzenewskyi* [2012] 3 SCR 769);

- Following the repeal of Part VI of the Elections Act, by virtue of the Election Offences Act, 2016, election courts no longer determine election offences but can make a finding on whether possible election offences have been committed and transmit the finding to the Director of Public Prosecutions. The prosecution of election offences found by an election court should be commenced by the Director of Public Prosecutions within a year of the determination by the election court, or within a year of the election the offence relates to. The Chief Justice may, by Gazette Notice, appoint special magistrates to hear and determine such proceedings (sections 21, 22 and 23, Election Offences Act, No. 37 of 2016; section 87, Elections Act; *Bernard Kibor Kitur v Alfred Kiptoo Keter & Another,* Eldoret Election Petition No. 1 of 2017).

- A finding of the possible commission of an election offence is not sufficient to nullify an election. The election court has to consider the effect thereof in determining whether the disjunctive tests set out in section 83 of the Elections Act have been met. The Supreme Court, in the case of *Bernard Kibor Kitur v Alfred Kiptoo Keter & Another,* Supreme Court Petition No. 27 of 2018, held as follows:

> *Looked at as a whole, this matter at the High Court and at the Appellate Court turned on the issue of campaigning outside of the gazetted period. While the High Court found that the alleged campaigning, affected the 'free and fair' aspect of the election, the Appellate Court was of a different view finding that*

> *not only was it not proved in light of the 10,051 votes margin, and the small crowd addressed at these gatherings, the supposed illegality, could not have affected the result...*
>
> *...The question we must then ask ourselves then is, whether the issue is substantial enough to nullify an election? The impugned decisions of this court indicate that elections are voided when they are a sham or a travesty, or a poor imitation of what an election ought to be. Invalidation of an election follows considerable irregularities, malpractices and non-compliance with the law.*
>
> *In light of the foregoing, we find that a single issue, even where the effect is criminal, where it does not amount to massive or substantial non-compliance with the law or irregularities is not enough to dissuade from the fact that an election was conducted largely in accordance with the law. This is the case in this present matter.*

4.9.13 The criteria for nullification of elections discussed in this Bench Book should be read disjunctively. The proof of any one or more of the vitiating factors covered in these criteria, therefore, will normally result in the nullification of an election.

4.10 Payment of Costs

4.10.1 Costs in EDR proceedings follow the event (s 84 of the Elections Act, 2011). An election court may either award the total costs payable, or cap the maximum sum payable and leave the assessment thereof to the Taxing Officer of the Court. The election court may also determine which litigant will shoulder the costs, regard being had to, *inter alia*, their conduct in the proceedings (Rule 30 & 31, Elections (Parliamentary and County Elections) Petitions Rules, 2017; *George Mike Wanjohi v Steven Kariuki,* Supreme Court Petition No. 2A of 2014; *Ibrahim Ahmed v IEBC and 2 Others.* Nairobi Election Petition 21 of 2017; *Mohamed Mahamud Ali v IEBC & 2 Others,* Mombasa Election Petition Appeal 7 of 2018).

4.10.2 It is also within the discretion of the election court to disallow costs incurred because of vexatious conduct, unfounded allegations or unfounded objections by a party or 'impose the burden of payment on the party who may have caused an unnecessary expense, whether that party is successful or not, in order to discourage any such expense' (Rule 30(2) Elections (Parliamentary and County Elections) Petitions Rules, 2017; *Clement Kung'u Waibara v Annie Kibeh,* Kiambu Election Petition 1 of 2017).

4.10.3 Further, an election court may direct that the whole or part of any monies deposited as security be applied in the payment of taxed costs (Rule 31(3) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017).

4.10.4 The rationale for the power to cap costs is to encourage genuine petitioners to challenge flawed elections without being unduly hindered by the fear of incurring huge costs (per the dissenting opinion in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others,* Supreme Court Petition No. 18 of 2014 at para 381 *Martha Wangari Karua v IEBC & 3 Others,* Nyeri Election Petition Appeal 1 of 2017). The capping of costs prevents the mischief of runaway costs previously demanded by successful parties in electoral disputes (*Karanja Kabage v Joseph Kiuna Kariambegu Ng'ang'a & 2 Others,* Nairobi Civil Appeal No. 301 of 2013). The capping of costs, therefore, is a valuable tool for promoting the right of access to justice (Article 48 of the Constitution). High costs are an impediment to the right of access to justice and are not meant to be punitive (*Martha Wangari Karua v IEBC & 3 Others,* Nyeri Election Petition Appeal 1 of 2017).

4.10.5 The election court ought to be guided by the principles of fairness, justice and access to justice in making an award for costs. Costs should not seek to punish an unsuccessful litigant (*Dennis Magare Makori & Another v IEBC & 3 Others,* Kisumu Election Petition Appeal No. 22 of 2018; *Philip Kyalo Kaloki v IEBC & 2 Others,* Election Petition Appeal 25 of 2018).

4.10.6 Once an election court caps the costs of, and incidental to, an election petition, the actual amount payable is determined through taxation. The Registrar taxes the costs of a parliamentary or county election petition in the same manner as costs are taxed in civil proceedings and in accordance with the Civil Procedure Act (Rule 31, Elections (Parliamentary and County Elections) Petitions Rules, 2017).

4.10.7 Unlike an ordinary civil court, an election court cannot decline to award costs solely on the ground that the award of costs is a matter of judicial discretion (*Joseph Amisi Omukanda v IEBC & 2 Others*, Kisumu Civil Appeal No. 45 of 2013; *George Mike Wanjohi v Steven Kariuki,* Supreme Court Petition No. 2A of 2014). The general rule that the award of costs is in the discretion of the court, which applies to ordinary civil cases, is subject to the special rules set out in EDR laws (*Karanja Kabage v Joseph Kiuna Kariambegu Ng'ang'a & 2 Others,* Nairobi Civil Appeal No. 301 of 2013).

4.10.8 Generally, the costs of and incidental to an election petition follow the event (s 84 of the Elections Act, 2011; *Godfrey Mwaki Kimathi & 2 Others v Jubilee Alliance Party & 3 Others*, Nairobi High Court Petitions No. 102 and 145 of 2015; *Joseph Amisi Omukanda v IEBC & 2 Others*, Kisumu Civil Appeal No. 45 of 2013). This does not necessarily mean that the election court is obliged to make an order for costs against an unsuccessful petitioner. In fact, election courts often award costs to unsuccessful petitioners, especially where the evidence indicates that the election petition was triggered by failures on the part of the IEBC.

4.10.9 The rule that costs follow the event seeks to compensate the successful party for the trouble taken in prosecuting or defending legal proceedings rather than to penalise the losing party (*Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate of & 4 Others,* Supreme Court Petition No. 4 of 2012; *Godfrey Mwaki Kimathi & 2 Others v Jubilee Alliance Party & 3 Others,* Nairobi High Court Petition No. 102 and 145 of 2015). Further, as earlier mentioned, although the costs of, and incidental to, an election petition generally follow the event, an election court may disallow costs to a person who would otherwise be entitled to an order for costs if that person has been vexatious or caused unnecessary expense in the case (Rule 30(2), Elections (Parliamentary and County Elections) Petitions Rules, 2017; *George Mike Wanjohi v Steven Kariuki,* Supreme Court Petition No. 2A of 2014).

4.10.10 Further, where an election court attributes the genesis of an electoral dispute to one or more of the parties to an election petition, it may order that party or parties to pay the costs of and incidental to the election petition (*George Mike Wanjohi v Steven Kariuki,* Supreme Court Petition No. 2A of 2014; *Dr. Thuo Mathenge & Another v Nderitu Gachagua & 2 Others*, Nyeri Court of Appeal Civil Appeal No. 29 of 2013; *Abdinoor Adan Abdikarim v IEBC & Another*, Garissa Petition Appeal No. 10 of 2013).

4.10.11 However, where proceedings are subsequently declared a nullity, no party can be deemed as a successful party, thus each party should bear its own costs. In setting this out, the Supreme Court, in the case of *Martha Wangari Karua v IEBC & 3 Others,* Petition No. 3 of 2019, the Supreme Court opined:

> *We sympathise with the Petitioner who, without any fault of her own, has been locked out of the seat of justice. We also take note of the long time and the judicial processes*

> *that the parties have engaged themselves in. Equally, it is expected that huge financial resources have been spent in prosecuting and defending this matter. Yet, while the general rule is that the successful party ought to be paid costs by the unsuccessful one, where proceedings are declared to be a nullity, no party can claim success – see* ***Paul Chen-Young v. Ajax Investments Ltd & Others, Jamaica Supreme Court Civil Appeal No.39 of 2006,*** *Paras 205 and 206. Each party should therefore bear their costs in the proceedings before all the Courts.*

4.10.12 The abatement of an election petition does not extinguish the liability of the petitioner, or any other party, to pay costs already incurred (Rule 30(3), Elections (Parliamentary and County Elections) Petitions Rules, 2017). Further, the courts may order a petitioner to pay costs where an election petition is withdrawn, struck out, or otherwise abate (*Anastacia Wanjiru Mwangi v IEBC & Another,* Election Petition No 11 of 2013).

4.10.13 Where a petitioner moves an election court as a proxy, that is, on behalf of an unsuccessful candidate, and the petition is dismissed, the court may make an order for costs against such a petitioner or against his/her principal (*John Okello Nagafwa v IEBC & 2 Others,* Busia Election Petition No. 3 of 2013; *Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others,* Meru Election Petition No. 1 of 2013). In *Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others,* Meru Election Petition No. 1 of 2013, the Court held as follows:

> *The Petitioner who agrees to bring a petition on behalf of an unsuccessful candidate should be ready to meet the consequences of a failed petition and cannot hide behind the fact of being a sponsored petitioner. He should make arrangements with the principal in advance. The Petitioner in my view should not be left unpunished for his actions as by failing to do so would encourage the unsuccessful candidates to use men of no means to file petitions with the hope of getting away without paying costs in case the Petitioner does not succeed.*

4.10.14 In *John Okello Nagafwa v IEBC & 2 Others,* Busia Election Petition No. 3 of 2013, the Court held as follows:

> *Rule 36 (1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 [now Rule 30 (1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017] is wide enough to enable a Court to direct an order of costs against such persons [i.e. persons who use a proxy to file an election petition…The use of the word "persons" and not "party" [in that Rule] is, in my view, deliberate. In appropriate circumstances, persons other than the Petitioner/s or the Respondents may be subjected to costs. There is no reason why the actual owner of a failed petition should be left unpunished.*

4.10.15 The Supreme Court in *Cyprian Awiti & Another v IEBC & 3 Others,* Supreme Court Petition 17 of 2018, at para 105F, taking judicial notice of the notoriety of the award of costs in election petitions, issued the following guidelines for the award of costs in election petitions:

> *(a) the general rule that "**costs follow the event**" is applicable in election matters in which no special circumstances are apparent;*
>
> *(b) however, an election Court holds discretion in reserve, for awarding costs as merited by the occasion;*
>
> *(c) a discretion vests in the election court to prescribe a ceiling for the award of costs;*
>
> *(d) in setting a ceiling to the award of costs, the election court stands to be guided by certain considerations, namely:*

(i) costs are not to be prohibitive, debarring legitimate litigants from moving the judicial process;

(ii) inordinately high costs are likely to compromise the constitutional right of access to processes of justice;

(iii) costs are not to bear a punitive profile;

(iv) Courts, in awarding costs, are to be guided by principles of fairness, and ready access to motions of justice;

(v) costs are intended for decent and realistic compensation for the initiatives of the successful litigant;

(vi) costs are not an avenue to wealth, and are not for enriching the successful litigants;

(vii) the award of costs shall not defer to any makings of opulence or profligacy in the mode of conduct of the successful party's cause.

Editorial Note: The Rules do not make provision for the timelines for taxation of costs and whether the election court has jurisdiction after the timeline has lapsed to deal with the issue of costs. The Rules are also silent on what is included in the capped costs. The assumption is that save for disbursements, all other costs are capped. In *George Gilbert and Mombo Advocates v Lesirma Simeon Saimanga*, Misc Application No. 20 of 2022, the Taxing Master held as follows:

Rule 34 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 empowers the election court, at the conclusion of a petition to make an order specifying the total amount of costs payable. Pursuant to this the Election Court rendered itself as follows:

a) The 1st and 2nd Respondents are awarded costs of Kshs. 4,000,000/=

b) The 3rd Respondent is awarded costs of Kshs. 2,000,000/=

The Election Court did not itemize the costs to the Respondents awarded. As such the instruction fees is unknown and cannot therefore be Kshs. 6,000,000/= as submitted and proposed by the Applicant. The costs awarded were not capping but rather the precise costs consisting of everything. The respective costs were therefore inclusive of instruction fees, getting up fee, attendance, drawings, perusals, making copies, service, and disbursements. This is confirmed by the certificate of costs dated 6/08/2018. There was no party and party bill of costs for the court to go through as the costs was awarded and set by the Election Court.

What appears from the orders of cost by the Election Court is that each Respondent was awarded Kshs. 2,000,000/= as cost. In other word the party and party cost for each Respondent was assessed at Kshs. 2,000,000/=

4.11 Appeals to the High Court

4.11.1 The High Court has appellate jurisdiction over decisions of Magistrate's Courts on disputes relating to elections to county assemblies (section 75, Elections Act, 2011). The appellate jurisdiction of the High Court in such cases is limited to 'matters of law only' (section 75, Elections

Act, 2011); *Kitavi Sammy v IEBC & 2 others,* Kitui Election Petition Appeal No 3 of 2017).

4.11.2 The procedure for the filing, hearing and determination of appeals from the decisions of a Magistrate's Courts in EDR is set out in Rule 34 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. In summary, the provision states as follows:

- the party desiring to appeal against the decision of a Magistrate's Court in EDR must file a memorandum of appeal at the nearest High Court registry within thirty days of the date of the judgment of the Magistrate's Court;
- the registrar of the High Court to which the appeal is preferred must send the Notice of Appeal to the Magistrate's Court against whose decree the appeal is preferred within seven days of filing of the memorandum of appeal;
- the Magistrate's Court against whose decree the appeal is preferred must send the proceedings and all relevant documents relating to the election petition to the High Court;
- the appellant must serve the memorandum of appeal on all parties directly affected by the appeal within seven days of filing; (*Kitavi Sammy v IEBC & 2 Others,* Kitui High Court Election Petition Appeal No. 3 of 2017)
- the appellant must file and serve a record of appeal within twenty-one days of filing the memorandum of appeal;
- the High Court must give directions on the hearing of the appeal within thirty days of the lodging of the memorandum of appeal; and
- the appeal must be heard and determined within three months of the date of the lodging of the appeal.

> **Editorial Note**: Rule 34(11) of the Elections (Parliamentary and County Elections) Petition Rules 2017 provided that an appeal must be heard and determined within three months of the date of lodging the appeal. This is inconsistent with s 75(4) of the Elections Act which provides for 6 months.

4.11.3 Objections relating to defects in a memorandum or record of an EDR appeal to the High Court, including those relating to service thereof, should be raised when the appeal is mentioned for directions. A party to an EDR appeal at the High Court who fails to raise objections as to service or defects in the memorandum or record of appeal during the mention for directions is deemed to have compromised the right to raise the objections (*Twaher Abdulkarim Mohamed v Mwathethe Adamson Kadenge & 2 Others,* Malindi High Court Election Petition Appeal No. 1 of 2014).

4.11.4 Moreover, the High Court will not strike out a record of appeal for failure to include a certified copy of the decree of the trial court where the record of appeal contains a copy of the judgment of the trial court (*Twaher Abdulkarim Mohamed v Mwathethe Adamson Kadenge & 2 Others,* Malindi High Court Election Petition Appeal No. 1 of 2014). There are two justifications for this rule. First, the Rules require the lower court to send its proceedings and all relevant documents to the High Court upon the filing of an appeal (Rule 34(8), Elections (Parliamentary and County Elections) Petitions Rules, 2017). This means that the court can easily access such documents that may have been omitted from the record of appeal. Secondly, the appeal will

usually have sprung from the judgment and hence obsession with the decree only serves to obfuscate the substantive issues between the parties.

4.11.5 Once an appellant has filed the memorandum and record of appeal, it is the responsibility of the High Court to set in motion processes to ensure that the appeal is heard and determined expeditiously (*Mwathethe Adamson Kadenge v Twahir Abdulkarim Mohamed & 2 Others*, Mombasa High Court Civil Appeal No. 153 of 2013). The High Court must determine EDR appeals lodged before it *within 6 months* of the date of the lodging of the appeal (s. 75(4) of the Elections Act, 2011; *Mwathethe Adamson Kadenge v Twahir Abdulkarim Mohamed & 2 Others*, Mombasa High Court Civil Appeal No. 153 of 2013).

4.11.6 In *Mwathethe Adamson Kadenge v Twahir Abdulkarim Mohamed & 2 Others*, Mombasa High Court Civil Appeal No. 153 of 2013, it was held that the High Court ceases to have jurisdiction upon the expiry of the six-month period, irrespective of who is to blame for the delay. In *Mary Wairimu Muraguri & 12 Others v IEBC & 5 Others*, Nyeri High Court Election Appeal No. 30 of 2014, it was held that the High Court can hear and determine the appeal even after the expiry of six months, especially where the delay has been occasioned by the reorganisation of the court or other factors beyond the control of the parties.

4.11.7 The conflict between these two positions may arguably be resolved by the decision in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others,* Supreme Court Petition No. 18 of 2014, in which it was held that the constitutional imperative of timely resolution of electoral disputes deprived the Court of Appeal of the jurisdiction to entertain an appeal filed outside prescribed statutory timelines, even where the delay was occasioned by administrative lapses on the part of the High Court.

4.11.8 More recently, the Supreme Court, in the case of *Martha Wangari Karua v IEBC & 3 Others,* Petition No. 3 of 2019, held that the courts lack jurisdiction to entertain a petition (and appeal) outside the constitutional timelines. The Apex Court opined that:

> *Section 75 undoubtedly derives its authority from Article 87 of the Constitution which requires timely resolution of electoral disputes. We have already explained why there was a need to provide for defined timelines for settling electoral disputes. As such, we hold and maintain our position that once an election petition is filed at the High Court sitting as the Election Court, it must be determined within a period of 6 months…*
>
> *…Our holding above brings us to a more difficult question which is what happens, as in this case, where the 6 months' period lapses as a result of an appellate process which was necessary for the enforcement of a litigant's right of access to court. Is there any exception to the position we have already taken?…*
>
> *…We take the view that all the suggested propositions must be considered within the context of the strict timelines provided for the settlement of electoral disputes. We understand that these proposals seek to remedy the likelihood of denial of substantive justice due to impeding court processes or where a wrong cannot be corrected at the appellate stage due to lapse of time. Hence, a proper consideration of this issue requires a balancing of rights such as the right of appeal, access to Court, the right to have a matter adjudicated within the specified timeframes and the right to substantive justice…* [Paras 48–49]

4.11.9 The Supreme Court then issued the following principles to guide the exercise of appellate jurisdiction over election petitions:

a. *All Applications by a Respondent in an election petition, save in exceptional circumstances, should form part of the response to the Petition. Similarly, a Petitioner should as much as possible file any application arising from his Petition e.g. for scrutiny or recount at the same time as the Petition.*

b. *Unless for want of jurisdiction or in any other deserving circumstance, a trial Court should exercise restraint in striking out a Petition or a response, where such an action is likely to summarily dispose of the matter.*

c. *All applications for striking out an election petition for want of jurisdiction, or for any other reason, must be made and determined within the constitutional and statutory timelines for the resolution of electoral disputes. In this regard, it is for the trial Court, to make and enforce such case management orders, so as to meet this objective.*

d. *Appeals on interlocutory applications, other than for striking out in circumstances explained in (b) and (c) above, should await the final determination of the whole petition before the trial Court.*

e. *In exceptional circumstances, an appellate Court may dispose of an appeal arising from an interlocutory application filed and determined by the trial Court while the substantive matter is still ongoing at the trial Court. In doing so, the timeframe question as explained above must always be borne in mind.*

(*Martha Wangari Karua v IEBC & 3 Others*, Petition No. 3 of 2019, para 55)

4.12 Appeals to the Court of Appeal

4.12.1 *Notice of Appeal*

4.12.1.1 A person who seeks to appeal against the decision of the High Court in EDR must file a notice of appeal within 7 days of the decision (Rule 6(2), Court of Appeal (Election Petition) Rules, 2017).

4.12.2.2 Although appeals against interlocutory decisions of the High Court in EDR must await the final judgment of that court, the notice of appeal in respect of an interlocutory decision must be filed *within 14 days* of the decision (*Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others*, Nyeri Civil Appeal No. 38 of 2013).

4.12.3.3 The Notice of Appeal is to be lodged at the Court of Appeal Registry (Rule 6(1), Court of Appeal (Election Petition) Rules, 2017; *Lesirma Simeon Saimanga v IEBC & 2 others*, Election Petition Appeal Application No. 7 of 2018).

4.12.2 *Filing and Service of the Memorandum and Record of Appeal*

4.12.2.1 A litigant who intends to appeal against a decision of the High Court in EDR must do so *within 30 days* of the decision of the election court (section 85A, Elections Act, 2011; *Wavinya Ndeti v IEBC & 4 Others*, Nairobi Civil Appeal No. 323 of 2013). In practical terms, the requirement to file an appeal *within 30 days* means the appellant must file the record of appeal within 30 days of the decision of the High Court (Rule 9(1), Court of Appeal (Election Petition) Rules, 2017).

4.12.2.2 Delay in furnishing typed proceedings and other administrative lapses on the part of the courts will not excuse the failure to comply with this mandatory requirement (*Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others*, Supreme Court Petition No. 18 of 2014).

4.12.2.3 A certificate of delay from the High Court, which normally excuses the late filing of an appeal in ordinary civil cases, will not suffice to save an EDR appeal filed outside the 30-day period set out in section 85A of the Elections Act, 2011 (*Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others*, Supreme Court Petition No. 18 of 2014).

4.12.2.4 A party who seeks to object to the competence of an appeal must do so by way of a formal application within 7 days of service of the notice or record of appeal (Rule 17, Court of Appeal (Election Petition) Rules, 2017). Where such an application is not made within the specified period, it may not be raised later (Rule 17(2), Court of Appeal (Election Petition) Rules 2017).

4.12.3 *Filing a Supplementary Record of Appeal without Leave*

4.12.3.1 Where the High Court does not avail relevant documents, an appellant is allowed to file the record of appeal, followed by a supplementary record of appeal within seven days.

4.12.3.2 The Supreme Court considered whether a supplementary record of appeal filed out of time ought to be struck out in *Mawathe Julius Musili v IEBC & Another,* Supreme Court Petition 16 of 2018. In this case, one of the issues submitted for determination before the apex Court was whether the Court of Appeal erred by admitting a supplementary record of appeal outside the 30-day timeline provided under section 85A of the Elections Act and Rule 9(1) of the Court of Appeal (Election Petition) Rules 2017. The Court of Appeal had declined to strike it out for reasons that the omission did not go to 'the root of the appeal, or in any way affect the jurisdiction of the Court.'

4.12.3.3 The Supreme Court noted that Rule 92(3) of the Court of Appeal Rules 2010 allowed the filing of copies of supplementary records of appeal 'as soon as may be practical' and that the Court of Appeal (Election Petition) Rules 2017 had not specified a time limit to file the same. Therefore, since there was no express statutory timeline for filing a supplementary record of appeal, this case was not one where the strict interpretation of timelines could be adhered to as it was in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others*, Supreme Court Petition 18 of 2014 (as Consolidated with Supreme Court Petition 20 of 2014)).

4.12.4 *Depositing the Security for Costs*

4.12.4.1 Section 78 of the Elections Act, 2011, which requires the deposit of security for costs, only applies to proceedings before an election court. The section does not, therefore, apply to appeals before the Court of Appeal (*Lydia Mathia v Naisula Lesuuda & Another,* Civil Appeal (Application) No. 287 of 2013). The Court of Appeal, however, requires an appellant to deposit a sum of five hundred thousand shillings as security for costs of an appeal (Rule 27 of the Court of Appeal (Election Petition) Rules, 2017).

4.12.4.2 The decision of the High Court on an appeal from the Magistrates Court is final. The Court of Appeal lacks jurisdiction to hear appeals from County Assembly election petitions (*Hassan Jimal Abdi v Ibrahim Noor Hussein and 2 Others*, Nairobi Election Petition Appeal No. 30 of 2018; *Mohamed Ali Sheikh v Abdiwahab Sheikh & 4 others; Emmanuel Changawa Kombe (Interested Party),* Election Appeal (Application) No. 261 of 2018; *Hamida Yaroi Shek Nuri v Faith Tumaini Kombe, Amani National Congress & IEBC,* Supreme Court Petition No. 38 of 2018; and *Peter Bodo Okal v Philemon Juma Ojuok & 2 Others,* Supreme Court Election Petition (Application) 9 & 33 of 2019 (consolidated)).

4.12.4.3 Although there is no provision barring such appeals, the absence of a provision permitting them was interpreted, by the Supreme Court, as evincing the intention of Parliament to limit appeals from the Magistracy to the High Court. In the case of *Hamida Yaroi Shek Nuri v Faith Tumaini Kombe, Amani National Congress & IEBC*, Supreme Court Petition No. 38 of 2018, the Supreme Court held:

> *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.*
>
> *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.*
>
> *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.*

4.13 Appeals to the Supreme Court

4.13.1 A person who intends to lodge an appeal to the Supreme Court must file a Notice of Appeal *within 14 days* of the date of the judgment or ruling of the Court of Appeal (Rule 36, Supreme Court Rules, 2020); and *Naomi Wangechi Gitonga & 3 Others v IEBC & 4 Others*, Supreme Court Civil Application No. 2 of 2014). Where the Court of Appeal makes a final decision in EDR but reserves or defers the reasons for the decision to a subsequent date, the time for filing the Notice of Appeal runs from the date of the decision rather than the date of the reasons for the decision (*Richard Nyagaka Tong'i v Chris N. Bichage & 2 Others*, Supreme Court Petition No. 17 of 2014).

4.13.2 Appeals to the Supreme Court must be filed *within 30 days* of filing the Notice of Appeal or within 30 days from the Grant of Certification, where certification is required (Rule 38,

Supreme Court Rules, 2020); and *Nicholas Kiptoo Arap Salat v IEBC & 7 Others*, Supreme Court Civil Application No. 16 of 2014).

4.13.3 Not all decisions of the Court of Appeal are appealable, as of right, to the Supreme Court. Only decisions of the Court of Appeal in appeals involving the interpretation or application of the Constitution can be appealed as of right (Article 163(4)(a) of the Constitution; section 15 of the Supreme Court Act; and *Alfred Nganga Mutua & 2 Others v Wavinya Ndeti & Another,* Supreme Court Petition 11 of 2018*).*

4.13.4 Election petition appeals are not automatically cases involving the interpretation or application of the Constitution. In the case of *Nasra Ibrahim Ibren v IEBC & 2 Others*, Supreme Court Petition No 19 of 2018, the Supreme Court emphasised this point as follows:

> *...Consequently, it is pragmatic that the Munya 1 case should be construed within the larger framework of the constitutional rationale in Article 163(4)(a) of the Constitution. Parties cannot disengage from the legal filtering mechanism enshrined in Article 163(4) of the Constitution and haphazardly cite this case law when invoking this Court's appellate jurisdiction as of right...*
>
> *...Consequently, it is our determination that where a party in an election petition invokes this Court's jurisdiction under Article 163(4)(a) of the Constitution, it is not enough for one to generally allege that the Court of Appeal erred in its decision(s) and that its reasoning and conclusions took a constitutional trajectory. The constitutional trajectory stated by this Honourable Court is not illusionary. It is tangible and should be discernable from a party's pleadings. A party is under a constitutional forensic duty to clearly set out the particulars of the constitutional transgressions that in his/her opinion the Court of Appeal committed in their interpretation and/or application. Those grounds must be pleaded with precision and the constitutional principle and/or provision alleged to have been violated clearly set out.*

4.13.5 Where no constitutional interpretation or application was done by the Court of Appeal in its determination of an election petition appeal, the decision of the Court of Appeal can only be appealed to the Supreme Court with leave/Certification as to the appeal's general public importance (Article 163(4)(b) of the Constitution; Section 16 of the Supreme Court Act; Rule 33 of the Supreme Court Rules, 2020; and *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone,* Supreme Court Application 4 of 2012).

4.13.6 An Application for Certification of an appeal as raising a matter of general public importance must be made, in the first instance, at the Court of Appeal. The decision of the Court of Appeal on an application for certification may be reviewed by the Supreme Court if the review is sought within 14 days of the Court of Appeal's ruling (Rule 33 of the Supreme Court Rules, 2020; and *Sum Models Industries Ltd v Industrial and Commercial Development Corporation,* Supreme Court Civil Application No. 1 of 2011.

CHAPTER 5

THE PRESIDENTIAL ELECTIONPETITION

THE PRESIDENTIAL ELECTION PETITION

5.1. General Rules relating to Presidential Election Petitions

5.1.1. Generally, every presidential election petition must conform to the mandatory requirements set under Articles 87 and 140 of the Constitution of Kenya 2010, the Elections Act, 2011, and the Supreme Court (Presidential Election Petition) Rules, 2017.

5.2. Filing of Petition

5.2.1. The presidential election petition must be filed within 7 days after the declaration of the presidential results (Article 140(1) of the Constitution).

5.2.2. The form of the Petition must conform to Rule 8 of the Supreme Court (Presidential Election Petitions) Rules, 2017.

5.2.3. The Filing fees for a presidential election petition are Kshs. 500,000.

5.2.4. Every presidential election petition must:

(i). Be divided into paragraphs and numbered consecutively;

(ii). have each paragraph being confined to a distinct portion of the subject;

(iii). be Printed or typed legibly;

(iv). briefly set out the facts and the grounds relied on to sustain the relief claimed;

(v). Be signed by the Petitioner[s] or their duly authorized representative;

(vi). Be supported by an Affidavit which should be sworn personally by the Petitioner(s) containing:

(vii). The grounds on which the relief is sought, setting out the facts relied on by the petitioner(s);

(viii). Be divided into paragraphs which should each be confided to a distinct portion of the subject and numbered consecutively; and

(ix). Conclude with a statement setting out the particulars of the relief sought.

5.2.5. The requirements set out in Rule 7 and 8 and the First Schedule of the Supreme Court (Presidential Election Petition) Rules, 2017, are not mere technical requirements limited to procedural form and content of election petitions.

5.2.6. The Supreme court has discretion, pursuant to Article 159(2)(d) of the Constitution and Rule 5 of the Supreme Court (Presidential Election Petition) Rules, 2017, to excuse minor or trivial deviations from the above and other mandatory requirements.

5.3. The Response to the Petition

5.3.1. A respondent who wishes to oppose an election petition must file and serve an answer to the petition within four days of service of the Petition (Rule 11(1), Supreme Court (Presidential Election Petition) Rules, 2017).

5.3.2. Rule 11 of the Supreme Court (Presidential Election Petitions) Rules, 2017 provides for the Rules relating to the response to the Petition as follows:

i. The respondent may file a response; it is not mandatory. Any party who does not respond to the petition or file notice of intention not to oppose shall not be allowed to be a party in the proceedings (Rule 11(3));

ii. The response must be filed and served within 4 days of service of the Election petition;

iii. The response must be accompanied by Replying Affidavit(s) sworn by the respondent(s) and any of their witnesses, setting out the substance of the evidence to be relied upon;

iv. The response must be in relation to each claim in the petition; and

v. Where the respondent does not intend to oppose the Petition, he or she must file a notice of intention not to oppose the petition within 3 days of service of the Petition (Rule 11(2)).

5.4. Witness Affidavits

5.4.1. Rule 9 and 11(1)(b) of the Supreme Court (Presidential Election Petitions) Rules, 2017, require the Petitioner to file, **together** with the election petition or response to the election petition, affidavits sworn by the parties, and all witnesses the parties intend to call at the trial.

5.4.2. Failure to file a supporting affidavit is fatal to a petition: it is not a procedural technicality as the affidavit contains the evidence a party wishes to rely on. Furthermore, the supporting affidavit must be filed contemporaneously with the Petition, to enable the respondent to be aware of the case before it and the requisite time to respond.

5.4.3. The Affidavit cannot annex or adduce the affidavit of the other witnesses. Each Affidavit should be independent, and in the event the affidavit annexes another witnesses' affidavit, such evidence of the witnesses is deemed testimony of the main deponent and as such the witnesses cannot be examined on it. In *Raila Odinga & Others v IEBC & 4 Others,* Supreme Court Petitions 4, 3 & 5 of 2013**,** the Supreme Court expunged from the record such affidavits which were put in as annexures of the petitioner's affidavit. It stated:

> *The Petitioner has used an unusual way of availing the affidavits as annexures or evidence as there were various further affidavits filed through the affidavit in reply which were not independent affidavits filed to stand on their own evidence in the particular proceedings. Such affidavits evaded payment of the filing fees and their probative value was questionable. The affidavits and the supporting affidavit of the petitioner are not commissioned. The affidavits are thereby struck out and expunged from the record.*

5.5. Service of Election Petitions

5.5.1. The time of declaration of presidential election results is the operative moment in the exercise of the Supreme Court's jurisdiction over a presidential election petition (*Isaac Aluoch Polo Aluochier v IEBC & 19 Others*, Supreme Court Petition No. 2 of 2013). The Supreme Court has no jurisdiction, therefore, to entertain an election petition filed before the declaration of the results of the presidential election (*Isaac Aluoch Polo Aluochier v IEBC & 19 Others*, Supreme Court Petition No. 2 of 2013).

5.5.2. All presidential election petitions must be served *within twenty-four hours of* filing (Rule 10(1) of the Supreme Court (Presidential Election Petition) Rules, 2017). The Petitioner must then serve the respondents, with an electronic copy of the Petition, within six hours of filing of the Petition (Rule 10(2)).

5.5.3. Service may be effected either directly on the respondents or by advertisement in a newspaper with national circulation (Rule 10(1) of the Supreme Court (Presidential Election Petition) Rules, 2017).

5.6. Security for Costs

5.6.1. Section 78(2) of the Elections Act, 2011 requires a petitioner to deposit security for the payment of costs *within 10 days* of filing the election petition.

5.6.2. The Security of Costs for the presidential election petition is Kshs. 1,000,000.

5.7. Filing and Service of Responses to Election Petitions

5.7.1. A respondent who wishes to oppose a presidential election petition must file and serve an answer *within four days* of service of the election petition (Rule 11(1) of the Supreme Court (Presidential Election Petition) Rules, 2017).

5.7.2. The response must be substantially as in Form B to the Second Schedule to the Supreme Court (Presidential Election Petition) Rules, 2017.

5.7.3. The response must be accompanied by Replying Affidavits sworn by the respondent and any witnesses the respondent wishes to call at the trial, setting out the substance of the evidence (Rule 11(1)(b) of the Supreme Court (Presidential Election Petition) Rules, 2017).

5.8. Pre-Trial Conference and Directions

5.8.1. The pre-trial conference for presidential election petitions must be held *within eight days* of filing of the petition (Rule 14(1) of the Supreme Court (Presidential Election Petition) Rules, 2017).

5.8.2. Rule 15 of the Supreme Court (Presidential Election Petition) Rules 2017 requires the Court to do the following during the pre-trial conference:

(a) frame contested and uncontested issues in the petition;

(b) consider consolidation of petitions in cases where more than one petition is filed with respect to the same election;

(c) determine the number of advocates that the Court shall hear on behalf of each party;

(d) allocate time for each party to address the Court;

(e) give directions specifying the place and time of the hearing of the Petition; and

(f) Make such other orders as may be necessary to ensure a fair determination of the Petition.

5.9. Preliminary matters

5.9.1. *Joinder*

5.9.1.1. The Supreme Court may, either on its own motion or at the request of any party enjoin a person as a *'friend of the court'/Amicus curiae*. The factors to be considered by the Court before admitting a person as a 'friend of the court' are their proven expertise, their independence/ impartiality and the public interest. (Rule 19 of the Supreme Court Rules, 2010, and Rule 17A(1) of the Supreme Court (Presidential Election Petition) Rules, 2017).

5.9.1.2. The fact that a party has previously been admitted as *amicus* before the Court is not sufficient to warrant admission in a subsequent case as each matter has to be determined on its own merit and in light of its unique issues and circumstances (*Raila Amolo Odinga & Another v IEBC & 2 Others & Charles Kanjama,* Supreme Court Presidential Petition 1 of 2017. Conversely, previous denial of admission as *amicus* is not a ground for subsequent denial (*Raila Amolo Odinga & Another v IEBC & 2 Others & Law Society of Kenya (as Amicus Curiae)*, Supreme Court Election Petition 1 of 2017).

5.9.1.3. The Court will not grant an application to join as *amicus* where the applicant advances new issues not raised by the parties (*Raila Amolo Odinga & Another v IEBC & 2 Others & Charles Kanjama,* Supreme Court Presidential Petition 1 of 2017).

5.9.1.4. The Court will also not be inclined to admit as *amicus* any applications that do not bear a general orientation focused on a specific question falling for determination before the Court (*Raila Amolo Odinga & another v IEBC & 2 others & Information Communication Technology Association (ICTAK) (as Amicus Curiae)* Supreme Court Presidential Petition 1 of 2017).

5.9.1.5. However, applications to be admitted as *'Interested Parties'* in presidential election petitions will not be allowed by the Supreme Court (Rule 17A(4) of the Supreme Court (Presidential Election Petition) Rules, 2017). Although the Supreme Court has previously admitted various persons as Interested Parties in presidential election Petitions, the coming into force of the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2019 (Legal Notice No. 7 of 2020) did away with this practice.

5.9.2 *Interlocutory Applications and Reliefs*

5.9.2.1 Rule 17 provides for the following in respect to interlocutory applications:

i. If filed at the close of the pleadings, interlocutory applications should be filed together with the written submissions not exceeding five pages;

ii. They must be served on every respondent within twenty-four hours of filing;

iii. Any response to the Application must be filed together with the written submissions, not exceeding five pages, within twenty-four hours of service of the Application; and

iv. The Court may deliver the ruling through electronic means, and the reasons thereto may be given at a later date.

5.10 Further Affidavits and Additional Evidence

5.10.1 An election court has discretion to allow the filing of further affidavits and admit new or additional evidence *Raila Odinga v IEBC & 3 Others*, Supreme Court Petition No. 5 of 2013).

5.10.2 An election court will not grant an application for the adducing of new or additional evidence where the grant of such an application will prejudice the other parties to the dispute or undermine the constitutional imperative of timely resolution of electoral disputes (*Raila Odinga v IEBC & 3 Others*, Supreme Court Petition No. 5 of 2013).

5.10.3 In *Raila Odinga v IEBC & 3 Others*, Supreme Court Petition No. 5 of 2013, the Supreme Court gave the following guidelines for determining applications for the filing of further affidavits and admission of new or additional evidence:

- *the admission of additional evidence is not an automatic right. Instead, the election court has a discretion on whether or not to admit the evidence;*
- *further affidavits must not seek to introduce massive evidence which would, in effect, change the nature of the petition or affect the respondent's ability to respond to the said evidence;*
- *the parties to an election petition should strive to adhere to the strict timelines set out in EDR laws; and*
- *admission of new evidence must not unfairly disadvantage the other parties to an election petition.*

5.10.4 Again, the limited period within which the Supreme Court is required to hear and determine presidential election petitions may justify the rejection of applications for introduction of new or additional evidence (*Raila Odinga v IEBC & 3 Others*, Supreme Court Petition No. 5 of 2013).

5.11 Scrutiny and Recount/Re-tally

5.11.1 The Supreme Court may, either on its own motion or on application of any party, order for a scrutiny of votes to be conducted during the hearing of the presidential election petition. (s 82 of the Elections Act). The Supreme Court may also order a recount of the votes cast; and if the winner is apparent after the recount, it will proceed to direct the IEBC to issue a Certificate to the winning presidential candidate.

5.11.2 In the 2013 presidential election petition (*Raila Odinga v IEBC & 3 Others*, Supreme Court Petition No. 5 of 2013), the Supreme Court issued an order for *suo motu* scrutiny of the Forms 34 and 35 (declaration forms used in result declarations). The Court equally ordered a re-tally/recount of presidential votes at 22 polling stations which had featured in the petitioner's grievance.

5.11.3 In the 2017 presidential election petition (*Raila Odinga v IEBC & Others*, Supreme Court Presidential Election Petition 1 of 2017), the petitioners' Application for scrutiny of Forms 34A, 34B & 34C was allowed alongside scrutiny of the electoral management system. The outcome of the scrutiny featured heavily in the grounds relied upon to nullify the election.

5.11.4 Scrutiny and Recount have been addressed at length separately in section 4.7.5 of this Bench Book. The documents that guide the process from the grant of an order of scrutiny to the preparation of the report are annexed as an Appendix to this bench book.

5.12 Withdrawal of Election Petitions and Substitution of Petitioners

5.12.1 Since election petitions are inherently brought in the public interest, an election petition can only be withdrawn *with the leave of the election court* (Rule 20(1), Supreme Court (Presidential Election Petition) Rules, 2017). Further, a petitioner wishing to withdraw an election petition must file an application for withdrawal of the petition vide Form E, set out in the Second Schedule to the Supreme Court (Presidential Election Petition) Rules 2017.

5.12.2 The Court may issue any orders upon application of withdrawal, as it may deem fit.

5.13 Hearing and Determination

5.13.1 Due to the strict constitutional timelines, hearing should commence immediately after pre-trial and should continue uninterrupted and on a day-to-day basis, unless there are exceptional circumstances (Rule 18 and 19 of the Supreme Court (Presidential Election Petition) Rules 2017).

5.13.2 Hearing of presidential petitions is by way of affidavit evidence and written submissions. (Rule 18(2) of the Supreme Court (Presidential Election Petition) Rules 2017).

5.14 Burden of Proof

5.14.1.0 The Supreme Court in the case of *Raila Odinga & Another v IEBC & Others*, Presidential Election Petition 1 of 2017, described the burden of proof as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue.

5.14.1 *Legal burden of proof*

5.14.1.1 In election petitions, just as in civil matters, the legal burden of proof rests solely on the petitioner throughout the course of the trial (*Opitz v Wrzenewskyi* [2012] 3 SCR 769; and *John Harun Mwau & 2 Others v IEBC & 2 Others,* Supreme Court Petition 2 & 4 of 2017). This much is codified in section 107(1) of the Evidence Act.

5.14.2 *Evidential burden of proof*

5.14.2.1 Though initially resting on the petitioner (the party bearing the legal burden of proof), the evidential burden of proof may shift between the parties as the weight of evidence adduced during the trial varies. The evidential burden of proof shifts to the respondent once the petitioner proves sufficient evidence to impugn an election, if uncontroverted. (*Raila Amolo Odinga & Another v IEBC & 4 Others & Attorney General & Another*, Presidential Petition No. 1 of 2017; and *John Harun Mwau & 2 others v IEBC & 2 Others,* Supreme Court Petition 2 & 4 of 2017).

5.15 Standard of Proof

5.15.1 Standard of proof refers to the extent a petitioner is required to go to succeed in his/her petition. The standard of proof in EDR is an 'intermediate standard', one that is greater than a 'balance of probabilities' but lower than 'beyond reasonable doubt' (*Raila Amolo Odinga & Another v IEBC & 4 Others & Attorney General & Another*, Presidential Petition No. 1 of 2017).

5.15.2 The implication of section 83 of the Elections Act, it has been determined, is that unless the irregularities or malpractices proved by the petitioner are such that they actually interfere with the free choice of the voters, the Court will not be willing to interfere with the existing voter's choice (*Raila Odinga v IEBC & 2 Others,* Supreme Court Presidential Election Petition No. 1 of

2017). This is also in tandem with Lord Denning's proposition, noted here in part, that 'if the Election was so conducted that it was substantially in accordance with the law as to Elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the result of the Election' (*Morgan v Simpson* [1974] 3 All ER 722).

5.15.3 However, where the petition alleges corrupt practice, election offences or data-specific allegations, the petitioner must prove them beyond reasonable doubt (*Raila Odinga v IEBC & 3 Others,* Supreme Court Petition No. 5 of 2013).

5.15.4 For a party to succeed in a presidential election petition, as per section 83 of the Elections Act, 2011, they must prove either that:

- The election was not conducted in accordance with the principles set out in the Constitution and other written law; or
- The election was fraught with irregularities which affected the declared result.

(*Raila Odinga v IEBC & 2 Others,* Supreme Court Presidential Election Petition No. 1 of 2017).

5.15.5 The rationale for the exception on election offences is that they are penal in nature and subject to prosecution by the Director of Public Prosecutions once an election court finds that there is reason to believe that an election offence may have been committed (s 87 Elections Act; and s 21 and 22 of the Election Offences Act, 2016). Where election offences are alleged, the evidence must be specific, satisfactory, definitive, cogent and certain.

5.15.6 In the case of *Alfred Nganga Mutua & 2 Others v Wavinya Ndeti & Another*, Supreme Court Petitions 11 and 14 of 2018, the Supreme Court held:

> *It is now settled law in this country, (see Raila 2013 and many authorities following it as well as Section 107(1) of the Evidence Act), that the burden of proof lies upon the party alleging a fact to prove it to the required standard. It is also settled law, (see Raila 2017) that the standard of proof of any election offence or quasi criminal conduct is that of beyond reasonable doubt.*

5.15.7 Secondly, a litigant who alleges that the successful candidate did not garner a prescribed minimum number of votes must prove such an allegation beyond all reasonable doubt *Raila Odinga v IEBC & 3 Others*, Supreme Court Petition No. 5 of 2013 (*Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others*, Supreme Court Petition No. 5 of 2013).

5.16 Section 83 of the Elections Act

5.16.1 Section 83 of the Elections Act is the fulcrum of every election petition. It presently reads:

> *(1) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that—*
>
> *(a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and*
>
> *(b) the non-compliance did not substantially affect the result of the election.*
>
> *(2) Pursuant to section 72 of the Interpretation and General Provisions Act (Cap. 2),*

> *a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead.*

5.16.2 The above provisions were enacted in 2017, vide the Election Laws (Amendment) Act No. 34 of 2017, with the effect that the previous disjunctive 'section 83 test' was replaced with a conjunctive test thus requiring petitioners to prove both limbs, i.e., that the election was conducted in violation of the Constitution and written law, and that non-compliance with the law affected the result of the elections.

5.16.3 Prior to this amendment, the provision read:

> *no election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.*

5.16.4 However, following the enactment of the Election Laws Amendment Act, No. 34 of 2017, it was challenged by Katiba Institute *vide* *Katiba Institute & 3 Others v Attorney General & 2 Others*, Nairobi Petition No 548 of 2017. The High Court declared the Amendment to section 83 of the Elections Act unconstitutional and struck it down.

5.16.5 No legislative amendment was introduced to align section 83 with the decision of the Court, nor was an appeal preferred against the decision of the Court. Reference may, therefore, be had to similar situations where an amendment was declared unconstitutional to ascertain the effect of the declaration of unconstitutionality.

5.16.6 In *Senate & 2 Others v Council of County Governors & Others,* Supreme Court Petition 25 of 2019, an amendment to section 91(f) of the County Governments Act was declared unconstitutional. The Court ruled that the effect of the declaration of unconstitutionality was to restore the previous section 91(f) of the County Governments Act. Similarly, in the case of *Attorney General & 2 Others v David Ndii & 79 Others,* Supreme Court Petition 12 of 2021 (consolidated with petitions 11 and 13 of 2021), the Supreme Court addressed the issue of the quorum of the IEBC in light of the amendments to paragraph 5 of the Second Schedule to the IEBC Act, which were also declared unconstitutional in the *Katiba case*. The majority of the judges endorsed the position taken in the *Senate* case that the effect of an amendment being declared unconstitutional is to restore the *status* quo before the amendment.

5.16.7 In light of the above jurisprudence of the Supreme Court, by parity of reasoning, the declaration of invalidity of the 2017 amendment to section 83 of the Elections Act had the effect of restoring section 83 as it stood before the Election Laws (Amendment) Act, No. 34 of 2017.

5.16.8 Courts are thus left with the binding edicts of the Supreme Court on the interpretation to be applied to section 83 of the Elections Act, i.e., that the test is disjunctive. This test was affirmed in *Raila Odinga v IEBC & 2 Others,* Supreme Court Presidential Election Petition No. 1 of 2017; and *Gatirau Peter Munya v Dickson Mwenda Githinji and 2 Others,* Supreme Court Application 5 of 2014.

5.17 Integration of Technology in Transmission of Presidential Election Results

5.17.1 Presidential results are required to be transmitted electronically from polling stations to the Constituency and National Tallying Centres. They are also required to be live-streamed and maintained on a public portal (s 39(1C) of the Elections Act).

5.17.2 However, that was not the case at the enactment of the Elections Act, 2011 and at the first general election under the new constitutional era in 2013.

5.18 History of Section 39 of the Elections Act

5.18.0.1 On promulgation of the 2010 Constitution, Parliament was given certain timelines to pass 'consequential' pieces of legislation (Article 261(1) of the Constitution). Some of these legislation were to be on:

i. *elections and electoral disputes (Articles 82 & 87);*

ii. *the Independent Electoral and Boundaries Commission (Article 88); and*

iii. *political parties (Article 92).*

(Refer to the 5th Schedule of the Constitution)

5.18.0.2 The Elections Act, No 24. of 2011 was assented to on the first Anniversary of the Constitution's promulgation, narrowly beating the constitutional timeline for its enactment. The Act commenced operation on 2 December 2011.

5.18.0.3 Section 39 of the Elections Act states as follows:

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

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

(3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed.

5.18.0.4 At inception, the provision made no reference to transmission of election results for presidential elections. The only statutory reference to the word *'technology'* was in section 44 of the Elections Act, which then read *'The Commission **may use such technology as it considers appropriate** in the electoral process'*. This provision alluded to the IEBC having the discretion on how, when or whether to use technology.

5.18.0.5 However, regulation 82 of the Elections (General) Regulations, 2012 (then) provided as follows:

(1) The presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such manner as the Commission may direct.

(2) The results submitted under sub-regulation (1) shall be provisional and subject to confirmation after the procedure described in regulation 73.

5.18.0.6 Following the 2013 general elections, the first elections to be governed by the Elections Act of 2011, a presidential election petition was filed – *Raila Odinga & 3 Others v IEBC & Others*, Petitions 3, 4 & 5 of 2013. Raila Odinga's petition was centred on electoral technology, particularly the failure of the transmission system and failure of the Biometric Voter Registration system (BVR). The IEBC contended that the use of technology was discretionary and that in the event of a failure of technology, it had been resolved to allow the persons in these special circumstances to vote, upon verification of their data. In ruling on the petition, the Supreme Court opined that: *'It is not surprising that the applicable law has entrusted a discretion to IEBC, on the application*

of such technology as may be found appropriate.' On this basis, the Court found that the election could not be annulled on account of the reversal to the manual system.

5.18.0.7 In 2016, the Election Laws (Amendment) Act No. 36 of 2016 was enacted. It gave effect to several areas for legislative reform proposed by the Supreme Court in *Raila Odinga 2013*. The Act made several changes that included extensive amendments to sections 39 and 44 of the Elections Act.

5.18.0.8 Section 39 of the Elections Act was amended by, *inter alia*, adding the following sub-section on presidential elections:

> *(1A) the Commission shall appoint constituency returning officers to be responsible for-*
>
> *(i) ...*
>
> *(ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and*
>
> *(iii) .....*
>
> *(1C) For purposes of a presidential election the Commission shall:-*
>
> *(a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;*
>
> *(b) tally and verify the results received at the national tallying centre; and*
>
> *(c) publish the polling result forms on an online public portal maintained by the Commission.*
>
> *(1D) The chairperson of the Commission shall declare the results of the election of the President in accordance with Article 138(10) of the Constitution.*

5.18.0.9 This amendment, for the first time, placed a mandatory obligation on the IEBC to electronically transmit the tabulated presidential results from the polling stations to the constituency tallying centre and national tallying centre. It, nonetheless, retained sub-sections (2) and (3) on 'provisional results' (see sections 5.18.0.3 and 5.18.1.2).

5.18.0.10 As for IEBC's discretion on deployment of technology, the same was done away with by deleting section 44 of the Elections Act. In its place the following provision was enacted:

> *44 (1) Subject to this section,* ***there is established*** *an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.*
>
> *(2) The Commission shall, for purposes of subsection (1), develop a policy on the progressive use of technology in the electoral process.*
>
> *(3) The* ***Commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent****.*
>
> *(4) The Commission shall, in an open and transparent manner-*

(a) *procure and put in place the technology necessary for the conduct of a general election at least eight months before such elections; and*

(b) *test, verify and deploy such technology at least sixty days before a general election.*

5.18.0.11 Following the Election Laws (Amendment) Act No. 1 of 2017, section 44(4) and (7) were amended to change the time for the procurement of the technology from 8 months to 120 days. Further section 44A of the Elections Act was introduced, which mandated the IEBC to put in place a complementary mechanism for identification of voters (and transmission of election results) that is simple, accurate, verifiable, secure, accountable and transparent. In the case of *National Super Alliance (NASA) Kenya v IEBC & 2 Others*, Nairobi High Court Petition No. 328 of 2017, the High Court was urged to declare that the 8 August 2017 general election would be exclusively electronic with respect to identification of voters and transmission of results. The High Court acknowledged that the current legal regime in the country requires an integrated electronic system that enables biometric voter registration, electronic voter identification, and electronic transmission of results.

5.18.0.12 The Court, however, observed that the complementary mechanism envisaged in section 44A only sets in when the integrated electronic system fails. In rejecting the prayer that identification of voters and transmission of results be exclusively electronic, the Court held:

> *To our mind, what was required of the respondent was to put in place a mechanism that would complement the one set out in section 44 of the Act. The particulars of the mechanism, whether electronic, manual, or any other mode was not expressly provided in section 44A. If that were the intention of Parliament, nothing would have been easier than to specify so.*

5.18.0.13 The High Court decision was upheld by the Court of Appeal in *National Super Alliance (NASA) Kenya v IEBC & 2 Others,* Civil Appeal 258 of 2017. In *Katiba Institute & 3 Others v Attorney General & 2 Others,* Nairobi High Court Petition 548 of 2017, the High Court declined to declare the complementary mechanism under section 44A of the Elections Act unconstitutional. This was because it was complementary and was not envisaged to replace the electronic voter identification system but only used when the principal voter identification system failed due to technological failure.

> **Editorial Note:** The decision by the IEBC to do away with the manual register of voters as a complementary mechanism for voter identification in 2022 was challenged in the case of *Kenya Human Rights Commission & Others v IEBC & 2 Others,* HCCHR Petition E306 of 2022 (unreported). While the IEBC asserted that its decision to not use the manual register was informed by its findings in 2017 that the printed Register provided an avenue for misuse during the voting process, the High Court ruled that the decision deviated from Regulation 69(1)(e) of the Elections (General) Regulations, 2012, which provides, as part of the voting procedure, that identification of voters who could not be identified using electronic voter identification kits was to be done using the printed Register of Voters. The decision to abandon the use of the printed Register was, therefore, a violation of Articles 38, 83 and 86 of the Constitution.
>
> The Court of Appeal in *United Democratic Alliance Party v Kenya Human Rights Commission & Others* Civil Application No E288 of 2022, the appellate court granted a stay of the judgment of the High Court and reiterated that the

decision in *IEBC v Maina Kiai & 5 Others*, Civil Appeal No. 105 of 2017 would guide the IEBC in respect of voter identification.

5.18.1 *The Maina Kiai Petition*

5.18.1.1 Following the enactment of the above amendment, *Maina Kiai & 2 Others v IEBC & 2 Others,* Petition No 207 of 2016, was filed. The petition challenged section 39(2) and (3) of the Elections Act and Regulations 83(2), 84(1) and 87(2) of the Elections (General Regulations, 2012.

5.18.1.2 The impugned Regulations provided that the presidential results declared at a constituency level were subject to confirmation by the IEBC after a tally of all the votes cast; and that at the time of their transmission, they were provisional results. The petition was heard by a 3-judge bench of the High Court and allowed. The High Court then declared that the IEBC had no powers to audit, rectify, or in any way interfere, with an election result once it was declared by the Constituency Returning Officer. The Court annulled section 39(2) and (3) of the Elections Act and Regulations 83(2) and 87(2) of the Elections (General) Regulations, 2012. In so doing the Court affirmed the principle of finality of election results.

5.18.1.3 The decision of the High Court was appealed by the IEBC to the Court of Appeal in *IEBC v Maina Kiai & 5 Others*, Civil Appeal No. 105 of 2017. A 5-judge bench of the Court of Appeal dismissed the appeal and affirmed the High Court's judgment. In so doing, the Court of Appeal decreed that the polling station was the 'true locus for the free exercise of the voters' will.'

5.18.1.4 Another issue that arose, albeit, in *obiter*, at the hearing of the appeal, was the IEBC's passage of the Elections (General) (Amendment) Regulations, 2017 while it pursued the Appeal against the High Court judgment. On the matter, the Court of Appeal opined that:

> *We now turn our attention to amendments to the Regulations, which we alluded to earlier. It will be recalled that the High Court annulled Section 39(2) and (3) of the Act and regulations 83(2) and 87(2)(c) on 7th April, 2017. One would have expected the concerned institutions, including the appellant, to either comply with the determination of the court or if aggrieved, to challenge it in this Court as the appellant did within two weeks on 24th April 2017. Instead, 14 days following the delivery of the judgment impugned in this appeal, the appellant issued a gazette supplement, being Legal Notice No. 72 of 21st April, 2017, making drastic amendments to the Elections (General) Regulations 2012, whose effect was clearly to render impotent and circumvent the declaration by the High Court of the inconsistency with the Constitution of section 39(2) and (3) of the Act and regulations 83(2) and 87(2)(c)...*
>
> *The controversial regulations 83(2) and 87(2) were not affected by the amendments, and the object is not difficult to see. The High Court having found those regulations to be inconsistent with the Constitution, it was in bad faith for the appellant to re-enact them while pursuing this appeal. It is our firm position that the purpose for which section 39(2) and (3) of the Act and regulations 83(2) and 87(2)(c) were promulgated or made have the effect of infringing constitutional principles of transparency, impartiality, neutrality, efficiency, accuracy and accountability.*

5.18.2 *Raila Odinga & Another v IEBC & Others, Supreme Court Presidential Petition 1 of 2017*

5.18.2.1 After the 2017 general election, a presidential election petition was filed by presidential candidate, Raila Odinga, disputing the declared results. Once more, the issue of transmission of the election results featured heavily. The Supreme Court faulted the IEBC for failing to comply with section 39(1C) of the Elections Act, by which, the IEBC was under an obligation to scan the results declaration forms at the polling station (Forms 34A) and transmit them to the

constituency and national tallying centres.

5.18.2.2 The Supreme Court also held that the failure by the IEBC to submit crucial documentation subject to a court-issued scrutiny order, left it with no choice but to draw an adverse inference against the IEBC. The rationale for this finding was that as section 39(1C) of the Elections Act had imposed an obligation on the IEBC to transmit the forms 34A from the polling stations, the conceded failure to transmit all the forms at the time of declaration of the presidential election results was in error.

5.18.2.3 On this basis, the Supreme Court held that the presidential elections were not conducted in accordance with the Constitution and annulled them, ordering that a fresh election be conducted.

5.18.3 *The Election Laws (Amendment) Act No 34 of 2017*

5.18.3.1 The annulment of the 2017 presidential election seemed to spurn the National Assembly into action as less than a month of the Supreme Court's annulment of the election, a Bill was introduced in Parliament to amend, *inter alia*, sections 39 and 83 of the Elections Act. This was in an implied bid to change the test that would be used to govern the fresh presidential election.

5.18.3.2 The Bill was moved and passed through both houses of Parliament in record time. On submission to the President for assent, no action was taken by him leading to the Bill becoming an Act on the 14th day after its submission to the President, in line with Article 116 of the Constitution (and it taking effect on publication in the Kenya Gazette). Thus, the Election Laws (Amendment) Act No 34 of 2017 was enacted, making further changes to section 39 and 44 of the Elections Act. The 2017 Amendment Act sought to amend section 39 in the following ways:

i. *Requiring both electronic transmission and physical delivery of presidential results from the polling stations to the constituency tallying centre, and then to the national tallying centre.*

ii. *Tallying and verifying the results received at both the constituency tallying centre and the national tallying centre.*

iii. *Requiring the IEBC to verify that the transmitted results are an accurate record of the results tallied, verified and declared at the respective polling stations.*

iv. *In cases of discrepancies between the transmitted and physical results, the IEBC would verify the results and that which was an accurate record of the results at the polling stations would prevail.*

v. *Any failure to transmit or publish the results in an electronic format would not invalidate the results as declared by the presiding and returning officers at polling station and constituency tallying centres respectively.*

vi. *IEBC was to establish, for purposes of public information only, a system of live-streaming of results as announced at polling stations.*

vii. *Sub-section 2 of the Act (as it initially existed) was deleted and substituted with a provision permitting the IEBC Chair to announce the results of the presidential election before all constituency results had been transmitted if the Chair was satisfied that the results that had not been received would not affect the result of the election.*

viii. Provisional results were done away with and the IEBC obligated to announce the final results in the order in which they were tallied.

5.18.3.3 Section 44, on the other hand, was amended, in part, by establishing a complementary system for identification of voters. One that is simple, accurate, verifiable, secure. accountable and transparent.

5.18.3.4 The amendment to section 39(1C) of the Elections Act did away with the requirement for result transmission, to the constituency and national tallying centres, in the required form. In addition, the amendment required the verification of the electronically transmitted results as against the physical result declarations and in the event of a contradiction, the results that reflected the accurate results of the election at the polling station would prevail.

5.18.3.5 Before the fresh election decreed by the Supreme Court following the nullification of the 2017 presidential election was conducted, two election petitions were lodged by *John Harun Mwau* (Petition 2 of 2017), and *Njonjo Mue and Khelef Khalifa* (Petition 4 of 2017) in the other. One of the issues that arose was whether the 2017 Amendment (Election Laws (Amendment) Act, 2017) would govern the fresh election.

5.18.3.6 The Supreme Court held that the applicable law was the Elections Act, 2011 as it existed prior to the said amendment, which had not come into effect as at the time of the election. The Supreme Court resisted the invitation to declare the amended section 83 of the Elections Act unconstitutional, leaving it to the High Court which, as at the time of the decision, was seized of the case of *Katiba Institute & 3 Others v Attorney General & 2 Others* (Nairobi Petition No 548 of 2017), seeking to declare the Election Laws (Amendment) Act, 2017 unconstitutional (For a somewhat different reasoning on the applicability and constitutionality of the amended section 83, see the concurring opinion of Njoki Ndungu SCJ).

5.18.4 *Katiba Institute & 3 Others v Attorney General & 2 Others Nairobi Petition 548 of 2017*

5.18.4.1 The petitioners challenged the Election Laws (Amendment) Act, 2017 claiming that it was vague and unconstitutional. Some of the grounds raised by the petitioner were that the amendment to sections 39 and 83 of the Elections Act were inconsistent with the 2010 Constitution and contrary to the electoral principles enshrined therein.

5.18.4.2 The High Court, in determining the petition, considered the impact of the Amendment Act, as against the provisions of the Constitution and interpretations made by the Supreme Court in the 2017 *Raila Odinga case*. It then found that some of the amended provisions were unconstitutional for violating Articles 81 and 86 of the Constitution. The provisions declared unconstitutional were sections 39(1C)(a), 39(1D), 39(1E), 39(1F), 39(1G) and the entire amendment to section 83 of the Elections Act.

5.18.4.3 Section 39(1C) of the Elections Act, which had proposed to remove the requirement for results to be transmitted using a prescribed form and stated that where there was an inconsistency between physically transmitted results and electronically transmitted ones, the IEBC would determine which results were an accurate reflection of the results as declared at the polling station and that these would prevail, did not accord with the constitutional principles of verifiability, transparency and accountability of election results. Accordingly, the Court opined at para 82 that:

> *The problem in so far as I can see, is with regard to transmission of results from the polling stations to the constituency and national tallying centres as required by the new section 39(1C)(a). First, there is no requirement for the results to be transmitted in any*

> *prescribed form which was an essential requirement in the deleted subsection. This was an essential safeguard that guaranteed verifiability, transparency and accountability of the election results transmitted from polling centres to the constituency and national tallying centres. This is made even more troubling by the fact that results will also be physically delivered to the constituency and national tallying centres but in no particular prescribed form. This not only opens the results to possible adulteration and manipulation but also mischief. The amendment obviously reverses the gains the country had made in electoral reforms including results transmitted in a particular form.*

5.18.4.4 Because the proposed amendment sought to elevate manual result transmission over the electronic one, it undermined verifiability of results, which was the spirit of Articles 81 and 86 of the Constitution, which would revert the country to the pre-2010 era. As the Court held at para 85:

> *...a law allowing election officials once again to troop to the Constituency and national tallying centres with hard copies of election results in no particular forms, is to take several steps backward from the progress the country had made to guarantee free, fair and transparent elections in conformity with the Constitution. This amendment is clearly against the spirit of Articles 10, 81 and 86 of the Constitution and cannot pass the constitutionality test of validity.*

5.18.4.5 The Court also impugned section 39(1D) and (E) of the Elections Act, with the former requiring the tallying, verification and declaration of results at the polling station and the latter stating that where there was a discrepancy between the electronic and manual results, the IEBC would determine which results would prevail. The Court took issue with the creation of a situation where there was a potential for conflict between manual and electronically transmitted results, yet the two sets of results were to flow from the same process of tallying, verification and declaration. At para 91, the Court asserted:

> *The Constitution is very clear on the accuracy, verifiability and reliability of elections. Accuracy guarantees democratic elections as the foundation of a democratic state. Section 39(1D) as read with 39(1)(F) are vague and ambiguous on which results are the accurate record of the election as tallied verified and announced by the presiding officers since there can be only one result from an election. In this regard, these subsections downgrade the significance of accuracy and transparency of an election thus open room for speculation and manipulation of election results. The Commission has the enviable role of not only guaranteeing the accuracy of elections and results therefrom, but also ensuring that they are in conformity with constitutional principles in Articles 10, 81 and 86. There should never be room again in our election laws for the possibility of manipulating elections or results as this would undermine free and fair elections which are the hallmark of a democratic society. I therefore find fault with sections 39 (1D) and 39(1E) of the Act.*

5.18.4.6 The High Court also declared unconstitutional sections 39(1F) and (G). The former provided that the failure by the Presiding Officer to electronically transmit results would not invalidate the results as declared by the Presiding Officer or Returning Officer, while the latter stated that results contained on the IEBC public portal were 'for public information only' and could not be the basis for declaration of results by the Commission. Because these provisions flew in the face of the heavy investment made in elections technology and the clear intention of the legislature that results from the primary source matter, and absolved IEBC officers who failed to transmit results without justification, they were held inconsistent with constitutional principles.

5.19 Present status of the Law – sections 39 and 83 of the Elections Act and Regulations 83(2) and 87(2) of the Elections (General) Regulations

5.19.1 With regard to section 39(1C) and the impugned amendment to section 83 of the Elections Act, independent of any legislative reform from Parliament and these provisions having been declared unconstitutional by the Court, they are inapplicable and void. Barring the enactment of other provisions in their place, the provisions that preceded the annulled ones cannot be said to have been automatically reinstated, as Parliament is the sole body with legislative authority. Nonetheless, the binding decisions of the Supreme Court in the presidential election petitions it has determined form a sound reference point on how the provisions are to be interpreted and applied.

5.19.2 As for Regulations 83(2) and 87(2) of the Elections (General) Regulations, shortly after the provisions were declared unconstitutional, the IEBC issued fresh Regulations, the Elections (General) (Amendment) Regulations, 2017, which in the reasoning of the Court of Appeal, were meant to *'render impotent and circumvent the declaration by the High Court of [their] inconsistency with the Constitution.'* As the issue was not squarely before it, the Court of Appeal could not proceed to declare the amended Regulations as being inconsistent with the Constitution.

5.19.3 However, despite the Court of Appeal's remarks, the Elections (General) (Amendment) Regulations, 2017 have not been challenged and declared unconstitutional. Neither has the IEBC, in consideration of the stinging rebuke by the Court of Appeal in the *Maina Kiai* appeal case, revoked, amended or issued fresh Regulations in their place.

5.20 Judgment and Remedies

5.20.1 The Supreme Court must determine a presidential election petition within 14 days of the petition being filed, and may reserve its reasons to a date not later than 21 days from the determination (Rule 23, Supreme Court (Presidential Election Petition) Rules 2017).

5.20.2 The Court may issue the following orders after hearing the presidential election petition:

i. *Dismiss the petition;*

ii. *Invalidate the declaration made by the Commission;*

iii. *Declare the results of the president-elect to be valid or invalid;*

iv. *Issue orders as to costs; and*

v. *Issue any other orders it may deem appropriate.*

(Rule 26 of the Supreme Court (Presidential Election Petition) Rules 2017)

Editorial Note: While section 84 of the Elections Act applies to all election courts, the Supreme Court has not in practice awarded costs in election petitions. Given that section 84 is worded in mandatory terms, it is not clear whether section 84 of the Elections Act applies to petitions before the Supreme Court and if so, whether the Supreme Court has the discretion in law to not award costs.

5.21 Conduct of a fresh election subsequent to an annulment of declared presidential results

5.21.1 *Meaning of 'a fresh election' under Article 140(3) of the Constitution*

5.21.1.1 If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the Court's determination (Article 140 (3) of the Constitution).

5.21.1.2 The question of what amounted to a *'fresh election'* and the parameters of such an election featured in the 2013 presidential election determination, *i.e.*, *Raila Odinga & 5 Others v IEBC & 3 Others,* Supreme Court Petitions 5, 3 & 4 of 2013. The Attorney General, as an *amicus curiae*, sought the Court's interpretation on whether fresh election referred to in Article 140(3) of the Constitution meant *'an entirely new presidential election (including nomination process) or whether it was similar to that contemplated under Article 138 (5) which was limited to the same candidates as at the annulled polls.'*

5.21.1.3 The Supreme Court rendered itself on this question, at paragraph 289, on the parameters of a 'fresh election' following an annulment of the declared presidential election results. On the question of whether a fresh nomination would be required, the Court held that:

> *It is clear that a fresh election under Article 140(3) is triggered by the invalidation of the election of the declared President-elect, by the Supreme Court, following a successful petition against such election. Since such a fresh election is built on the foundations of the invalidated election, it can, in our opinion, only involve candidates who participated in the original election. In that case, there will be no basis for a fresh nomination of candidates for the resultant electoral contest.*

5.21.1.4 In its determination of the *2017 Raila Odinga Case,* the Supreme Court noted that the parties had not addressed the Court on the question of a fresh election, and, therefore, it was not proper for the Court to delve into an interpretation of the term. Moreover, it was the Court's view that the matter had been addressed in the *2013 Raila Odinga Case*, and further that the first Interested Party, Dr Ekuru Aukot, had filed an application in relation to that matter which was pending at the time of judgment.

5.21.1.5 However, the Supreme Court did not address the meaning of the term or modalities of the IEBC organising the fresh election under Article 140 of the Constitution. Moreover, the Court did not rule on whether a 'run-off' as contemplated under Article 138(5) of the Constitution was synonymous with a fresh election as contemplated by Article 140(3), seeing as the same term was used in both provisions.

5.21.1.6 Following the nullification of the 8 August 2017 presidential election, the Supreme Court was asked to rule on the meaning and effect of the term 'fresh elections' in the application by Dr Ekuru Aukot, seeking an interpretation of Article 140(3) of the Constitution. The Supreme Court ruled that constitutional interpretation was a matter reserved for the jurisdiction of the High Court under Article 165(3)(d) of the Constitution and save for the instances set out in Articles 163(3) and (6) of the Constitution, the Supreme Court did not have the mandate of interpretation of the Constitution. Having formed the view that the matter ought to have been filed in the High Court, the Supreme Court struck out the application. The first Interested Party, therefore, filed a petition raising this issue before the High Court in *Ekuru Aukot v IEBC & 3 Others,* High Court Petition 471 of 2017.

5.21.1.7 The High Court in *Ekuru Aukot v IEBC & 3 Others,* High Court Petition 471 of 2017, began by interpreting the meaning of a 'fresh election' and considering whether Article 140 of the

Constitution had been interpreted by the Supreme Court in 2013, and if the findings of the Supreme Court on a fresh election were *obiter dicta* or formed part of the *ratio decidendi* of the Court's decision.

5.21.1.8 On the meaning of a fresh election, since Article 140(3) of the Constitution dealt with the validity of a presidential election, what was anticipated, in the view of the Court, was a 'completely fresh election'. On the other hand, a 'fresh election' within the meaning of Article 138(5) of the Constitution envisaged a run-off between the two leading candidates. The meaning of a fresh election as used in Article 138(5) of the Constitution could, therefore, not be imposed on Article 140(3) of the Constitution, since the two provisions envisaged two different sets of circumstances.

5.21.2 *Candidates in a fresh election under Article 140(3) of the Constitution*

5.21.2.1 On the question of who would be eligible to contest the fresh election, the Supreme Court held in the *2013 Raila Odinga case* that it depended on who had petitioned the Supreme Court. Where the petitioner(s) were presidential candidates, only the presidential candidates who had contested the declared results would be eligible to run in the fresh election. The rationale for this interpretation was to the effect that a candidate who had not contested the declared result was deemed to have either conceded defeat, or acquiesced in the results as declared by IEBC, hence their exclusion from the fresh election. However, where the petition was filed by a person other than a presidential candidate, all the candidates in the original election would be entitled to contest the fresh election.

5.21.2.2 In the *2017 Raila Odinga case*, it was the Court's assessment that because of use of the word 'suppose' before addressing the possible scenarios that could arise in relation to Article 140(3), as set out by the Court in the *2013 Raila Odinga Case*, the findings of the Supreme Court on who would be eligible to contest a fresh election were *obiter*. Moreover, the Supreme Court did not have jurisdiction to interpret the Constitution and in any case, the nature of constitutional interpretation required the principles of the case to transcend the case before it and be applicable to all similar cases. The fact that the scenarios had been addressed in a hypothetical manner indicated that the apex Court was only expressing an opinion. This was affirmed by the Supreme Court in *John Harun Mwau & 2 Others v IEBC & 2 Others,* Supreme Court Petition 2 & 4 of 2017, where the Court held that the Court in the *2013 Raila Odinga case* was only responding to hypothetical questions posed by the Attorney General, which were not material to the determination of the petitions before the Court at the time.

5.21.2.3 In *Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 Others* Petition 471 of 2017, the High Court, having ruled that the scenarios in Article 138(5) and 140(3) of the Constitution were not identical, the court assessed the 60-day timeline and found it insufficient to conduct a fresh nomination for a fresh election under Article 140(3). Therefore, it was in the public interest that only those who had participated in the invalidated election contest in the fresh election (see also s 86A(2) Elections Act). Even where a candidate had issued a statement conceding defeat, if they later retracted the statement and participated in the presidential election petition as an interested party supporting the petition, they were eligible to contest in the election.

5.21.2.4 Section 86A of the Elections Act, introduced by the Election Laws (Amendment) Act, 2017, and which provides that no fresh nominations are to be carried out in respect of a fresh election pursuant to Article 140(3) of the Constitution was also found to be in consonance with the Constitution in the case of *Katiba Institute & 3 Others v Attorney General & 2 Others* Nairobi

High Court Petition 548 of 2017. This was because it gave clarity on the lacuna with respect to a fresh presidential election.

5.21.2.5 In *John Harun Mwau & 2 Others v IEBC & 2 Others*, Supreme Court Petition 2 & 4 of 2017, the Supreme Court delved deeper into the question of whether fresh nominations were required following an invalidation of a presidential election result, as it was argued that section 14 of the Elections Act required nominations before all presidential elections. Upon scrutiny of section 14 of the Elections Act, the apex Court found that of the five instances when presidential elections were required to be held, a closer scrutiny revealed that elections were only required to be held in three instances: in case of a general election, where no candidate had met the threshold for election under Article 138(5) of the Constitution, and in cases when a vacancy had arisen in the office of the President. Since an Article 140(3) election was anchored on an 'initial' election, which was not the subject of contest in the petition nullifying the election, it would be illogical to compel candidates to take part in a fresh nomination process when the process had not been in issue, or to allow persons who had not been candidates in the initial election to contest the repeat election. A purposive interpretation, predicated upon the Constitution's intent of assuring an unbroken governance process, led to the conclusion that the nominations held in respect of the initial election remained valid. However, where the election is nullified on the basis of flawed nominations, the ensuing fresh election could not be founded on the flawed nomination and fresh nominations would in such circumstances be required.

5.21.2.6 The apex Court further asserted that the decision in *Aukot* did not limit candidature to those who contested the election outcome, but it was open to every person who participated in the initial election to participate in the fresh election.

5.21.3 *Effect of withdrawal of a candidate before the fresh election*

5.21.3.1 Regulation 52 of the Elections (General) Regulations, 2012 allows a nominated candidate to withdraw his or her candidature before the election by filling out a notice vide Form 24A and delivering it to the Returning Officer no later than three days after nomination. The Election Laws (Amendment), 2017 also introduced section 86A(3), which provides that an eligible candidate may withdraw from the election by notice in writing to the IEBC, and where there were more than two remaining candidates, the election would proceed as scheduled. However, if only one candidate remained after withdrawal, they would be declared elected without any election being held. Seeing as the amended law came into effect on 2 November 2017, whereas the fresh election had been conducted on 26 October 2017, the Supreme Court ruled in *John Harun Mwau & 2 Others v IEBC & 2 Others,* Supreme Court Petition 2 & 4 of 2017 that section 86A was not applicable to the fresh election in 2017.

5.21.3.2 In *John Harun Mwau & 2 Others v IEBC & 2 Others,* Supreme Court Petition 2 & 4 of 2017, the apex Court was asked to determine whether the IEBC had erred in retaining the name of Raila Odinga on the ballot after he had issued a letter on 10 October 2017 withdrawing his candidature. The candidate had neither filled the prescribed Form 24A, nor had he tendered his notice of withdrawal from the presidential race within three days of his nomination. Conversely, it was asserted that Regulation 52 was not applicable to a fresh election under Article 140(3) since no nomination was required.

5.21.3.3 In making reference to para 290 of the *2013 Raila Odinga* judgement, where the Court had asserted that if a candidate withdrew from the fresh election or died before the scheduled date a fresh nomination would be required, the apex Court ruled that this finding was *per incuriam*. This was because Article 138(8)(b) of the Constitution only contemplated three scenarios when

an election could be cancelled: where no person had been nominated before the expiry of the period set for delivery of nominations, where a candidate for election as President or Deputy President died before the scheduled election date, or where a candidate who would have been entitled to be declared as President died before being declared elected as President. Withdrawal of a candidate was not one of the scenarios contemplated by Article 138(8)(b) as a basis for cancellation of an election. It was, therefore, open to the Court to depart from the 2013 decision.

5.21.3.4 The Supreme Court thus found that since Regulation 52 required withdrawal within three days of a nomination, it was not applicable to a fresh election under Article 140(3) of the Constitution. Consequently, the writing of a formal letter by a candidate constituted a substantive and legally effective withdrawal from the elections. Nevertheless, the IEBC could not be faulted for retaining Raila Odinga's name on the ballot paper since the withdrawal could not in any case have led to the cancellation of the election. Moreover, seeing as a candidate could withdraw at any time before the election, it would not always be possible for the IEBC to remove the name of a candidate who withdraws from the ballot paper.

5.21.4 *Failure to conduct presidential election in every constituency*

5.21.4.1 Due to the violence experienced in some regions with threats meted out against IEBC officials conducting the fresh election, 25 constituencies did not participate in the fresh election, giving rise to the challenge in *John Harun Mwau & 2 Others v IEBC & 2 Others,* Supreme Court Petition 2 & 4 of 2017.

5.21.4.2 The Court was asked to find that the repeat election did not comply with Article 138(2) of the Constitution, which requires a presidential election to be conducted in every constituency. The petitioners submitted that, irrespective of the source of the violence, the occurrence of violence itself was enough to vitiate an election as Article 138(2) requires that the presidential election be held in every constituency. The 1st and 2nd respondents, on the other hand, cited section 55B of the Elections Act as the legislative authority for postponing elections in the 25 constituencies since the provision allows postponement where it is impossible to hold the same for, among other reasons, a likelihood of a breach of the peace. Regulation 87 of the Elections (General) Regulations, 2012 also gives the IEBC discretion to declare the presidential election result without results from certain constituencies where it is certain that the result will not be affected by the omission.

5.21.4.3 In finding that the declaration of the election result without the participation of the 25 constituencies was, nevertheless, in accordance with the Constitution, the Supreme Court ruled:

> ***[315]*** *The terms of Article 81(e)(ii) of the Constitution, read in proper context, must be understood to mean that no person, candidate, political party, party agent or supporter, or State agency is to resort to acts of violence, intimidation, improper influence or corruption, to defeat the will of the people exercising their democratic rights to vote. The said provision cannot be read as sanctioning or lending legitimacy to acts of violence and intimidation, to achieve the invalidation of an election. If we were to hold otherwise, the authority of the Constitution would be surrendered to cynical acts of violence: all that one would need to do, is to instigate violence in any corner of the Republic during a Presidential election, and thereafter petition this Court to nullify the election. Those who intentionally instigate and perpetrate violence must not plead the same violence as a ground for nullifying an election...*

> ***[318]*** *We have already established that the Presidential election could not be held in certain constituencies because of the threat of insecurity caused by violent demonstrations. In that regard, the IEBC invoked Section 55B of the Elections Act, postponing the conduct of the repeat election to 28th October, 2017. The IEBC is empowered by the Elections Act to postpone an election in a Constituency, County or Ward, in circumstances specified by the Act. However, there is a non-obstante [a 'none-the-less' qualification] proviso to that provision; the Commission may, if satisfied that the result of the elections will not be affected by voting in the area in respect of which substituted dates have been appointed, direct that a return of the elections be made...*
>
> ***[322]*** *It is clear that the Commission made its declaration pursuant to Article 138 of the Constitution, Section 55B of the Elections Act, 2011 and Regulation 87 of the Elections (General) Regulations, 2012. On that basis, even though voters in 25 constituencies had not voted, the declaration of results by the Commission was in perfect accord with the terms of the Constitution.*

5.21.4.4 Having reviewed Section 55B of the Elections Act, the apex Court noted that there is a low threshold placed upon the IEBC in exercising its discretion to postpone an election for one reason or the other. As such, mere apprehension of breach of the peace may trigger the exercise of this power.

5.22 Transition and Assumption of Office

5.22.1 Upon declaration of a presidential election result as valid, following a presidential election petition, or in the absence of any challenge to the result, the President-elect shall be sworn in by the Chief Justice (CJ) (or the Deputy Chief Justice, in the absence of the CJ). The timelines for the swearing in are either:

i. On the 14th day after the results were declared by the IEBC, in case no presidential election petition is filed; or

ii. On the 7th day following the date on which the Court makes a decision declaring the election as valid, if any election petition was filed.

(Article 140 of the Constitution)

5.22.2 A president-elect assumes office by taking and ascribing to the oath/affirmation of allegiance, and the oath/affirmation for the execution of the functions of the office, as prescribed in the Third Schedule of the Constitution.

5.22.3 The Assumption of the Office of the President Act, 2012 was enacted to make further provisions on the manner in which the President-elect and Deputy President-elect assume office. The Act establishes the Assumption of Office of the President Committee to organise and facilitate the handing over process by the outgoing President to the President-elect.

5.22.4 The date and place of the swearing in of the President-elect and Deputy President-elect must be gazette, with the day of the swearing in being a public holiday. The swearing in ceremony can only be conducted in the capital city and only between 1000hrs and 1400hrs (s 13 of the Assumption of the Office of the President Act, 2012).

CHAPTER 6

APPEALS

APPEALS

6.1. Introduction

6.1.1. The effective resolution of disputes throughout the electoral cycle is critical to the credibility of elections, the acceptance of election results and the stability of the election environment. The International Foundation for Electoral Systems (IFES) rightly argues that public perceptions around elections have a tremendous implication for the peaceful transfer of power and the viability of governing institutions, particularly in fragile political contexts (IFES, *Elections on Trial: The Effective Management of Election Disputes and Violations* (2018)).

6.1.2. While, administrative appeals from decisions of political parties, the Registrar of Political Parties, the PPDT and the IEBC are covered in Chapter Three, this Chapter deals with appeals from election courts.

6.1.3. Election appeals were inadvertently omitted from the Elections Act when it was first drafted. As noted by the Supreme Court in *Frederick Otieno Outa v Jared Odoyo Okello & 4 Others,* Supreme Court Petition No. 6 of 2014:

> *"[50] It is to be recognized that Section 85A found its way into the Elections Act by way of a Miscellaneous Amendment Act, No. 47 of 2012. The Act, in its original design, was silent on the issue of appeals to the Court of Appeal. Section 85 had only provided that an election petition was to be heard and determined within a period specified in the Constitution. That period is specified in Article 105(2) of the Constitution: a question relating to the validity of the election of a Member of Parliament is to be heard and determined within a period of six months by the High Court. The Act, as initially enacted, gave no room for appeals to the Court of Appeal, with respect to election petitions.*

6.1.4. The introduction of the right of appeal by amendment, limited this right to matters of law only; both at the High Court and the Court of Appeal (s 75(4) and 85A of the Elections Act). This limitation is not unconstitutional as it aligns with the constitutional imperative for the speedy resolution of electoral disputes (*Frederick Otieno Outa v Jared Odoyo Okello & 4 Others,* Supreme Court Petition No. 6 of 2014). The jurisdiction of the Supreme Court in electoral appeals is derived from the Constitution.

6.1.5. The jurisdiction of each of these appellate courts is discussed below.

6.2. Appeals to the High Court

6.2.0.1 The High Court has appellate jurisdiction over decisions of Magistrate's Courts on disputes relating to election to County Assemblies (s 75(4) of the Elections Act, 2011). The appellate jurisdiction of the High Court in such cases is limited to '*matters of law only*' (s 75(4) of the Elections Act, 2011).

6.2.1 Memorandum of Appeal

6.2.1.1. An appeal to the High Court is initiated by filing a Memorandum of Appeal within 30 days of the decision of the Magistrate's Court (Rule 34 Elections (Parliamentary and County Elections) Petition Rules 2017).

6.2.1.2. Where the Memorandum of Appeal raises issues of both fact and law, contrary to s 75(4), the court may overlook this fact and determine only the issues of law (*Kitavi Sammy v IEBC & 2 Others,* Kitui Election Petition Appeal 3 of 2017).

6.2.1.3. The procedure for the filing, hearing and determination of appeals from the decisions of a Magistrate's Court in EDR is set out in Rule 34 of the Elections (Parliamentary and County Elections) Petition Rules, 2017. In summary, Rule 34 provides as follows:

> *(i) the party desiring to appeal against the decision of a Magistrate's Court in EDR must file a memorandum of appeal at the nearest High Court registry within thirty days of the judgment of the Magistrate's Court;*
>
> *(ii) the registrar of the High Court to which the appeal is preferred must send the Notice of Appeal to the Magistrate's Court against whose decree the appeal is preferred within seven days of filing of the memorandum of appeal;*
>
> *(iii) the Magistrate's Court against whose decree the appeal is preferred must send the proceedings and all relevant documents relating to the election petition to the High Court;*
>
> *(iv) the appellant must serve the memorandum of appeal on all parties directly affected by the appeal within seven days of filing;*
>
> *(v) the appellant must file and serve a record of appeal within twenty-one days of filing the memorandum of appeal; and*
>
> *(vi) the High Court must give directions on the hearing of the appeal within thirty days of the lodging of the memorandum of appeal.*
>
> **Editorial Note**: Rule 34(11) of the Elections (Parliamentary and County Elections) Petition Rules 2017 provided that an appeal must be heard and determined within three months of the date of lodging the appeal. This is inconsistent with s 75(4) of the Elections Act which provides for 6 months. Moreover, while the Court of Appeal (Election Petition) Rules 2017 provide that an appeal to the Court of Appeal automatically acts as a stay of the certification of the election court until the appeal is heard and determined, no similar provision exists in respect of decisions of the Magistrate's Court *(Baridi Felix Mbevo v Musee Mati & 2 others,* Kitui Election Petition Appeal 1 of 2018).

6.2.1.4. Objections relating to defects in a memorandum or record of an EDR appeal to the High Court, including those relating to service thereof, should be raised when the appeal is mentioned for directions. A party to an EDR appeal at the High Court who fails to raise objections as to service or defects in the memorandum or record of appeal during the mention for directions is deemed to have compromised the right to raise the objections (*Twaher Abdulkarim Mohamed v Mwathethe Adamson Kadenge & 2 Others*, High Court (Malindi) Election Petition Appeal No. 1 of 2014). Moreover, the High Court will not strike out a record of appeal for failure to include a certified copy of the decree of the trial court where the record of appeal contains a copy of the judgment of the trial court (*Twaher Abdulkarim Mohamed v Mwathethe Adamson Kadenge & 2 Others*, High Court (Malindi) Election Petition Appeal No. 1 of 2014).

6.2.1.5. There are two justifications for this rule. First, the Rules require the lower court to send its proceedings and all relevant documents to the High Court upon the filing of an appeal (Rule 34(8) of the Elections (Parliamentary and County Elections) Petition Rules, 2017). This means that the Court can easily access such documents as may have been omitted from the record of appeal. Secondly, the appeal will usually have sprung from the judgment and hence obsession with the decree only serves to obfuscate the substantive issues between the parties.

6.2.1.6. Once an appellant has filed the memorandum and record of appeal, it is the responsibility of the High Court to set in motion processes to ensure that the appeal is heard and determined expeditiously (*Mwathethe Adamson Kadenge v Twahir Abdulkarim Mohamed & 2 Others*, High Court (Mombasa) Civil Appeal No. 153 of 2013).

6.2.2. *Timelines*

6.2.2.1. The High Court must determine EDR appeals lodged before it *within 6 months* of the date of the lodging of the appeal (s 75(4)(b) of the Elections Act, 2011; and *Mwathethe Adamson Kadenge v Twahir Abdulkarim Mohamed & 2 Others*, High Court (Mombasa) Civil Appeal No. 153 of 2013).

6.2.2.2. In *Mwathethe Adamson Kadenge v Twahir Abdulkarim Mohamed & 2 Others*, High Court (Mombasa) Civil Appeal No. 153 of 2013, it was held that the High Court ceases to have jurisdiction upon the expiry of the six-month period, irrespective of who is to blame for the delay. In *Mary Wairimu Muraguri & 12 Others v IEBC & 5 Others*, Nyeri High Court Election Appeal No. 30 of 2014, it was held that the High Court can hear and determine the appeal even after the expiry of six months, especially where the delay has been occasioned by the reorganisation of the court or other factors beyond the control of the parties.

6.2.2.3. The conflict between these two positions may arguably be resolved by the decision in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others,* Supreme Court Petition No. 18 of 2014, in which it was held that the constitutional imperative of timely resolution of electoral disputes deprived the Court of Appeal of the jurisdiction to entertain an appeal filed outside prescribed statutory timelines, even where the delay was occasioned by administrative lapses on the part of the High Court.

6.2.2.4. More recently, the Supreme Court, in the case of *Martha Wangari Karua v IEBC & 3 Others,* Petition No. 3 of 2019, held that the courts lack jurisdiction to entertain a petition outside the constitutional timelines. The Apex Court opined that:

> *Section 75 undoubtedly derives its authority from Article 87 of the Constitution which requires timely resolution of electoral disputes. We have already explained why there was a need to provide for defined timelines for settling electoral disputes. As such, we hold and maintain our position that once an election petition is filed at the High Court sitting as the Election Court, it must be determined within a period of 6 months...*
>
> *...Our holding above brings us to a more difficult question which is what happens, as in this case, where the 6 months' period lapses as a result of an appellate process which was necessary for the enforcement of a litigant's right of access to court. Is there any exception to the position we have already taken?...*
>
> *...We take the view that all the suggested propositions must be considered within the context of the strict timelines provided for the settlement of electoral disputes. We understand that these proposals seek to remedy the likelihood of denial of substantive justice due to impeding court processes or where a wrong cannot be corrected at the appellate stage due to lapse of time. Hence, a proper consideration of this issue requires a balancing of rights such as the right of appeal, access to Court, the right to have a matter adjudicated within the specified timeframes and the right to substantive justice...* [Paras 48–49]

6.2.2.5. The Supreme Court then issued the following principles to guide the exercise of appellate jurisdiction over election petitions:

a. *All Applications by a Respondent in an election petition, save in exceptional circumstances, should form part of the response to the Petition. Similarly, a Petitioner should as much as possible file any application arising from his Petition e.g. for scrutiny or recount at the same time as the Petition.*

b. *Unless for want of jurisdiction or in any other deserving circumstance, a trial Court should exercise restraint in striking out a Petition or a response, where such an action is likely to summarily dispose of the matter.*

c. *All applications for striking out an election petition for want of jurisdiction, or for any other reason, must be made and determined within the constitutional and statutory timelines for the resolution of electoral disputes. In this regard, it is for the trial Court, to make and enforce such case management orders, so as to meet this objective.*

d. *Appeals on interlocutory applications, other than for striking out in circumstances explained in (b) and (c) above, should await the final determination of the whole petition before the trial Court.*

e. *In exceptional circumstances, an appellate Court may dispose of an appeal arising from an interlocutory application filed and determined by the trial Court while the substantive matter is still ongoing at the trial Court. In doing so, the timeframe question as explained above must always be borne in mind.*

(*Martha Wangari Karua v IEBC & 3 Others*, Petition No. 3 of 2019, para 55)

6.2.3. Remedies

6.2.3.1. The Rules give the High Court power to grant the following remedies upon hearing of an appeal:

(i) Confirm, vary or reverse in whole or in part the decision of the Magistrate's Court; and

(ii) Exercise the same powers as the Magistrate's Court when acting as an election court, with the exception of making factual conclusions/findings.

6.2.3.2 Where the High Court orders the petition to be re-heard, it can only do so if the petition can be heard within the 6 months stipulated timeline for the hearing of the petition (*Gerald Iha Thoya v Chiriba Daniel Chai & IEBC,* Malindi Election Petition Appeal 1 of 2018; and *Martha Wangari Karua v IEBC & 3 others*, Petition No. 3 of 2019).

6.3. Appeals to the Court of Appeal

6.3.1.0 Before 2017, appeals from the High Court to the Court of Appeal were governed by the Court of Appeal Rules, 2010. The adoption of the Court of Appeal (Election Petition) Rules, 2017 provided more specifically for appeals under section 85A of the Elections Act. The 2017 Rules amended the practice of filing appeals in two ways. First, they require the Notice of Appeal to be filed within 7 days of the decision complained of (Rule 6). Second, they require the Notice of Appeal to be filed at the Court of Appeal registry or nearest sub-registry rather than the High Court Registry (Rule 2 & Rule 6(7), Court of Appeal (Election Petition) Rules, 2017).

6.3.2.0 The Court of Appeal has no jurisdiction to entertain a second appeal from a decision of the Magistrate's Court in an election petition concerning the validity of the election of a member of the County Assembly (*Hassan Jimal Abdi v Ibrahim Noor Hussein and 2 Others*, Nairobi EPA No.

30 of 2018). Per Odek JA (as he then was) in *Mohamed Ali Sheikh v Abdiwahab Sheikh & 4 Others; Emmanuel Changawa Kombe (Interested Party),* Election Appeal (Application) No. 261 of 2018:

> *64. In furtherance of their submission, the respondents urged the position that this Court has no jurisdiction to entertain second appeals concerning MCA election petitions impede, negate and contradict the automatic right of appeal to the Supreme Court under* ***Article 163 (4) (a)*** *of the Constitution on questions involving application and interpretation of the Constitution. It is settled law with regard to election matters that not every election petition-decision by the Court of Appeal is appealable to the Supreme Court – only those appeals arising from the decision of the Court of Appeal in which questions of constitutional interpretation or application were at play lie to the Supreme Court. This was stated by the Supreme Court in* ***Lawrence Nduttu & 6000 others vs. Kenya Breweries Ltd & Another, S.C. Petition No. 3 of 2012; [2012] eKLR*** *as follows:*
>
> ***"...the appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)."***
>
> *65. At a de facto and de jure level, both the Court of Appeal and the Supreme Court have in the recent past heard and determined election petition appeals concerning membership to County Assembly. Notable cases where the Supreme Court has considered membership to County Assembly appeals include the judgment in* ***Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 others [2018] eKLR; Moses Mwicigi & 14 others vs. Independent Electoral and Boundaries Commission & 5 others [2016] eKLR and Jennifer Koinante Kitarpei vs. Alice Wahito Ndegwa & another [2015] eKLR. It is noteworthy that in all these cases the superior court in the first instance was moved by way of judicial review and not an election petition. Except in the pending case of Hamida Yaroi Sheikh Nuri vs. Faith Tumaini Kombe & 2 others [2018] eKLR there is presently no other MCA election petition appeal heard by the Supreme Court.***
>
> *66. It begs the question if the Court of Appeal has no jurisdiction to entertain MCA second appeals, it would be creating legal confusion to hold the above cited cases were heard and determined by both the Court of Appeal and Supreme Court without jurisdiction and are per incuriam. This cannot be so. It can be argued that the foregoing cases that were heard and determined by this Court and the Supreme Court were initiated through a judicial review process and as such, both courts had jurisdiction. This may be so. However, doctrinal consistency and electoral jurisdictional certainty should not encompass and entertain a two way approach to appellate dispute resolution namely: that if you follow the judicial review route, this Court and the Supreme Court have jurisdiction to hear and determine a second or third appeal respectively; that if you follow the election petition appeal route, there is no second or third appeal. This is the duality and dichotomy of legal penumbra that is not doctrinally consistent.* ***Such duality in jurisdictional approach should not be tenable in law. It is for this reason that the Supreme Court or legislative intervention is required to settle the jurisdictional question on the right to second or third appeals concerning MCA election petitions.***

6.3.3.0 The Supreme Court, being seized of an application to stay the orders of the Court of Appeal in *Mohamed Ali Sheikh v Abdiwahab Sheikh Osman Hathe & 3 Others,* Election Appeal Application No 38 of 2018, declined to grant the orders of stay, but did not address the question of jurisdiction of the Court of Appeal in second appeals on MCA petitions. In the words of the Court:

> ***[15]*** *In the above context and on considering the matter, we have difficulties in granting the Applicant's prayer for stay against the Ruling of the Court of Appeal. We say so because, even if the appeal may be arguable, which we do not dispute, staying the Court of Appeal's Ruling is unnecessary and would serve no purpose as there is no subject matter which is required to be preserved. The Court of Appeal only struck out the Notice and Record of Appeal without more.*

What then is to be stayed? We submit, nothing.

[16] *We also note that the Applicant seeks a conservatory order against the Speaker of the County Assembly of Garissa to restrain him from declaring a vacancy in the seat of the member of County Assembly for Abakaile Ward. Further, the Applicant also seeks to restrain the 3rd and 4th Respondents from conducting fresh elections in that Ward. More particularly, the Applicant seeks a stay of execution against the Judgment and Order of the High Court if we are to grant those orders.*

[17] *In that regard, we are certain that, the High Court decision which nullified the Applicant's election is not the subject of appeal before us. Since the Court of Appeal found that it had no jurisdiction to hear appeals arising from the elections of the member of County Assemblies, it did not determine the question of the validity of the election for the member of County Assembly for Abakaile Ward. As a result, the High Court decision was never determined on appeal. Indeed, in his Petition of Appeal, the Applicant appreciates the limited issue before us, when he seeks the prayer for the remittal of the matter to the Court of Appeal for hearing on merit. Therefore, since the question of the validity of the election of the member of County Assembly of Abakaile Ward is not before us, we cannot grant a stay order on an issue that cannot be legitimately solved by this Court. Accordingly, we find no basis for granting the stay orders or indeed any other orders sought.*

6.3.4.0 The Court of Appeal nevertheless opined that the Supreme Court's position was that there was no jurisdiction in respect of second tier appeals from the Magistrate's Courts. In *Mohamed Ali Sheikh v Abdiwahab Sheikh & 4 Others; Emmanuel Changawa Kombe (Interested Party),* Election Appeal (Application) No. 261 of 2018, the Court of Appeal at para 67 opined:

A reading of paragraphs 117 and 118 of the Supreme Court judgment in ***Moses Mwicigi & 14 others vs. Independent Electoral and Boundaries Commission & 5 others*** ***[2016] eKLR*** *relating to nomination concerning membership to County Assembly seems to suggest the Court of Appeal has no jurisdiction to entertain MCA election petition appeals. The paragraphs state:*

"[117] It is clear to us that the Constitution provides for two modes of 'election'. The first is election in the conventional sense, of universal suffrage; the second is 'election' by way of **nomination**, *through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of 'election petition'.*

[118] On such a foundation of principle, we hold it to be the case that whereas the Court of Appeal exercised jurisdiction as an appellate electoral Court, it had not been moved as such, in accordance with Section 85 A of the Elections Act, and relevant provisions of the Constitution. The respondents had moved the Appellate Court on the basis that they were aggrieved by the High Court's decision in **judicial review proceedings,** *in which that Court had declined jurisdiction. This in our view, would have been a proper case for the Appellate Court to refer the matter back to the High Court, with appropriate directions.*

6.3.5.0 The Supreme Court would later have an opportunity to make a finding on this issue in the case of *Hamida Yaroi Shek Nuri v Faith Tumaini Kombe, Amani National Congress & IEBC,* Supreme Court Petition No. 38 of 2018, when it held at paras 32 and 33:

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.*
>
> ***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.***

6.3.6.0 This position was affirmed by the Supreme Court in the case of *Peter Bodo Okal v Philemon Juma Ojuok & 2 Others,* Supreme Court Election Petition (Application) 9 of 2019.

6.3.1 *Notice of Appeal*

6.3.1.1 A person who seeks to appeal against the final determination of the High Court in EDR must file a notice of appeal within 7 days of the decision (Rule 6(2) of the Court of Appeal (Election Petition) Rules, 2017). The 2017 Rules were silent about appeals against interlocutory decisions, as the jurisdiction of the Court of Appeal over interlocutory decisions has severally been held to be 'deferred and sequential.' (*Peter Gichuki King'ara v IEBC & 2 Others,* Civil Appeal No 23 of 2013).

6.3.1.2 The Notice of Appeal is the primary jurisdictional document, giving rise to the appellate jurisdiction of the court (*Lesirma Simeon Saimanga v IEBC & 2 Others* (Nakuru) Election Petition Appeal (Application No. 7 of 2018); (*Patricia Cherotich Sawe v IEBC & 4 Others,* Supreme Court Petition No. 8 of 2014); (*Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others,* Supreme Court Application 16 of 2014; *Boy Juma Boy & 2 Others v Mwamlole Tchappu Bwana & Another,* Civil Appeal/Application 45 of 2013). It signals the intention to appeal (*Patricia Cherotich Sawe v IEBC & 4 Others,* Supreme Court Petition No. 8 of 2014). Without a Notice of Appeal, there is no valid appeal as no intention to appeal is expressed (*IEBC v Jane Cheperenger & 2 Others,* Supreme Court Civil Application No. 36 of 2014**;** *Lesirma Simeon Saimanga v IEBC & 2 Others* (Nakuru) Election Petition Appeal (Application No. 7 of 2018); *John Munuve Mati v RO Mwingi North & Others,* Nairobi Election Petition Appeal 5 of 2018; and *Anuar Loitiptip v IEBC & 2 Others,* Supreme Court Petition 18 & 20 of 2018 (Consolidated)).

6.3.1.3 The Notice of Appeal must be filed in the appropriate registry for the appeal to be valid. In 2017, confusion as to where to file the notice of appeal was occasioned by the previous use of the Court of Appeal Rules, 2010 by dint of which appeals were filed in the High Court registry where the matter was being heard. The 2017 Rules provide that the Notices of Appeal are to be filed at the Court of Appeal registry or nearest sub-registry.

6.3.1.4 While some appeals were sustained despite their founding Notices of Appeal being filed in the wrong registry (*Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 Others***,** Nairobi Election Appeal 18 of 2018; *Timamy Issa Abdalla v IEBC & 3 Others,* Mombasa Election Appeal No 4 of 2018; *Apungu Arthur Kibira v IEBC & 2 Others,* Kisumu Election Petition Appeal No 11 of 2018), a contrary position was taken in *Lesirma Simeon Saimanga v IEBC & 2 Others,* (Nakuru) Election

Petition Appeal (Application No. 7 of 2018). The law on the issue appears to be settled now, with the Supreme Court asserting in *Musa Cherutich Sirma v IEBC & 2 Others*, Supreme Court Petition 13 of 2018, that the fact that the Court of Appeal had exercised its discretion to strike out the appeal could not be faulted, as nothing had been laid before the apex Court to show that the exercise of discretion by the Court of Appeal was erroneous. While it was acknowledged that the error was occasioned by a late introduction of the Court of Appeal (Election Petition) Rules, 2017, it was observed that parties were now aware of the rules and there was a lower likelihood of conflicting jurisprudence on this issue in the future.

6.3.1.5 Although appeals against interlocutory decisions of the High Court in EDR that do not have the effect of striking out a petition must await the final judgment of that court (*Nathif Jama Adam v Abdikhaim Osaman Mohamed & 3 Others*, Supreme Court Petition No. 13 of 2014; *Peter Gichuki King'ara v IEBC & Others*, Nyeri Civil Appeal No. 23 of 2013; *Benjamin Ogunyo Andama v Benjamin Andola Adayi & 2 Others*, Civil Appeal (Application) No.11/13); *Martha Wangari Karua v IEBC & 3 Others,* Supreme Court Petition 3 of 2019).

6.3.1.6 However, the above provision came into focus before the Supreme Court, in the case of *Anuar Loitiptip v IEBC & 2 Others,* Supreme Court Petition 18 & 20 of 2018 (Consolidated) where the Court paras 22 and 23 considered the Rules and held:

> *The combined effect of the above is that a person who seeks to appeal from a final determination of the High Court must file a Notice of Appeal within 7 days of the decision in accordance with Rule 6(2) of the Court of Appeal (Election Petition) Rules, 2017, and one who seeks to appeal against an interlocutory decision must file their intended notice within 14 days of the decision, in line with Rule 75 of the Court of Appeal Rules 2010.*
>
> *However, we note that this position may present some impracticalities as where judgement is in ones favour, a party who had filed notice of appeal against an interlocutory order may be faced with unnecessary costs, a situation which may make parties shy away from filing Notices of Appeal pending the hearing and determination of the petition.* ***We therefore direct that, for the purposes of election petitions only, where one is aggrieved by a decision in an interlocutory application in election petitions, such a party must file a notice of appeal against the interlocutory decision consecutively with the notice of appeal against the final judgement.*** *Indeed, it is this notice that shall grant an appellate Court jurisdiction to determine issues before it.*

6.3.1.7 In *Martha Wangari Karua v IEBC & 3 Others,* Supreme Court Petition 3 of 2019, the Court acknowledged the challenges that interlocutory applications pose in realising access to justice, in light of the strict timelines, and provided the following guidance in para 55:

> *(a) All Applications by a Respondent in an election petition, save in exceptional circumstances, should form part of the response to the Petition. Similarly, a Petitioner should as much as possible file any application arising from his Petition e.g. for scrutiny or recount at the same time as the Petition.*
>
> *(b) Unless for want of jurisdiction or in any other deserving circumstance, a trial Court should exercise restraint in striking out a Petition or a response, where such an action is likely to summarily dispose of the matter.*

(c) All applications for striking out an election petition for want of jurisdiction, or for any other reason, must be made and determined within the constitutional and statutory timelines for the resolution of electoral disputes. In this regard, it is for the trial Court, to make and enforce such case management orders, so as to meet this objective.

(d) Appeals on interlocutory applications, other than for striking out in circumstances explained in (b) and (c) above, should await the final determination of the whole petition before the trial Court.

(e) In exceptional circumstances, an appellate Court may dispose of an appeal arising from an interlocutory application filed and determined by the trial Court while the substantive matter is still ongoing at the trial Court. In doing so, the timeframe question as explained above must always be borne in mind.

6.3.1.8 In light of these guiding principles, it is hoped that in subsequent cases regarding interlocutory appeals, there will be a consistent approach at the High Court as well as at the Court of Appeal.

6.3.1.9 Appeals are limited to 'matters of law' (*Ndwiga Steve Mbogo v IEBC & 2 Others,* Nairobi Election Petition No. 10 of 2017) and what amounts to a point of law is not dependent on the appellation given by the party raising it (*Cyprian Awiti & Another v IEBC & 3 Others,* Kisumu Election Petition Appeal No. 5 of 2018). The Supreme Court set out the guidelines for what amounts to a matter of law in the *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others,* Supreme Court Petition No. 2B of 2014, as follows:

[80] From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase "matters of law" as follows:

a. the technical element: involving the interpretation of a constitutional or statutory provision;

b. the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record;

c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.

[81] Now with specific reference to Section 85A of the Elections Act, it emerges that the phrase "matters of law only", means a question or an issue involving:

a. the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;

b. the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;

c. the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on "no evidence", or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence.

6.3.1.10 Where an appeal invites the court to examine the probative value of the evidence presented before the trial court, or where the appellate court is called upon to calibrate the evidence or question the credibility of witnesses, such an appeal is inadmissible (*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others,* Supreme Court Petition No. 2B of 2014; *John Munuve Mati v RO Mwingi North & Others,* Nairobi Election Petition Appeal 5 of 2018). On the other hand, making a determination as to the place in law of the affidavit of an original petitioner who had been allowed to withdraw from the petition before being cross-examined, rather than determining the veracity of the averments in the affidavit amounts to a point of law (*Bernard Kibor Kitur v Alfred Keter & IEBC,* Supreme Court Petition 27 of 2018). The Court of Appeal has also asserted that it can re-evaluate the evidence on record to determine whether the decision and conclusions of the trial court were so perverse that no reasonable tribunal would have arrived at the same conclusion (*Idris Abdi Abdullahi v Ahmed Bashame & 2 Others,* Nairobi Election Petition Appeal No 19 of 2018).

6.3.1.11 The Court of Appeal has ruled in some cases that appeals where the Notice of Appeal is anchored on mixed grounds of law and facts divests it of jurisdiction (*Apungu Arthur Kibira v IEBC & 2 Others,* Kisumu Election Petition Appeal No 11 of 2018; *Lesirma Simeon Saimanga v IEBC & 2 Others,* (Nakuru) Election Petition Appeal (Application No. 7 of 2018); *Hon. Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & 3 Others*, Nairobi Election Petition Appeal No. 2 of 2018). It is asserted that it is not the role of the appellate court to separate grounds of fact from points of law. In *Pius Yattani Wario v IEBC & Another,* Election Petition 10 of 2018, the Court asserted:

> *As we have already noted, many of the grounds of appeal and of the cross-appeal are prefixed by the assertion that the learned judge "erred in law and in fact" in arriving at various determinations. Of late, we have encountered two strands of response from appellants when we query why they have framed their grounds of appeal in an election petition to include invitations to the Court to determine issues of fact. The first is denial that the appeal indeed raises issues of fact, notwithstanding how the grounds of appeal are framed. In this response, the matter is reduced to an issue of semantics, raising the question why a party who seeks determination of issues of law only is not able to say so in a straightforward manner. The second, a more honest, if lazy approach, is to admit that the appeal indeed raises issues of fact and throw back the problem to the Court to sort out matters of fact from matters of law, before making its determination. We think both approaches are to be deprecated. It is not the business of the Court in each and every appeal to jump into the haystack to look for the needle. It is for the appellant to frame the issues that aggrieve him or her with precision and clarity. Encouraging that kind of practice will ultimately make nonsense of the rules of pleadings and encourage parties to present to the Court a potpourri of myths, rumours, allegations, facts, and so on, in the mistaken belief that it is the business of the Court to sort out the relevant from the irrelevant, as it strives to sustain all and sundry claims, however presented.*

6.3.1.12 However, in other cases, it has been ruled that the Court of Appeal ought to look beyond the manner in which the grounds of appeal were crafted to determine whether points of law were raised and which the court can address itself to (*Wavinya Ndeti &Another v IEBC & 2 Others,* Nairobi Election Appeal 8 of 2018; *Stanley Muiruri Muthama v Rishad Hamid Ahmed & 2 Others*, Mombasa Election Petition Appeal No 1 of 2018 as consolidated with Election Petition Appeal No 3 of 2018; *Timamy Issa Abdalla v IEBC & 3 Others,* Mombasa Election Appeal No 4 of 2018; *Joel Makori Onsando & Another v IEBC & 5 Others,* Kisumu Election Petition Appeal No 17 of 2018; *Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 Others*, Nairobi Election Appeal 18 of 2018; *Hassan Aden Osman v IEBC & 2 Others,* Election Petition Appeal No 11 of 2018; *Mawathe Julius Musili v IEBC & Another,* Supreme Court Petition 16 of 2018). Reiterating the latter

approach, in *Cyprian Awiti & Another v IEBC & 3 Others,* Election Petition Appeal No. 5 of 2018, the Court of Appeal emphasised the approach of looking at the grounds raised substantively and not mere appellation.

6.3.2 *Additional evidence on appeal*

6.3.2.1 Although the Elections Act limits appeals to matters of law, following the 2017 election petition cycle there was a legal development that arose in relation to the powers of appellate courts to admit additional evidence on appeal. In the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others*, Petitions 7 & 9 of 2018 (Consolidated), the appellant sought leave to adduce additional evidence for the first time at the Supreme Court, which was sitting on a second appeal. In allowing the Application and permitting the taking of additional evidence, the Supreme Court held:

> *Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the* ***governing principles on allowing additional evidence*** *in appellate courts in Kenya as follows:*
>
> *a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;*
>
> *b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;*
>
> *c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;*
>
> *d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;*
>
> *e. the evidence must be credible in the sense that it is capable of belief;*
>
> *f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;*
>
> *g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;*
>
> *h. where the additional evidence discloses a strong prima facie case of willful deception of the Court;*
>
> *i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.*
>
> ***j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.***

k. *The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.*

We must stress here that **this Court even with the Application of the above-stated principles will *only* allow additional evidence on a case-by-case basis and even then, sparingly with abundant caution.**

6.3.3 *Filing & Service of the Memorandum & Record of Appeal*

6.3.3.1 A litigant who intends to appeal against a decision of the High Court in EDR must do so *within 30 days* of the decision of the election petition (s 85A of the Elections Act, 2011; *Wavinya Ndeti v IEBC & 4 Others,* Nairobi Civil Appeal No. 323 of 2013). In practical terms, the requirement to file an appeal *within 30 days* means that the appellant must file the record of appeal within 30 days of the decision of the High Court (Rule 9(1) of the Court of Appeal (Election Petition) Rules, 2017).

Editorial Note: In line with the Electronic Case Management Practice Directions, 2020, all pleadings, including amended pleading and other documents filed in the court, will be required to be filed in the e-filing portal.

6.3.3.2 Delay in furnishing typed proceedings and other administrative lapses on the part of the courts will not excuse the failure to comply with this mandatory requirement (*Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others,* Supreme Court Petition No. 18 of 2014). A certificate of delay from the High Court, which normally excuses the late filing of an appeal in ordinary civil cases, will not suffice to save an EDR appeal filed outside the 30-day period set out in section 85A of the Elections Act, 2011 (*Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others,* Supreme Court Petition No. 18 of 2014).

6.3.3.3 A party who seeks to object to the competence of an appeal must do so by way of a formal application within 30 days of service of record of appeal (Rule 17 of the Court of Appeal (Election Petition) Rules, 2017). Where such an application is not made within the specified period, it may not be raised later (Rule 17(2), Court of Appeal (Election Petition) Rules 2017).

6.3.3.4 Failure to file an appeal on time may be excused only where it can be demonstrated that no prejudice is occasioned by the non-compliance with the Rules (*John Munuve Mati v RO Mwingi North & Others,* Election Petition Appeal 5 of 2018; *Sumra Irshadali v IEBC & Another,* Nairobi Election Appeal 22 of 2018).

6.3.3.5 In *Hon. Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & 3 Others,* Nairobi Election Petition Appeal No. 2 of 2018, the appellate Court emphasised that a Memorandum of Appeal must comply with section 85A of the Elections Act and set out the questions of law raised distinctly, concisely and precisely. Anything short of this is deserving of dismissal.

6.3.4 *Security for Costs*

6.3.4.1 Section 78 of the Elections Act, 2011, which requires the deposit of security for costs, only applies to proceedings before an election court. Section 78 of the Elections Act, 2011 does not, therefore, apply to appeals before the Court of Appeal (*Lydia Mathia v Naisula Lesuuda & Another*, Civil Appeal (Application) No. 287 of 2013). The Court of Appeal, however, now requires an appellant to deposit a sum of five hundred thousand shillings as security for costs of an

appeal (Rule 26 of the Court of Appeal (Election Petition) Rules, 2017).

6.3.4.2 A failure to deposit security may result in a dismissal of the appeal and an order for the payment of the respondents' costs, either at the court's instance or that of the respondent. The Court may also order for further security for costs to be given or that security be paid for past costs payable in the appeal.

6.3.4.3 Appeals are usually disposed of by way of written submissions and brief oral highlighting. All appeals must be heard and determined within 6 months of the date of filing. In *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others,* Supreme Court Petition No. 18 of 2014, the apex Court held that the constitutional imperative of timely resolution of electoral disputes deprived the Court of Appeal of the jurisdiction to entertain an appeal filed outside prescribed statutory timelines, even where the delay was occasioned by administrative lapses on the part of the High Court.

6.3.5 *Remedies*

6.3.5.1 After hearing an election appeal, the Court of Appeal may dismiss the appeal, declare the election valid, invalid or invalidate the declaration of the Commission. It may also make an order for the payment of costs and any other order it may deem fit and just (Rule 25 Court of Appeal (Election Petition) Rules, 2017).

> **Editorial Note:** While it is not expressly stated, an election court can refer the matter to the High Court for re-hearing and determination. However, this can only be done if the determination will comply with the 6 months' timeline stipulated by s 85A of the Elections Act.

6.4 Appeals to the Supreme Court

6.4.1 *Notice of Appeal*

6.4.1.1 A person who intends to lodge an appeal to the Supreme Court must file a Notice of Appeal *within 14 days* of the date of the judgment or ruling of the Court of Appeal (Rule 36 of the Supreme Court Rules, 2020; *Naomi Wangechi Gitonga & 3 Others v IEBC & 4 Others*, Supreme Court Civil Application No. 2 of 2014). However, failure to serve the Notice of Appeal timeously is not fatal to the appeal (*Hamida Yaroi Sheikh Nuri v Faith Tumaini Kombe & 2 Others,* Petition (Application) 38 of 2018).

6.4.1.2 The appeal is instituted by filing a petition of appeal, a record of appeal and payment of the requisite fees within *30 days* of filing the notice of appeal (Rule 38 Supreme Court Rules 2020).

6.4.1.3 On whether the relevant provision of appeal must be specified, in *Martha Wangari Karua v IEBC & 3 Others,* Supreme Court Petition 3 of 2019, the appellant failed to particularise the provision on the basis of which the Court's jurisdiction was invoked. However, the Court considered this omission not fatal and observed that from the body of the appeal, it was crafted in a manner that demonstrates that the appellant invokes its jurisdiction under Article 163(4)(a) of the Constitution and specific provisions of the Constitution were cited as having been violated. Notably, it reiterated the need for elegant drafting which entails specifying the provision under which one seeks to invoke its jurisdiction.

6.4.1.4 While the filing of an appeal from the High Court to the Court of Appeal automatically stays the decision of the High Court, the rules are silent on the stay of the decision of the Court of Appeal pending appeal to the Supreme Court.

6.4.2 *Timelines*

6.4.2.1 Where the Court of Appeal makes a final decision in EDR but reserves or defers the reasons for the decision to a subsequent date, the time for filing the Notice of Appeal runs from the date of the decision rather than the date of the reasons for the decision (*Richard Nyagaka Tong'i v Chris N. Bichage & 2 Others,* Supreme Court Petition No. 17 of 2014).

6.4.2.2 Appeals to the Supreme Court must be filed *within 30 days* of filing the Notice of Appeal, where the appeal is as of right: or *within 30 days* of the grant of Certification. (Rule 38(1) of the Supreme Court Rules, 2020; *Nicholas Kiptoo Arap Salat v IEBC & 7 Others,* Supreme Court Civil Application No. 16 of 2014). Failure to file an appeal on time may be excused only where it can be demonstrated that there was no inordinate delay in bringing the appeal (*Bernard Kibor Kitur v Alfred Kiptoo Keter v IEBC,* Supreme Court Petition Application 27 of 2018).

6.4.2.3 Moreover, the absence of the proceedings of the Court of Appeal is not fatal to the hearing and determination of the appeal (*Sammy Kemboi Kipkeu v Bowen David Kangogo & 2 Others,* Petition 23 of 2018; *Hamida Yaroi Sheikh Nuri v Faith Tumaini Kombe & 2 Others,* Petition (Application) 38 of 2018).

6.4.3 *Scope of an Election Appeal to the Supreme Court*

6.4.3.1 The Supreme Court has ruled that its role of interpretation involves 'revealing or clarifying the legal content or meaning of a constitutional provision, for purposes of resolving the dispute at hand', while application concerns 'creatively interpreting the Constitution to eliminate ambiguities, vagueness and contradictions, in furtherance of good governance' (*Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others,* Supreme Court Petition 18 & 20 of 2014).

6.4.3.2 The Supreme Court, in *Zebedeo John Opore v IEBC & 2 Others,* Supreme Court Petition 32 of 2018, while finding that its jurisdiction had not been properly engaged, distilled the categories of electoral appeals that may be lodged at the apex court as follows:

> *i. In election petitions before this court, a party may not invoke the Court's jurisdiction under Article 165 (4) (a), where the trial Court had found that alleged irregularities and malpractices were not proved, as a basis then does not lie for an application or interpretation of the Constitution;*
>
> *ii. The Articles of the Constitution cited by a party as requiring interpretation or application by this Court, must have required interpretation or application at the trial Court, and must have been a subject of appeal at the Court of Appeal; in other words, the Article in question must have remained a central theme of constitutional controversy, in the life of the cause.*
>
> *iii. A party seeking this Court's intervention has to indicate how the Court of Appeal misinterpreted or misapplied the constitutional provision in question. Thus, the said constitutional provision must have been a subject of determination at the trial Court.*
>
> *iv. As a logical consequence of the foregoing, a party must indicate to this Court in specific terms, the issue requiring the interpretation or application of the Constitution, and must signal the perceived difficulty or impropriety with the Appellate Court's decision.*

6.4.3.3 A question of conduct of an election under Articles 81 and 86 of the Constitution falls within the jurisdictional ambit of Article 163(4)(a) of the Constitution (*Alfred Nganga Mutua & 2 Others v Wavinya Ndeti & Another,* Supreme Court Petition 11 & 14 of 2018; *Clement Kungu Waibara v*

Annie Kibeh & Another, Supreme Court Petition 24 of 2018; *Cyprian Awiti & Another v IEBC & 3 Others,* Supreme Court Petition 17 of 2018), and so is one involving constitutional timelines for EDR under Articles 87(1) and 105 of the Constitution (*Martha Wangari Karua v IEBC & 3 Others,* Supreme Court Petition 3 of 2019).

6.4.3.4 If an appeal includes both questions of constitutional interpretation and application and other matters which do not fall within the scope of Article 163(4) of the Constitution, the apex Court has ruled that it has the discretion to exercise jurisdiction over those falling within its mandate and exclude the rest. In the words of the Court in *Clement Kungu Waibara v Annie Kibeh & Another,* Supreme Court Petition 24 of 2018:

> *On the foregoing principles, we consider that a limited number of the issues raised in the petition do indeed involve constitutional interpretation or application: for instance, the issue of the application of Section 83 of the Elections Act, 2011 and the conduct of election in relation to the terms of Articles 81 and 86 of the Constitution. We recognize, however, that some of the issues raised in the petition of appeal and in the cross-petition fall outside this Court's mandate, and accordingly, we will omit them from the ambit of our determination.*

6.4.3.5 The Supreme Court will be hesitant to interfere with the exercise of the Court of Appeal's discretion unless the appellant can demonstrate that

(ii) the Court of Appeal acted on a whim,

(iii) the Court of Appeal's decision was unreasonable,

(iv) the decision of the Court of Appeal was made in violation of any law or the Constitution, or

(v) that the decision was plainly wrong and caused undue prejudice to a party (*Musa Cherutich Sirma v IEBC & 2 Others,* Supreme Court Petition 13 of 2018).

6.4.3.6 In the exercise of its jurisdiction, the Supreme Court is empowered by the Supreme Court Act 2011 to proceed, where it considers it necessary, by way of a fresh hearing, or to grant any order or relief that was open to the Court of Appeal to grant (*Cyprian Awiti & Another v IEBC & 3 Others,* Supreme Court Petition 17 of 2018).

CHAPTER 7

SELECTED ISSUES IN EDR

SELECTED ISSUES IN EDR

7.1 Joinder of Parties: *Amici Curiae* and Interested Parties

7.1.0.1 The courts have discretion to permit a party other than the primary litigants to join legal proceedings as an interested party or *amicus curiae* (Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and Rule 19 of the Supreme Court Rules, 2020).

7.1.0.2 The difference between an interested party and an *amicus curiae* is that the former has a stake in the outcome of the proceedings, while the latter has no interest in the proceedings other than ensuring that the court arrives at a decision of professional integrity (*Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others*, Supreme Court Petition No. 12 of 2013). The admission of a friend of the court is done either at the instance of a party or by the court on its own motion, based on the proven expertise of the person, their independence and impartiality or the public interest.

7.1.0.3 Applications for the joinder of interested parties and *amici curiae* must specifically state the capacity in which the applicant seeks to join the proceedings. The courts will not usually allow a person who has applied to join proceedings as an interested party to become an *amicus curiae*, or vice versa. Moreover, the applicant must meet the legal threshold for joining the proceedings either as an interested party or *amicus curiae*.

7.1.1 Amici curiae

7.1.1.1 In *Francis Karioki Muruatetu & Another v Republic & 5 Others*, Supreme Court Petition No. 15 of 2015, the Supreme Court restated the law on *amicus curiae* applications set out in the *Mumo Matemu* case as follows:

> *(i) an amicus brief should be limited to legal arguments.*
>
> *(ii) the relationship between amicus curiae, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law [see also Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others, Supreme Court Petition No. 12 of 2013; and Raila Odinga v IEBC & 3 Others, Supreme Court Petition No. 5 of 2013].*
>
> *(iii) an amicus brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of the Constitution's call for resolution of disputes without undue delay. The Court may therefore, and on a case- by- case basis, reject amicus briefs that do not comply with this principle.*
>
> *(iv) an amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.*
>
> *(v) the Court may call upon the Attorney General to appear as amicus curiae in a case involving issues of great public interest. In such instances, admission of the Attorney General is not defeated solely by the subsistence of a state interest, in a matter of public interest.*

(vi) where, in adversarial proceedings, parties allege that a proposed amicus curiae is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue before the Court, the Court will consider such an objection by allowing the respective parties to be heard on the issue.

(vii) an amicus curiae is not entitled to costs in litigation. In instances where the Court requests the appearance of any person or expert as amicus, the legal expenses may be borne by the Judiciary.

(viii) the Court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role in to [sic] partisan role.

(ix) in appropriate cases and at its discretion, the Court may assign questions for amicus research and presentation.

(x) An amicus curiae shall not participate in interlocutory applications, unless called upon by the Court to address specific issues.

...

(xi) the applicant ought to raise any perception of bias or partisanship, by documents filed, or by his submissions.

(xii) the applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.

(xiii) the applicant ought to show that the submissions intended to be advanced will give such assistance to the Court as would otherwise not have been available. The applicant ought to draw the attention of the Court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the applicant ought to show that there is no intention of repeating arguments already made by the parties. And such new matter as the applicant seeks to advance, must be based on the data already laid before the Court, and not fresh evidence.

(xiv) the applicant ought to show expertise in the field relevant to the matter in dispute, and in this regard, general expertise in law does not suffice.

(xv) whereas consent of the parties, to proposed amicus role, is a factor to be taken into consideration, it is not the determining factor.

7.1.1.2 The Constitutional Court of South Africa has had occasion to define the role of amicus curiae. *In Re: Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others*, CCT 8/02 [2002] ZACC 13, the Court stated as follows:

> *The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence.*

7.1.1.3 The Ugandan Supreme Court has also recognised the importance of amicus curiae briefs. In *Amama Mbabazi v Yoweri Kaguta Museveni & 2 Others*, Supreme Court of Uganda Presidential

Election Petition No. 01 of 2016, the Court noted that the amici curiae brief was useful in identifying pertinent structural and legal reforms needed to ensure free and fair elections in Uganda.

7.1.1.4 The functions of the office of the Attorney-General include an audience before any court, where the matter involves the public interest or concerns the legislature, judiciary or an independent agency or arm of government (Article 156(4)(c) of the Constitution; s 7 of the Office of the Attorney General Act, 2012).

7.1.1.5 In order to facilitate this right of audience, the Attorney-General is required to notify the court or tribunal of the intention to be joined, satisfy the body of the public interest involved and comply with the directions of the court or tribunal. Where the Attorney General does not have a right of audience, filing a certificate of intention will be sufficient to be joined and he/she shall be joined upon receipt of such certificate. Election petitions are generally accepted to be matters in the public interest.

7.1.1.6 To avoid prejudicing a party to the suit, and in line with the principles in *Muruatetu,* the Attorney-General will not be permitted to address as *amicus* issues which arose in a matter in which he was an active party in adversarial proceedings and where he took a clear position against a party whether directly or by association (*Raila Odinga v IEBC & 2 Others,* Supreme Court Presidential Petition 1 of 2017).

7.1.1.7 The fact that a party has previously been admitted as *amicus* before the court is not sufficient to warrant admission in a subsequent case as each matter has to be determined on its own merit and in light of its unique issues and circumstances (*Raila Amolo Odinga & Another v IEBC & 2 Others & Charles Kanjama,* Supreme Court Presidential Petition 1 of 2017). Conversely, previous denial of admission as *amicus* is not a ground for subsequent denial (*Raila Amolo Odinga & Another v IEBC & 2 Others & Law Society of Kenya (as Amicus Curiae)*, Supreme Court Election Petition 1 of 2017).

7.1.1.8 The court will not grant an application to join as *amicus* where the applicant advances new issues not raised by the parties (*Raila Amolo Odinga & Another v IEBC & 2 Others & Charles Kanjama,* Supreme Court Presidential Petition 1 of 2017).

7.1.1.9 The court will also not be inclined to admit as *amicus* any applications that do not bear a general orientation focused on a specific question falling for determination before the court (*Raila Amolo Odinga & Another v IEBC & 2 Others & Information Communication Technology Association (ICTAK)(as Amicus Curiae),* Supreme Court Presidential Petition 1 of 2017).

7.1.2 Interested Parties

7.1.2.1 In *Francis Karioki Muruatetu & Another v Republic & 5 Others*, Supreme Court Petition No. 15 of 2015, the Supreme Court summarised the law on interested parties and applications to join proceedings as an interested party as follows:

> *One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:*
>
> *i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral [see also Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others,*

Supreme Court Petition No. 12 of 2013].

ii. *The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote [see also Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others, Supreme Court Petition No. 12 of 2013].*

iii. *Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.*

7.1.2.2 The subject of an interested party application must be a person or entity that has a recognizable stake or legal interest in the matter before the court and who was not a party to the proceedings *ab initio* (*Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others*, Supreme Court Petition No. 12 of 2013). The basis for the admission of such a party is that their interest would not be well articulated unless they appeared in the proceedings and championed for their cause. A person who has no sufficient stake in the matter before the court but only seeks to advance a partisan interest will not be allowed to join the case as an interested party (*Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others*, Supreme Court Petition No. 12 of 2013).

7.1.2.3 Although the court has discretion to admit third or interested parties to a case, the overriding interest or stake remains that of the primary or principal parties. Accordingly, one cannot join legal proceedings as an interested party with a view to seeking their striking out or summary dismissal (*Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others*, Supreme Court Petition No. 12 of 2013). Moreover, the issues for determination always remain as presented by the principal parties or framed by the court from the pleadings and submissions of the principal parties, even where the court allows a third or interested party to join the proceedings.

7.1.2.4 A person who wishes to be enjoined as an interested party to any proceedings before the court may make an application for leave to appear as such, orally or in writing. A court may on its own motion join an interested party to the proceedings before it (Rule 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; Rule 24 Supreme Court Rules, 2020; *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others*, Supreme Court Petition No. 12 of 2013; *Judicial Service Commission v Speaker of the National Assembly & 8 Others* Constitutional Petition 518 of 2013; *Francis Karioki Muruatetu & Another v Republic & 5 Others*, Supreme Court Petition No. 15 of 2015).

7.1.2.5 However, applications to be admitted as *'Interested Parties'* in presidential election petitions will not be allowed by the Supreme Court. *(Rule 17A (4) of the Supreme Court (Presidential Election Petition) Rules, 2017)* Although the Supreme Court has previously admitted parties as Interested Parties in presidential election Petitions, the coming into force of the *Supreme Court (Presidential Election Petition) (Amendment) Rules, 2019 [Legal Notice No. 7 of 2020]* did away with this practice.

7.2 Judicial Precedent

7.2.1 The use of judicial precedent is an indispensable foundation upon which to decide what the law is and its application to individual cases in a common law legal system (per Lord Gardiner LC in *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234). Article 163(7) of the Constitution makes the doctrine of *stare decisis*, as understood at common law, where decisions of a higher

court bind all lower courts in similar or like cases unless distinguished or overruled, part of the law of Kenya (*George Mike Wanjohi v Steven Kariuki & 2 Others,* Supreme Court Petition No. 2A of 2014; *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others,* Supreme Court Petition No. 2B of 2014; *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others,* Supreme Court Petition No. 4 of 2014).

7.2.2 The rationale for the doctrine of *stare decisis* lies in the need to ensure predictability, certainty, consistency, uniformity and stability in the application of law (*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others,* Supreme Court Petition No. 2B of 2014; *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others,* Supreme Court Petition No. 4 of 2014; *Frederick Otieno Outa v Jared Odoyo Okello & 4 Others,* Supreme Court Petition No. 6 of 2014). All Kenyan courts, other than the Supreme Court, therefore, are bound by decisions of the Supreme Court (Art. 163(7) of the Constitution; *George Mike Wanjohi v Steven Kariuki & 2 Others,* Supreme Court Petition No. 2A of 2014; *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others,* Supreme Court Petition No. 2B of 2014; *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others,* Supreme Court Petition No. 4 of 2014).

7.2.3 Although the use of judicial precedent is an indispensable foundation upon which to decide what the law is and its application to individual cases, too rigid adherence to precedent can lead to injustice and unduly restrict the proper development of the law (per Lord Gardiner LC in *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234; *George Mike Wanjohi v Steven Kariuki & 2 Others,* Supreme Court Petition No. 2A of 2014). The courts should not, therefore, enforce judicial precedent in a manner that unduly impedes the development of the law, or the enforcement of the fundamental rights and freedoms set out in the Bill of rights (per the dissenting opinion in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others,* Supreme Court Petition No. 18 of 2014).

7.2.4 The criteria for overruling precedent are set out in, *inter alia*, *Chris Munga N. Bichage v Richard Nyagaka Tong'i & 2 Others,* Supreme Court Petition No. 17 of 2014; *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate of & 4 Others,* Supreme Court Petition No. 4 of 2012; *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234; and *Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others*, Supreme Court Petition No. 6 of 2014. According to these authorities, a superior court may overrule its precedents based on any one or more of the following considerations:

(i) whether the prevailing precedent has become impracticable or intolerable;

(ii) whether overturning the prevailing precedent would occasion hardship, or inequities to those who had already relied on the authority of the precedent;

(iii) whether, since the setting of the prevailing precedent, related principles have evolved to such an extent that it is fair to conclude that the society's conditions and expectations have taken new dimensions;

(iv) whether the facts have significantly changed, or are currently viewed so differently, that the design of the precedent has become irrelevant, or unjustifiable;

(v) where there are conflicting past decisions of the court, it may opt to sustain and apply one of them;

(vi) a court may disregard a previous decision if it is shown that such decision was given per incuriam;

(vii) a previous decision will not be disregarded merely because some, or all the members

of the Bench that decided it might now arrive at a different conclusion;

(viii) the Court will not depart from its earlier decision on grounds of mere doubts as to its correctness;

(ix) general ideals of justice and fairness cannot justify a departure from binding precedent where such precedent is based on clear and overriding imperatives of the law; and

(x) any number of judges that is equal to or bigger than the prescribed quorum of a court may reconsider and overturn the precedents of that court, including those established by a bigger or full bench of the court.

7.2.5 The doctrine of judicial precedent only requires similar cases to be decided similarly. A court is not obliged to follow a precedent where the case before it is clearly distinguishable. Moreover, a court could decline to follow a precedent that would otherwise be binding on it where (i) there are conflicting decisions of the court establishing the precedent; or (ii) the precedent is inconsistent with a decision of a higher court; or (iii) the decision embodied in the precedent was given *per incuriam* (*Michael Waweru Ndegwa v Republic*, Nyeri High Court Criminal Appeal No. 290A of 2010).

7.2.6 The phrase '*per incuriam*' refers to a decision given in ignorance or forgetfulness of an inconsistent statutory provision or authority binding on the court that gave it (*Young v Bristol Aeroplane Co Ltd* [1944] 2 All E.R. 293; and *Michael Waweru Ndegwa v Republic*, Nyeri High Court Criminal Appeal No. 290A of 2010). A court may decline to follow its own precedent, or the precedent of a court of co-ordinate jurisdiction, if the decision embodied in the precedent was given *per incuriam*. A court cannot, however, decline to follow a binding precedent of a higher court because it considers the decision embodied therein as having been made *per incuriam* (*Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 Others*, Nairobi Civil Appeal No. 238 of 2003; *Cassel & Co. Ltd v Broome and Another* [1972] A.C. 1027).

7.2.7 The use of foreign judicial precedent in the determination of EDR is also of great utility. Courts may use foreign case law as a reference point and source of inspiration, or to reinforce the solution handed down with a view to support their decisions (Prof. Marie-Claire Ponthoreau, *Foreign Precedents in Constitutional Litigation, General Reporter, Congress of Vienna 2014* (2014)). The potential precedents for use range from those derived from international law judicial and quasi-judicial bodies as well as those from foreign domestic courts. With regard to international law bodies, courts can be *persuaded* by decisions emerging from bodies such as the UN Human Rights Committee, which oversees the implementation of the International Covenant on Civil and Political Rights, or the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights that hold a protective mandate over the African Charter on Human and Peoples' Rights. In terms of the standing of international law, where it is derived from treaties ratified by Kenya or the general rules of international law, then courts are actually *obliged* to apply such international law as it forms part of the law of Kenya (Article 2(5) and (6) of the Constitution). In *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* Supreme Court Petition 3 of 2018, the court discussed at length the applicability of international law and ruled that the wording, 'general rules of international law', as present in Article 2(5) and (6) refers to customary international law.

7.2.8 Foreign domestic cases on their part are utilised for their *persuasive* utility and have in fact influenced EDR jurisprudence in Kenya significantly (see for instance, *Raila Odinga v IEBC & 3*

Others, Supreme Court Petition No. 5 of 2013, where key *ratio* in the judgment was influenced by foreign cases). The use of foreign precedent in this manner is part of judicial tradition, particularly in common law jurisdictions like Kenya. It aids in growing a country's jurisprudence and keeping up with positive legal, social and political developments from across borders. That notwithstanding, courts must examine the context and legal tradition of jurisdictions from which they select foreign cases. For instance, some foreign cases may be discredited within their own borders or be hampered from accusations of conferring judicial legitimacy to flawed electoral processes or, worse still, be derived from dictatorial regimes. In such scenarios, the use of questionable precedents poses much more jurisprudential harm than benefit and should be avoided.

Further Authorities

The following authorities also deal with judicial precedent and the criteria for overruling and departing therefrom:

1. *Roe v Wade 410 US 113 (1973).*
2. *Planned Parenthood of South Eastern Pennsylvania v Robert P. Casey 505 U.S. 833 (1992).*
3. *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others, Supreme Court Petition No. 18 of 2014.*

7.3 Special Interest Groups and Elections

7.3.1 It is a fundamental and cross-cutting principle of the Constitution and the country's electoral system that not more than two-thirds of the members of elective bodies are of the same gender (Articles 27(8), 81(b), 175(c), 177(b) and 197(1) of the Constitution).

7.3.2 Another fundamental principle of the Constitution and the country's electoral system is the protection and advancement of the interests of the youth, women, persons with disabilities, ethnic minorities, and other marginalised groups (Articles 21(3), 55, 97(1)(b) and (c), 98, 100 and 177(1)(c) of the Constitution). Article 10 of the Constitution also includes, among the national values and principles that bind all persons, human dignity, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.

7.3.3 Electoral processes are rife with disputes on gender discrimination and practices that perpetuate the exclusion of women and other special interest groups from politics and electoral processes. In resolving such EDR matters, courts and other quasi-judicial bodies with an EDR mandate, must be cognisant and guided by the constitutional principles on the promotion of gender equality and protection of the marginalised. These principles traverse the long-established nexus between democracy and human rights. Elections are an indispensable prerequisite for democracy; and democracy in turn fosters the full realisation of human rights and vice versa (see United Nations Commission on Human Rights, *Promotion of the Right to Democracy*, 27 April 1999, E/CN.4/RES/1999/57 and African Charter on Democracy, Elections and Governance).

7.3.4 The courts have an important role in the realisation of equality in electoral and political processes and are *constitutionally mandated* to interpret the Constitution and other laws in a manner that promotes human rights, gender equality, inclusiveness and non-discrimination (Articles 10 and 27 of the Constitution). Courts have an active role to play in enhancing women's participation in electoral and political processes in light of their historical disenfranchisement along with

past and continuing discrimination in political, economic, cultural and social spheres. Towards this end, the Constitution sanctions a *purposive* and progressive approach to human rights interpretation where it calls upon courts to 'develop the law to the extent that it does not give effect to a right or fundamental freedom; and adopt the interpretation that most favours the enforcement of a right or fundamental freedom' (Article 20(3)(a) and (b) of the Constitution). Ultimately, courts have both the duty and the power to enhance the representation of women and other special interest groups through rich, robust and progressive EDR (*In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Supreme Court Advisory Opinion No. 2 of 2012, Dissenting opinion by Mutunga CJ).

7.3.5 There is a 'deliberate and sustained effort' in the Constitution and Persons with Disabilities Act to ensure that persons with disabilities 'achieve equalisation of opportunities in life' (*Reuben Kigame Lichete v IEBC & Another*, Constitutional Petition E275 of 2022 (unreported)). There is also a constitutional duty to ensure progressive implementation of the principle that at least 5% of the members of the public in elective and appointive offices are persons with disabilities.

7.3.6 In reviewing the decision of the IEBC declining to register a person with disability as a presidential candidate for non-compliance with Regulation 43 of the Elections (General) Regulations, and the IEBC DRC's decision to uphold the decision of the Returning Officer, the High Court deprecated the DRC for failing to refer to the Constitution or any international instruments on disability, and for faulting the complainant who, in their view, was calling for 'extra special attention other than that envisaged in the law'. In finding a violation of Article 54 of the Constitution, the High Court ruled as follows in *Reuben Kigame Lichete v IEBC & Another*, Constitutional Petition E275 of 2022 (unreported):

> 55. *By placing the manner in which the DRC treated the Petitioner and the various provisions of the Constitution and the law side by side, there is no doubt that the Petitioner's rights were variously flouted. For instance, there is no indication or at all that the Petitioner was accorded any assistance to overcome the disability in complying with the election requirements. There has also been no mention that the documents availed to the Petitioner were in braille or how the Petitioner was to access the whole country with a view of collecting the signatures and copies of identity cards of his supporters and in ways to overcome the constraints that arise from his disability...*
>
> *58...the DRC ought to have seized the opportunity and added its weight in ensuring that the Petitioner who was the only person with disability in the presidential race was accorded a reasonable opportunity to participate in the election. The DRC ought to have noted that despite the challenges on his part, the Petitioner had endeavoured to come up with the required number of signatures of his supporters albeit and slightly out of the regulatory timelines. However, the Petitioner was instead placed on an equal footing with the rest of the presidential aspirants. There was no reprieve of any kind that was accorded to the Petitioner on account of his disability. The way the Petitioner was treated, therefore, amounted to placing the bar for him quite high compared to the other non-disabled presidential aspirants...*
>
> *63 The DRC's finding on the Petitioner's disability was, hence, not founded on the Constitution and the law. It openly flouted the Constitution and the law and did not treat the Petitioner with dignity and respect.*

While the High Court directed the IEBC to accept the nomination papers of the candidate, the decision was stayed pending appeal of the order of the High Court.

7.3.7 The Constitution also provides for special seats, filled by way of party lists based on proportional representation, as one of the mechanisms for implementing these two principles. Political

parties are also required to adopt nomination procedures that are compliant with these two principles (*Moses Mwicigi & 14 Others v Independent, Electoral and Boundaries Commission & 5 Others,* Supreme Court Petition 1 of 2015; *Katiba Institute v IEBC,* Constitutional Petition 19 of 2017).

7.3.8 Political parties must submit party lists to IEBC *at least forty-five days* before the date of a general election (s. 35 of the Elections Act, 2011). A party list must contain alternates between male and female candidates, listed in the political party's preferred order of priority (ss 36(2) and 34(5) of the Elections Act, 2011). A party list must comply with the constitutional requirement that not more than two thirds of the members of elective public bodies shall be of the same gender (Article 81(b) of the Constitution and Regulation 20(2) of the Elections (Party Primaries and Party Lists) Regulations, 2017).

7.3.9 Further, every political party must take measures to ensure that not more than two thirds of the persons nominated to contest elections on its ticket are of the same gender (*Katiba Institute v IEBC*, Nairobi High Court Constitutional Petition No. 19 of 2017).The persons named in a party list must hold the qualifications for the relevant elective office (*Nestehe Bare Elmi v Sarah Mohamed Ali & Another*, Nairobi Election Petition Appeal No. 1 of 2014).

7.3.10 Party list slots ought to be reserved for persons who would otherwise be excluded in the first-past-the-post elections for varied reasons. It is not open to political parties to adopt their own meaning of 'special interest' (*Commission for the Implementation of the Constitution v Attorney General & 2 Others*, Civil Appeal 351 of 2012). Therefore including persons who are able to contest elective positions, such as presidential and deputy presidential candidates, in party lists amounts to an 'irrational superimposition of well-heeled individuals on a list of the disadvantaged and marginalized to the detriment of the protected classes or interests' (*Commission for the Implementation of the Constitution v Attorney General & 2 Others,* Civil Appeal 351 of 2012).

7.3.11 While acknowledging that the term 'special interest' is not defined by the Constitution, the Court of Appeal in *Commission for the Implementation of the Constitution v Attorney General & 2 Others,* Civil Appeal 351 of 2012, ruled that whatever interpretation is given to the term, it must bear the same meaning as marginalised groups.

7.3.12 A party list should include only persons who meet the suitability and eligibility requirements for election to the relevant office, including the requirement for public officers to resign as a precondition for participating in politics. A person who is unsuitable or ineligible to be elected to an office cannot be nominated to the same office by way of a party list. In *NARC Kenya & Another v IEBC & Another*, Nairobi High Court Civil Appeal (Election Petition) No. 2 of 2014, the Court held as follows:

> *Section 43(5) of the Elections Act requires resignation by public officers who seek elective posts. As regards nomination of members to special seats, it is my considered opinion that Article 90 (2) of the Constitution places a threshold, that is, persons nominated and forming part of the party list should ordinarily qualify to be elected had there been availability of seats in the National Assembly, Senate or the County Assembly. The threshold thus takes us back to section 25 of the Elections Act wherein sub-section (2) (a) disqualifies a state officer or other public officer from being elected a member of a county assembly, unless such officer has resigned from office at least 7 months to the date of elections, as per section 43 (5) of the Elections Act…the impartiality of public servants is a cardinal value enshrined in Article 232 (1) (a) of the Constitution…It is my view that nominated members of a political party irrespective of whether the position is elective or nominative are active members of*

the said party who engages actively in party politics. A state or public officer, may not promote the principles outlined in Article 232 (1) (a) of the Constitution, if they have, in the words of Lenaola J., one leg in public service and another at the political arena. It is my considered opinion that the 2nd Respondent ought to have resigned from public service per section 43 (5) of the Elections Act. I therefore find and do hold that the 2nd Respondent was not eligible for nomination for membership of the County Assembly of Garissa under the Gender Top-Up Category.

7.3.13 Also, a party can only nominate persons who are registered as voters (*Amani National Congress Party & Another v Hamida Yaroi Shek Nuri & Another,* Nairobi Election Petition Appeal No 5 of 2018 & 1 of 2017 (consolidated)).

7.23.14 A political party must comply with its nomination rules in making the party list (s 34(6), Elections Act; Regulation 55, Elections (General) Regulations 2012; and Regulation 6, Elections (Party Primaries and Party Lists) Regulations, 2017) and take steps to ensure that the nomination process is not open to abuse (*NARC Kenya & Another v IEBC & Another*, Nairobi Chief Magistrate's Court Election Petition No. 12 of 2013). Parties are, therefore, required to submit a declaration of compliance with their nomination rules alongside the party list to the IEBC (Regulation 55(4), Elections (General) Regulations 2012).

7.3.15 Moreover, persons nominated by a political party must be members of the political party as at the date of submission of the party list (s 34(8) of the Elections Act, 2011; *Peninah Nandako Kiliswa v IEBC & 2 Others*, Nairobi Civil Appeal No. 201 of 2013). It is the role of the Registrar of Political Parties to verify party membership of those on the party list (s 34(fc) Political Parties Act No 11 of 2011).

7.3.16 Further, where there is a conflict between a political party's constitution or nomination rules and a decision of a court on the compilation of a party list, the court decision prevails (*Mary Wairimu Muraguri & 12 Others v IEBC & 5 Others*, Nyeri High Court Election Appeal No. 30 of 2014).

7.3.17 The party must also indicate the interest represented by each nominee. A nominee can only represent one interest at a time (*Aden Noor Ali v Jubilee Party & 2 Others,* PPDT Complaint 336A of 2017).

7.3.18 It is the responsibility of political parties, rather than the courts or the IEBC, to determine which of their members should be included in a party list, in which category, and in what order of priority (*Moses Mwicigi & 14 Others v IEBC & 5 Others*, Supreme Court Petition No. 1 of 2015; *Peninah Nandako Kiliswa v IEBC & 2 Others*, Nairobi Civil Appeal No. 201 of 2013; *Linnet Kemunto Nyakeriga & Another v Ben Njoroge & 2 Others*, Nairobi Civil Appeal No. 266 of 2013; *Billy Elias Nyonje v National Alliance Party of Kenya & Another,* Judicial Review 61 of 2013).

7.3.19 In other words, the IEBC has no power to ignore, re-arrange or disregard a political party's preferred priority of candidates as set out in a party list (*Linnet Kemunto Nyakeriga & Another v Ben Njoroge & 2 Others*, Nairobi Civil Appeal No. 266 of 2013; *Dubat Ali Amey v IEBC & 3 Others*, Nairobi Chief Magistrate's Court Election Petition No. 13 of 2013; *Ben Njoroge & Another v IEBC & 2 Others,* Nairobi High Court Petition No. 14 of 2013; and *Aden Noor Ali v IEBC & 2 Others,* Nairobi Election Petition 11 of 2017).

7.3.20 It is the responsibility of the IEBC, however, to ensure that candidates nominated by way of party lists meet suitability and eligibility requirements set out in the Constitution and the Elections Act, 2011 (Regulation 54(5), Elections (General) Regulations 2012; (*Moses Mwicigi & 14 Others v IEBC & 5 Others*, Supreme Court Petition No. 1 of 2015; *Micah Kigen & 2 Others v Attorney General*

& 2 Others, Nairobi High Court Constitutional Petition No. 268 of 2012; National Vision Party & Another v IEBC & Another, Chief Magistrate's Court (Makadara) Election Petition No. 11 of 2013).

7.3.21 The IEBC may require a political party to review and amend a party list where, after scrutiny, the IEBC believes the party list does not conform with the requirements of the Constitution, the Elections Act, 2011 or Regulations made thereunder (Regulations 21(2) and 26(2) of the Elections (Primaries and Party Lists) Regulations; and Amani National Congress Party & Another v Hamida Yaroi Shek Nuri & Another, (Election Petition Appeal 5 of 2018 & 1 of 2017 *(Consolidated)*).

7.3.22 The IEBC is obligated to supervise the process by which parties conduct party list nominations of candidates (NGEC v IEBC, Nairobi Constitutional Petition No. 147 of 2013).

7.3.23 As such, the IEBC has power to reject non-compliant lists (s 34(6A), Elections Act No 24 of 2011; and Regulation 55, Elections (General) Regulations 2012). As stated by the Supreme Court in Moses Mwicigi & 14 Others v IEBC & 5 Others, Supreme Court Petition 1 of 2015**:**

> *A political Party has the obligation to present Party lists to IEBC, which after ensuring compliance, takes the requisite steps to finalise the 'elections' for these special seats. In the event of non compliance by a political party, IEBC has power to reject the party list and to require the omission to be rectified, by submitting a fresh party list or by amending the list already submitted.*

7.3.24 However, the rejection of a party nominee does not invalidate the entire list (Regulation 54(6) Elections (General) Regulations 2012). The formula for allocation of the party list is published by the IEBC (Regulation 56, Elections (General) Regulations 2012).

7.3.25 A party list cannot, once submitted to the IEBC, be amended during the term of Parliament or County Assembly to which it relates (s 34(10) of the Elections Act, 2011; Linnet Kemunto Nyakeriga & Another v Ben Njoroge & 2 Others, Nairobi Civil Appeal No. 266 of 2013). The term of Parliament or County Assembly, for purposes of this rule, commences when the names of the persons named in the party list are gazetted as members of Parliament or County Assembly (NARC Kenya & Another v IEBC & Another, Nairobi Election Petition No. 12 of 2013). In other words, a political party can amend its party list any time between its submission to the IEBC and its publication in the Gazette. However, the seat allocated to a party can be re-allocated if the representative of a political party:

(a) Dies;
(b) withdraws from the party list;
(c) Changes parties;
(d) Resigns; or
(e) Is expelled from his/her party during the term of the representative.

7.3.26 However, where the re-allocation is necessitated by expulsion, it must be demonstrated that the party representative who is expelled was afforded a fair hearing before the expulsion (Hon Isaac Mwaura Maiga v Jubilee Party & 3 Others, Nairobi High Court Civil Appeal No. E248 of 2021).

7.3.27 Where re-allocation is to be done, the next candidate of the same gender in the respective party list is selected (s 37 Elections Act, 2011; Lydia Mathia v Naisula Lesuuda & Another, Civil Appeal (Application) No. 287 of 2013; Lydia Nyaguthii Githendu v IEBC & 17 Others, Civil Appeal 224 of 2013). Where there are no more candidates on the same party's list, IEBC shall require the party to nominate one within 21 days (s 37(2) Elections Act, 2011). However, where vacancy occurs within three months of a general election, it shall not be filled (s 37(3), Elections Act, 2011). Moreover, where the party fails to nominate a candidate within twenty-one days of the

vacancy, the slot shall not be allocated for the remainder of the term (s 37(4) Elections Act, 2011).

7.3.28 Legal challenges to party lists should ideally be raised before the publication of the nominated persons in the Kenya Gazette, and their assumption of the relevant office (*NGEC v IEBC*, Nairobi Constitutional Petition No. 147 of 2013). Since the manner of preparation of the party list is a matter within the exclusive jurisdiction of a political party (*Billy Elias Nyonje v National Alliance Party of Kenya & Another,* Judicial Review 61 of 2013), disputes concerning the party list are resolved by the Political Parties Disputes Tribunal. Such legal challenges are to be lodged at the Political Parties Disputes Tribunal where the persons named in the party list have not assumed the relevant office.

7.3.29 Where persons included in a party list have assumed the relevant office, their nomination can only be challenged by way of an election petition (*NGEC v IEBC*, Nairobi Constitutional Petition No. 147 of 2013; *Rose Wairimu Kamau v IEBC & 3 Others,* Nairobi Civil Appeal No. 169 of 2013; *Moses Mwicigi & 14 Others v IEBC & 5 Others,* Supreme Court Petition 1 of 2015; *Vitalis Ojuang Odek v IEBC & 3 Others,* Kisumu Election Petition 1 of 2017; *Busia County Persons with Disability Network & 4 Others v IEBC & 2 Others,* Kisumu Election Petition 5 of 2017;and *Shadrack Mutua Kitili v IEBC & 17 Others,* Kitui Election Petition 5 of 2017).

7.4 Independent Candidates

7.4.1 The 2010 Constitution, unlike its predecessors, allows aspirants of elected office to contest as independent candidates (Article 85 of the Constitution). A member of a political party who seeks to contest for an election as an independent candidate must resign from the political party at least three months prior to the date of the election (s 33 of the Elections Act, 2011). The resignation letter must be transmitted to the Registrar of Political Parties *within seven days* of the resignation (s 14(3) of the Political Parties Act). It is the role of the Registrar of Political Parties to certify that an independent candidate in an election is not a member of any registered political party (s 34(fa) Political Parties Act). Therefore, such a person must obtain a clearance certificate from the Registrar of Political Parties, certifying that they have not been a member of any political party for at least three months immediately before the date of the election (Rule 15 of the Elections (General) Regulations, 2012; and *William Omondi v IEBC*, Nairobi High Court Constitutional Petition No. 288 of 2014).

7.4.2 Independent candidates are also required to submit symbols they intend to use to the IEBC twenty-one days before nomination day or seven days before nomination in the case of a by-election (s 32(1), Elections, 2011). This is after obtaining a clearance certificate from the Registrar of Political Parties certifying that the person has not been a member of any political party for at least three months immediately preceding the date of the election (Regulation 15, Elections (General) Regulations 2012). The law that bars independent candidates from being party members three months before an election is not an undue limitation of political rights (*Council of Governors v Attorney General & Another,* Constitutional Petition 56 of 2017).

7.4.3 An independent candidate who is aggrieved with conduct related to party primaries (now party nominations) is entitled to approach the PPDT (s. 40 (1)(d) as read with s. 40 (1)(fa) of the Political Parties Act; *Wiper Democratic Movement of Kenya v Bernard Muia Tom Kiala & Hon. Wavinya Ndeti,* Nairobi High Court Election Petition Appeal No. 31 of 2017).

7.4.4 The IEBC also verifies that the symbol proposed to be used by an independent candidate is neither in use nor closely resembles that being used by another independent candidate, registered political party, or any other registered entity. It must also not be offensive (s

32(3) Elections Act, 2011). Once approved, the IEBC publishes the name and symbol of each independent candidate in the Kenya Gazette, electronic and print media of national circulation and other accessible media (Regulation 10, Elections (General) Regulations 2012).

7.4.5 Independent candidates must also demonstrate community support before being cleared to vie. Where an independent is contesting a County Assembly seat, their nomination must be supported by at least 500 registered voters (Regulation 36, Elections (General) Regulations 2012), 1000 voters if contesting for Member of National Assembly (Regulation 24, Elections (General) Regulations 2012), 2000 voters if contesting for a Senate seat (Regulation 28, Elections (General) Regulations 2012), 500 voters if contesting a gubernatorial seat (Regulation 31 and 32, Elections (General) Regulations 2012) and at least two thousand voters registered in each of a majority of the counties if contesting for the presidential election (Regulation 18, Elections (General) Regulations 2012).

> **Editorial Note**: In relation to independent candidates, the court ruled in *Free Kenya Initiative & 6 Others v IEBC & 4 Others; Kenya National Commission on Human Rights (Interested party),* Constitutional Petition E160 of 2022, that the requirement in Regulations 24(2)(c), 28(2)(c), 32(2)(c) and 36(2)(c) of the Elections (General) Regulations, 2012 that independent candidates supply copies of the identity cards of their supporters alongside signatures was discriminatory as it was not required of other political party candidates and it was therefore unconstitutional. The High Court in *John Harun Mwau v IEBC & Another,* Constitutional Petition 26 of 2013 had ruled in 2013 that there was nothing arduous or discriminatory about these requirements. Moreover, the Court ruled that the requirement to provide copies of supporters' identity cards contravened Article 31 of the Constitution on the right to privacy and the Data Protection Act. The decision was stayed pending appeal at the Court of Appeal during the time of finalising this bench book.

7.5 Alternative Procedures and EDR

7.5.1 EDR laws constitute a special or '*self-contained*' legal regime (*Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others,* *Supreme* Court Petition No. 12 of 2014; *Rozaah Akinyi Buyu v IEBC & 2 Others*, Kisumu Civil Appeal No. 40 of 2013; *Ferdinand Ndung'u Waititu v IEBC & 8 Others,* Nairobi Election Petition No. 1 of 2013; and *Ahmed v Kennedy* [2003] 1 WLR 1820). Accordingly, election courts and courts hearing appeals from decisions of election courts can only invoke or apply the powers and procedures set out in other laws only when, and only to the extent, expressly permitted under EDR laws.

7.5.2 The practical consequence of the rule that EDR laws constitute a separate, distinct and complete code unless otherwise expressly stated, is that a party cannot challenge the validity of an election by way of a civil suit, judicial review, constitutional reference or any other procedure that is alien to EDR laws. This rule applies even where the alternative procedure is arguably more pragmatic, expeditious or effective.

7.6 Logistical and Administrative Matters: Roles of Deputy Registrars & Judicial Staff

7.6.1 An election court has the power to delegate administrative and logistical matters, such as the holding of an inquiry, scrutiny or recount to a court Registrar, Deputy Registrar or any other judicial officer (Rule 29(3) of the Elections (Parliamentary and County Elections) Petition Rules, 2017; *Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others,* Kisumu Civil Appeal No. 52 of 2013; and *Raila Odinga v IEBC & 3 Others,* Supreme Court Petition No. 5 of 2013). The judicial

officer to whom such logistical or administrative matters are delegated is subject to the direction and supervision of the election court.

7.6.2 The rationale for the power of delegation is that the trial judge or magistrate cannot reasonably be expected to handle logistical and administrative matters, especially in view of the constitutional requirements as to the timely resolution of electoral disputes. A judicial officer exercising such delegated powers, however, has no jurisdiction to usurp the role of the election court by purporting to determine or make a conclusion on any of the substantive issues pending before the election court (*Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others,* Meru Election Petition No. 1 of 2013). The rationale for this restriction on the powers of registrars and other judicial officers in EDR is that the determination or making of conclusions on substantive issues is a judicial function to be exercised only by the judge(s) or magistrate(s) hearing the electoral dispute.

7.7 Use of Technology in Elections

7.7.1 The 2010 Constitution captured Kenyans' aspiration for verifiability of election results by requiring that the electoral system be 'simple, accurate, verifiable, secure, accountable and transparent' (Article 86(a) of the Constitution). The deployment of appropriate technology is an important tool for reducing the risk of electoral malpractice and increasing efficiency in the management of elections (see Article 86(d) of the Constitution).

7.7.2 The IEBC is under an obligation to operate in an open and transparent manner when procuring election technology (*Republic v IEBC & 3 Others ex parte Coalition for Reforms and Democracy (CORD)*, Nairobi High Court Miscellaneous Civil Application No. 637 of 2016). Election technology must, therefore, be procured in consultation with the relevant stakeholders in order to maintain the perception of fairness and win the confidence of the electorate. In the words of the court in the aforesaid *CORD* case:

> *...the provisions of section 38 of the Political Parties Act ought to be put into motion and implemented and the Political Parties Liaison Committee activated and booted up as it were in order to avoid unnecessary tensions and suspicions between the Independent Electoral Commission [sic] and Boundaries Commission, the Registrar of Political Parties and the political parties themselves...It must be appreciated that the process of general election is as much a political process as it is legal. Perception therefore plays a not too minor role in the said process. It is therefore as much important for the process to be fair as it is to be seen as fair. It is therefore crucial that a continuous dialogue between the Commission, the Registrar of political parties and the political parties themselves be nurtured in order to avoid any suspicions that the process is not being undertaken in a free, fair and transparent [manner] and that the system being administered is not impartial, neutral, efficient, accurate and accountable. An electoral process must not only meet the constitutional and legal threshold but ought to carry with it the confidence of the electorates. This in my view can only be achieved in a process where all the players are afforded a forum at which to air their grievances collectively and individually and in my view this is where the Political Parties Liaison Committee comes in.*

7.7.3 The IEBC is required to open the Register of Voters for the verification of biometric data by voters and to publish the Register online once the process of verification is completed (s 6A Elections Act, 2011). The publication of the Register online allows for verification of whether the votes cast exceeded the total number of registered voters during the EDR process. A petitioner may also request a copy of the Register from the IEBC when filing their petition

(*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others,* Supreme Court Petition 2B of 2014).

7.7.4 Section 44(1) of the Elections Act, 2011 requires the IEBC to establish 'an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results'. Section 44 of the Elections Act also requires the IEBC to, *inter alia*:

> *(2) ... develop a policy on the progressive use of technology in the electoral process.*
>
> *(3) ... ensure that the technology in use...is simple, accurate, verifiable, secure, accountable and transparent.*
>
> *(4) ...in an open and transparent manner—*
>
> > *(a) procure and put in place the technology necessary for the conduct of a general election at least eight months before such elections; and*
> >
> > *(b) test, verify and deploy such technology at least sixty days before a general election.*
>
> *(5) ...in consultation with relevant agencies, institutions and stakeholders, including political parties, make regulations... for—*
>
> > *(a) the transparent acquisition and disposal of information and communication technology assets and systems;*
> >
> > *(b) testing and certification of the system;*
> >
> > *(c) mechanisms for the conduct of a system audit;*
> >
> > *(d) data storage and information security;*
> >
> > *(e) data retention and disposal;*
> >
> > *(f) access to electoral system software source codes;*
> >
> > *(g) capacity building of staff of the Commission and relevant stakeholders on the use of technology in the electoral process;*
> >
> > *(h) telecommunication network for voter validation and result transmission;*
> >
> > *(i) development, publication and implementation of a disaster recovery and operations continuity plan...*

7.7.5 Although the deployment of appropriate technology is an important tool for reducing the risk of electoral malpractice and increasing efficiency in the management of elections, technology is inherently undependable and often prone to failure. Technology is not the sole or decisive determinant, therefore, of the validity of an election (*Raila Odinga v IEBC & 3 Others,* Supreme Court Petition No. 5 of 2013). In other words, technology only provides an additional layer of efficiency and integrity in the electoral process (*John Lokitare Lodinyo v Mark Lomunokol & 2 Others*, High Court Petition No. 5 of 2013). The mere failure of the technology adopted for an election will not, therefore, warrant the nullification of the election (*Raila Odinga v IEBC & 3 Others,* Supreme Court Petition No. 5 of 2013).

7.7.6 Section 44A of the Elections Act mandates the IEBC to 'put in place a complementary mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent'. In the case of *National Super Alliance (NASA) Kenya v IEBC & 2 Others*, Nairobi High Court Petition No. 328 of 2017, the Court was urged to declare that the 8 August 2017 general election be exclusively electronic in respect of identification of voters and transmission of results. The High Court acknowledged that the legal regime obtaining in the country, at the moment, requires an integrated electronic system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

7.7.7 The Court, however, observed that the complementary mechanism envisaged in section 44A only sets in when the integrated electronic system fails. In rejecting the prayer that identification of voters and transmission of results be exclusively electronic, the Court held:

> *To our mind, what was required of the respondent was to put in place a mechanism that would complement the one set out in section 44 of the Act. The particulars of the mechanism, whether electronic, manual, or any other mode was not expressly provided in section 44A. If that were the intention of Parliament, nothing would have been easier than to specify so.*

7.7.8 This High Court decision was upheld by the Court of Appeal in *National Super Alliance (NASA) Kenya v IEBC & 2 Others,* Civil Appeal 258 of 2017. In *Katiba Institute & 3 Others v Attorney General & 2 Others,* Nairobi High Court Petition 548 of 2017, the Court declined to declare the complementary mechanism under section 44A of the Elections Act unconstitutional. This was because it was complementary and was not envisaged to replace the electronic voter identification system but to only be used when the principal voter identification system failed due to technological failure.

7.7.9 The foregoing may be contrasted with a view from the Supreme Court of Ghana, in *Nana Addo Dankwa Akufo-Addo & 2 Others v John Dramani Mahama* (Writ J1/6/2013), where the Court was tasked with interpretation of an election Regulation stipulating that 'The voter shall go through a biometric verification process'. In one of the separate judgments in the matter, Dotse J used the following words at page 339 to explain what that Regulation meant:

> *This in effect means that every prospective voter must go through the process of biometric verification before casting his or her vote. Any votes that are therefore found to have been cast without this biometric verification stands [sic] the risk of being nullified.*

7.7.10 With regard to the apprehension of failure of biometric verification devices, Dotse J at page 350, stated:

> *However, there are certain things and practices as a nation we ought to have confidence and trust in its administration, and a typical one is this biometric verification device. Once we asked for it and it was provided, at huge cost, we must accept it and learn to rely on it for the verification that it was meant to provide...no biometric verification therefore in my estimation fails in its entirety.*

7.7.11 Overall, while there is consensus that technology may be prone to failure (*Raila Odinga v IEBC & 3 Others,* Supreme Court Petition No. 5 of 2013), a court should make inquiries as to the reason for the failure. For instance, it could be as a result of a glitch or the failure(s) could be so prevalent as to raise questions of culpable negligence, or worse still, fraud.

7.7.12 From a reading of section 39(1C), it is only in presidential elections that results are required to be electronically transmitted to the national tallying centre (NTC). Failure to electronically transmit results to the constituency and county tallying centres cannot be basis for impugning the results of other elections (*Ahmed Abdullahi Mohammed & Another v Mohamed Abdi Mohamed & 2 Others,* Nairobi Election Petition 14 of 2017). In *Mohamed Mahamud Ali v IEBC & 2 Others,* Mombasa Election Petition 7 of 2017, the Court asserted:

> *Section 39(1C) of the Elections Act is clear that electronic transmission and publication of poll results in a public portal is only a statutory requirement for the Presidential election. Further, except for voter registration and voter identification; voting, counting, tallying and transmission of results for the election of the other elective posts including that of the Governor are mainly manual.*

7.7.13 Moreover, errors in electronic transmission are not sufficient to invalidate an election if it cannot be demonstrated that the result forms at the polling station are impugned (*Jackton Nyanungo Ranguma v IEBC & 2 Others*, Kisumu Election Petition 3 of 2017).

7.7.14 In *Raila Odinga v IEBC & Others,* Supreme Court Presidential Petition 1 of 2017, the apex Court ruled that failing to ensure that all Forms 34A were electronically transmitted to the NTC as is required by section 39(1C) of the Elections Act could not be explained by failure of technology, since the respondents had indicated, prior to the elections, that alternative arrangements would be made where technology failed. Moreover, no plausible explanation was offered for the discrepancy in the results as contained in the scanned Forms 34A and those transmitted electronically to the NTC. In the words of the Court:

> *Our understanding of this process is that the figures keyed into the KIEMS corresponded with those on the scanned image of Form 34A. In the circumstances, we do understand why those figures which learned counsel referred to as mere "statistics" that did not go into the determination of the outcome of the results, differed. In these circumstances, bearing in mind that the IEBC had the custody of the record of elections, the burden of proof shifted to it to prove that it had complied with the law in the conduct of the presidential election especially on the transmission of the presidential election results and it failed to discharge that burden.*

7.7.15 The IEBC also failed to allow the petitioners access to the system to confirm the authenticity of the transmissions to Constituency Tallying Centres (CTCs) and the NTC. The Court, therefore, ruled that the IEBC failed to discharge its burden by demonstrating that it had conducted the elections in accordance with the Constitution and other written law.

7.7.16 To ensure that the use of technology meets the constitutional safeguards set out in Articles 81 and 86 of the Constitution, the High Court noted in *Ahmed Abdullahi Mohammed & Ahmed Muhumid Abdi v Mohamed Abdi Mahamed & 2 Others* (Nairobi Election Petition 14 of 2017) that while there was no obligation to electronically transmit results in all elections, there is nothing that should stop the IEBC from making arrangements for electronic transmission of all results, to fully operationalise section 44 of the Elections Act. Electronic transmission of results would, in the view of the Court, make the results declared at the polling station accountable, credible and verifiable. The Court, therefore, recommended an amendment to Regulations 5 (1A) and 82 of the Elections (General) Regulations to facilitate this progressive use of technology.

7.7.17 The Elections Law (Amendment) Act No. 34 of 2017, which sought to amend, *inter alia*, section 39 of the Elections Act, following the nullification of the first presidential election, was declared unconstitutional for violating Articles 81 and 86 of the Constitution. In *Katiba Institute & 3 Others v Attorney-General & 2 Others,* Nairobi High Court Petition 548 of 2017, section 39(1C) of

the Elections Act, which had proposed to remove the requirement for results to be transmitted using a prescribed form and stated that where there was an inconsistency between physically transmitted results and electronically transmitted ones, the IEBC would determine which results were an accurate reflection of the results as declared at the polling station and these would prevail, did not accord with the constitutional principles of verifiability, transparency and accountability of election results. The Court opined at para 82:

> *The problem in so far as I can see, is with regard to transmission of results from the polling stations to the constituency and national tallying centres as required by the new section 39(1C)*
>
> *(a). First, there is no requirement for the results to be transmitted in any prescribed form which was an essential requirement in the deleted subsection. This was an essential safeguard that guaranteed verifiability, transparency and accountability of the election results transmitted from polling centres to the constituency and national tallying centres. This is made even more troubling by the fact that results will also be physically delivered to the constituency and national tallying centres but in no particular prescribed form. This not only opens the results to possible adulteration and manipulation but also mischief. The amendment obviously reverses the gains the country had made in electoral reforms including results transmitted in a particular form.*

7.7.18 Because the proposed amendment sought to elevate manual result transmission over the electronic one, it undermined verifiability of results, which was the spirit of Articles 81 and 86 of the Constitution, which would revert the country to the pre-2010 era.

> *...a law allowing election officials once again to troop to the Constituency and national tallying centres with hard copies of election results in no particular forms, is to take several steps backward from the progress the country had made to guarantee free, fair and transparent elections in conformity with the Constitution. This amendment is clearly against the spirit of Articles 10, 81 and 86 of the Constitution and cannot pass the constitutionality test of validity.*
>
> (*Katiba Institute & 3 Others v Attorney General & 2 Others,* Nairobi High Court Petition 548 of 2017, para 85)

7.7.19 The Court also impugned section 39(1D) and (E) requiring tallying, verification and declaration of results at the polling station. The latter provision stated that where there is a discrepancy between the electronic and manual results, the IEBC would determine which results should prevail. The Court took issue with the creation of a situation where there was a potential for conflict between manual and electronically transmitted results, yet the two sets of results were to flow from the same process of tallying, verification and declaration. At para 91, the Court asserted:

> *The Constitution is very clear on the accuracy, verifiability and reliability of elections. Accuracy guarantees democratic elections as the foundation of a democratic state. Section 39(1D) as read with 39(1)(F) are vague and ambiguous on which results are the accurate record of the election as tallied verified and announced by the presiding officers since there can be only one result from an election. In this regard, these subsections downgrade the significance of accuracy and transparency of an election thus open room for speculation and manipulation of election results. The Commission has the enviable role of not only guaranteeing the accuracy of elections and results therefrom, but also ensuring that they are in conformity with constitutional principles in Articles 10, 81 and 86. There should never be room again in our election laws for the possibility of manipulating elections or results as this would undermine free and fair*

elections which are the hallmark of a democratic society. I therefore find fault with sections 39 (1D) and 39(1E) of the Act.

7.7.20 The High Court also declared unconstitutional sections 39 (1F) and (G). The former provision provided that the failure by the Presiding Officer to electronically transmit results would not invalidate the results as declared by the Presiding Officer or Returning Officer, while the latter stated that results contained on the IEBC public portal were 'for public information only' and could not be the basis for declaration of results by the Commission. Because these provisions flew in the face of the heavy investment made in elections technology and the clear intention of legislature that results from the primary source matter, and absolved IEBC officers who failed to transmit results without justification, they were inconsistent with constitutional principles.

Editorial Note: Use of technology for the 2022 Elections by IEBC

One of the emerging issues in relation to the 2022 general elections is the question of the complementary mechanism anticipated under s 44A of the Elections Act. While the IEBC has asserted that only BVR kits will be used to identify voters and not a manual register, civil society has challenged this position in the case of *Kenya Human Rights Commission & Others v IEBC & 2 Others,* HCCHR Petition E306 of 2022. It was the IEBC's contention that its decision to not use the manual register was informed by its findings in 2017 that the printed Register provided an avenue for misuse during the voting process. However, concern was expressed that failure to use the manual register would deprive some voters of their Article 38 rights if they could not be identified using electronic voter identification due to lack of fingerprints or technological failure. The High Court ruled that the decision deviated from Regulation 69(1)(e) of the Elections (General) Regulations, which provided, as part of the voting procedure, that identification of voters who could not be identified using electronic voter identification kits was to be done using the printed Register of Voters. The decision to abandon the use of the printed Register was, therefore, a violation of Articles 38, 83 and 86 of the Constitution.

The Court of Appeal in *United Democratic Alliance Party v Kenya Human Rights Commission & Others* Civil Application No E288 of 2022, the appellate court granted a stay of the judgment of the High Court and reiterated that the decision in *IEBC v Maina Kiai & 5 Others*, Civil Appeal No. 105 of 2017 would guide the IEBC in respect of voter identification.

7.8 Electoral Offences and Irregularities

7.8.0.1 Due to the complex, competitive and politically divisive nature of elections, they are vulnerable to abuse, violence and fraud. The causes of disputed elections generally fall into two categories: fraud and mistake. Fraud refers to the deliberate unfair manipulation of the electoral system, whereas mistake refers to unintentional disturbance of the election process usually caused by those administering the election. Whether by fraud (*electoral offence)* or mistake (*electoral irregularities)*, disputed elections have the effect of negating the will of the people (SF Huefner, 'Remedying election wrongs' (2007) 44 *Harvard Journal on Legislation,* 265–326).

7.8.0.2 The law on electoral offences and irregularities is to be found mainly in the Election Offences Act, 2016. Relevant legal provisions may also be found in the Political Parties Act; the Independent Electoral and Boundaries Commission Act, 2011; the Leadership and Integrity Act, 2012; the Election Campaign Financing Act, 2013; the Penal Code; the Anti-Corruption and Economic Crimes Act; National Cohesion and Integration Act; the Bribery Act; and the Electoral Code

of Conduct. Various actors are given a role in relation to securitisation of elections and these include the Office of the Director of Public Prosecutions (ODPP), the IEBC, the National Police Service, the National Cohesion and Integration Commission (NCIC), the Office of the Registrar of Political Parties (ORPP), the National Security Council, and the Judiciary.

7.8.0.3 In relation to election offences, the IEBC investigates election offences and refers the matter to the ODPP or institutes proceedings in the High Court to enforce the Electoral Code of Conduct (*Sabina Wanjiru Chege v IEBC,* Nairobi Constitutional Petition E073 of 2022; and *IEBC v Hon Sabina Wanjiru Chege,* Civil Appeal E255 of 2022 (unreported)) alongside regulating the amount of money that may be spent by or on behalf of a candidate, political party or referendum committee in respect of any election. The IEBC also contributes to securitisation of elections by collaborating with security agencies and other stakeholders to ensure compliance with electoral security laws and intelligence gathering on election security issues.

7.8.0.4 The ODPP directs investigations on election offences (s 22 Election Offences Act) and must commence prosecution within twelve months of the date of the election to which the offence relates, or within 12 months of a section 87 of the Elections Act report by an election court. Accordingly, the Judiciary, in the course of adjudicating electoral disputes, makes findings on whether election offences may have occurred and transmits them to the ODPP for action. The ODPP is to then compile reports on election offences countrywide to guide the appointment of special magistrates to hear election offences cases. Thus, special magistrates are gazetted to try election offences.

7.8.0.5 The phrase '*electoral offence*' refers to an illegal act or conduct that is proscribed under EDR laws, especially acts or conduct to which EDR laws attach penal consequences. The phrase '*electoral irregularities,*' on the other hand, refers to administrative or logistical lapses and breaches of election laws that do not amount to an election offence or a malpractice of a criminal nature. The phrase '*electoral irregularities,*' in the context of EDR usually connotes procedural and administrative failures on the part of election officials, often arising from poor training, incompetence or fatigue.

7.8.0.6 In *Raila Odinga v IEBC & Others,* Supreme Court Presidential Petition 1 of 2017, the Court distinguished 'irregularities' from 'illegalities' as follows: an illegality is a 'breach of the substance of specific law', while 'irregularities' are 'violations of specific regulations and administrative arrangements'.

7.8.0.7 Not every irregularity will lead to nullification of an election result (*Raila Odinga v IEBC & Others,* Supreme Court Presidential Petition 1 of 2017), but the reality that elections cannot be flawless should not be an excuse for allowing elections to degenerate into 'a culture of electoral lawlessness and non-adherence to the rules and laws as long as we get by' (*Clement Kung'u Waibara v Annie Kibeh & Another,* Kiambu Election Petition 1 of 2017). The errors, irregularities or extent of non-compliance must be so grave that the integrity of the election is materially compromised (*Wavinya Ndeti & Another v IEBC & 2 Others,* Machakos Election Petition 1 of 2017). Nevertheless, the electoral management body must bear responsibility for maintaining the highest standards of electoral integrity rather than excuse non-compliance under the guise of human error (*Mohamed Ali Mursal v Saadia Mohamed & 2 Others,* Garissa Election Petition 1 of 2013).

7.8.1 The Law on Election Offences

7.8.1.0 Before 2016, the courts required petitioners seeking to nullify an election on the ground of election offences to prove the offences beyond reasonable doubt (*Raila Odinga v IEBC & 3*

Others, Supreme Court Petition No. 5 of 2013; Frederick Otieno Outa v Jared Odoyo Okello & 4 Others, Supreme Court Petition No. 6 of 2014; Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others, Supreme Court Petition No. 12 of 2014). The courts often gave two justifications for this rule. First, the *quasi-criminal nature* of election offences and the attendant penal consequences made the ordinary civil standard of proof inappropriate. Secondly, the proof of election offences results in curtailment of the convicted person's political rights, by way of debarment from nomination or election for a specified period (section 24(3) of the Election Offences Act, 2016). The court also had power to make a finding during the hearing of an election petition as to whether an election offence had been committed and issue a certificate to this effect under section 87(1) of the Elections Act (George Aladwa Omwera v Benson Mutura Kang'ara & 2 Others, Nairobi High Court Petition 4 of 2013; and Abdinasir Yasin Ahmed & 2 Others v Ahmed Ibrahim Abass & 2 Others, Garissa High Court Petition 9 of 2013).

7.8.2.0 Following amendments to the law in 2016 vide section 21 of the Election Laws (Amendment) Act No. 36 of 2016, several changes were introduced to section 87 of the Elections Act. First, it is no longer mandatory to make a report concerning electoral malpractices of a criminal nature; the court only puts forward an opinion as to whether an election offence *"may have occurred"* (section 87(1) of the Elections Act, 2011) and transmits it to the DPP. Such reports were made in Mohamed Mahamud Ali v IEBC & 2 Others, Mombasa High Court Election Petition No.7 of 2017; Clement Kungu Waibara v Annie Wanjiku Kibeh & Another, Kiambu Election Petition 1 of 2017; Timamy Issa Abdalla v IEBC & 3 Others, Malindi High Court Election Petition 3 of 2017; Arthur Papa v Oku Edward Kaunya & 2 Others, Busia High Court Election Petition 2 of 2017; and Julius Makau Malombe v Charity Kaluki Ngilu & 2 Others Machakos Election Petition 4 of 2017.

7.8.3.0 It is not necessary for the persons who are alleged to have committed electoral malpractices to be enjoined in the election petition. As asserted by Ngugi J in Clement Kungu Waibara v Annie Wanjiku Kibeh, Kiambu Election Petition 1 of 2017 at para 29:

> *What this development means is that an election Court can no longer make a finding that a person has committed an election offence during the hearing of an election dispute. All that the Court can do is to refer a finding to the DPP for further investigations. This, in my view, lessens the need to have a party against whom the Court may ultimately find to have propagated an electoral malpractice which is criminal in nature to be a necessary party in the election Petition.*

7.8.4.0 As such, an election court should exercise caution and circumspection in determining the validity of an election, bearing in mind that there is a further process contemplated by law to determine whether a person is guilty of an election offence (Julius Makau Malombe v Charity Kaluki Ngilu & 2 Others, Machakos Election Petition 4 of 2017; Bernard Kibor Kitur v Alfred Kiptoo Keter & IEBC, Eldoret High Court Election Petition 1 of 2017).

7.8.5.0 Secondly, section 87 read together with section 22 of the Election Offences Act 2016 affirm prosecutorial discretion and, while the prosecutor is mandated to direct the conduct of an investigation, they make their own assessment as to whether to commence prosecution (s 87(3) Elections Act).

7.8.6.0 Thirdly, the prosecution of election offences is time-bound, with the DPP mandated to commence prosecution within a year of the election to which the offence relates, and where a section 87 report is made, proceedings must be commenced within twelve months of the date of the final judgment (s 22 Election Offences Act).

7.8.7.0 The phrase '*may have occurred*', as used in section 87(1) of the Elections Act, 2011, suggests that the courts should use the civil standard of proof in determining whether such malpractices have affected the validity of an election.

7.8.8.0 While previously, the Supreme Court had ruled that the proof of an election offence against the successful candidate would automatically result in the nullification of the election, regardless of its impact on the result of the election (s 80(4)(b) of the Elections Act, 2011; *Frederick Otieno Outa v Jared Odoyo Okello & 4 Others,* Supreme Court Petition No. 6 of 2014; and *Karanja Kabage v Joseph Kiuna Kariambegu Ng'ang'a & 2 Others,* Nairobi Civil Appeal No. 301 of 2013), the Supreme Court declined to nullify an election in *Bernard Kibor Kitur v Alfred Keter & IEBC,* Supreme Court Petition 27 of 2018, asserting that, while there was sufficient evidence of unlawful campaigns, it was not substantial enough to nullify an election. The courts, however, may allow an election petition even where the misconduct, irregularity or malpractice proved by the petitioner does not amount to an election offence (*Ali v Gethinji* [2008] 1 KLR (EP) 215; *Raila Odinga v IEBC & Others,* Supreme Court Presidential Petition 1 of 2017).

7.8.9.0 Further, the proof of a single act of bribery by or with knowledge and consent or approval of the successful candidate or the successful candidate's agents, however insignificant the act may be, is sufficient to invalidate an election (s 80(4)(b) of the Elections Act, 2011). Once bribery is proved, an election court is not at liberty to weigh its impact on the result of the election or allow any excuse whatever the circumstances may be (*Halsbury's Laws of England*, 4th Edition, Vol. 15 at p. 534; *Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others,* *Supreme* Court Petition No. 12 of 2014).

7.8.10.0 For this reason, the allegations of bribery must be proved by clear and unequivocal evidence (*Wilson Mbithi Munguti Kabuti & 5 Others v Patrick Makau King'ola & Another*, Election Petition (Machakos) No. 9 of 2013; *Arthur Papa v Oku Edward Kaunya & 2 Others,* Busia High Court Election Petition 2 of 2017; *Peter Odima Khasamule v IEBC (IEBC) & 2 Others,* Busia High Court Election Petition 4 of 2017; *Samwel Kazungu Kambi v Nelly Ilongo and 2 Others,* Malindi Election Petition 4 of 2017; *Joseph Oyugi Magwanga & Another v IEBC & 3 Others,* Homa Bay Election Petition 1 of 2017; *Peter Odima Khasamule v IEBC & 2 Others,* Busia High Court Election Petition 4 of 2017; and *Kennedy Moki v Rachel Kaki Nyamai & 2 Others,* Kitui Election Petition 2 of 2017). In *Twaher Abdulkarim Mohamed v Mwathethe Adamson Kadenge & 2 Others*, High Court (Malindi) Election Petition Appeal No. 1 of 2014, the Court (citing Halsbury's Laws of England) summarised the law on bribery in the following words:

> *Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by its agents, however insignificant that act may be, is sufficient to invalidate the election, the judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be such, such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason, clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive. Bribery, however, may be implied from the circumstances of the case, and the court is not bound by the strict practice applicable to criminal cases, but may act on the uncorroborated testimony of an accomplice... The court has always refused to give any exhaustive definition on the subject, and has always looked to the exact facts of each case to discover the character of the transaction. A corrupt motive must in all cases be strictly proved. A corrupt motive in the mind of the person bribed is not enough. The question is as to the intention of the person bribing him. Where the evidence as to bribery consists merely of offers or proposals to bribe, stronger evidence will be required.... A general conversation as to a candidate's wealth*

> *and liberality is not evidence of an offer to bribe. General evidence may, however, be given to show that what the character of particular acts has presumably been.*

7.8.11.0 Mere suspicion is not enough, and neither is the confession of the person alleged to have been bribed (*Arthur Papa v Oku Edward Kaunya & 2 Others,* Busia High Court Election Petition 2 of 2017). To succeed in invalidating an election based on the commission of the offence of bribery, not only must there be proof to the required standard, but the evidence must also demonstrate a relationship between a candidate and the offender and the impact of the offence on the election (*Arthur Papa v Oku Edward Kaunya & 2 Others,* Busia High Court Election Petition 2 of 2017; *Julius Makau Malombe v Charity Kaluki Ngilu & 2 Others,* Machakos Election Petition 4 of 2017; *Joseph Oyugi Magwanga & Another v IEBC & 3 Others* Homa Bay Election Petition 1 of 2017). It must be demonstrated that money was given to influence voters or to manipulate them to vote in favour of a candidate (*Samwel Kazungu Kambi v Nelly Ilongo and 2 Others,* Malindi Election Petition 4 & 5 of 2017; *Levi Simiyu Makali v Koyi John Waluke & 2 Others,* Bungoma Election Petition 4 of 2017).

7.8.12.0 Where electoral violence is alleged, it must be widespread, capable of being traced to the respondents, and it must have affected the voting and subsequent election results (*Benson Maneno v Jacob Machekele and Others,* Malindi EP No. 14 of 2013; *Kajembe v Nyange & Others* [2008] 2 KLR 1; *Lenno Mwambura Mbaga & Another v IEBC & Another,* Malindi EP No. 1 & 3 of 2013; *Joho v Nyange & Another* (No 4)(2008) 3KLR(EP); *Justus Gesito Mugali M'mbaya v IEBC & 2 Others,* KKG EP No. 6 of 2013; *Arthur Papa v Oku Edward Kaunya & 2 Others,* Busia High Court Election Petition 2 of 2017; *Levi Simiyu Makali v Koyi John Waluke & 2 Others,* Bungoma Election Petition 4 of 2017).

7.8.1.1 Standard of Proof

7.8.1.1.1 The standard of proof required for an election offence is beyond reasonable doubt. In the 2017 *Raila Odinga case*, the Supreme Court asserted that the standard of proof was not open to reconsideration. In the words of the Court at para 152:

> *[152] We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the Petitioner's submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.*

7.8.1.1.2 In *Joel Makori Onsando & 2 Others v IEBC & 3 Others,* Kisii High Court Election Petition 3 of 2017, violation of section 15(1) of the Election Offences Act on violation of neutrality of public officers was not proved, and the respondents were under no obligation to call for cross-examination of the persons whose conduct was impugned as the burden remained with the petitioner.

7.8.1.1.3 Where the election offence is allegedly committed by the agents of a candidate, the connection with the candidate must be comprehensively established (*Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 Others*, Election Petition (Eldoret) No. 11 of 2013). It is not enough, in such cases, to show that the perpetrators of the election offences were proxies or kinsmen of the candidate. The petitioner must go further and show that the perpetrators were agents of the candidate and engaged in the alleged acts with the candidate's consent.

7.8.1.1.4 The courts may properly dismiss an election petition where the petitioner's witnesses have been accomplices to the alleged election offences or malpractices, as such witnesses are generally unreliable (*Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 Others*, Election Petition

(Eldoret) No. 11 of 2013; *Sambu v Genga & Another* [2008] 1 KLR (EP) 396; and *Wekesa v Ongera & Another* (No. 2) [2008] 2 KLR (EP) 66). The courts may also dismiss an election petition where there are material inconsistencies in the evidence adduced by the petitioner's witnesses (*Karauri v Kang'ethe & Another* [2008] 1 KLR (EP) 135; and *Wekesa v Ongera & Another* [2008] 2 KLR (EP) 66). Further, the courts will not allow an election petition where the evidence is scanty, or where it appears that the petition is based on speculation, suspicion and guesswork (*Muliro v Musonye & Another* [2008] 2 KLR (EP) 52 at 65).

7.8.2 *The Law on Electoral Irregularities*

7.8.2.1 Allegations of electoral irregularities must be proved to the satisfaction of the court. The standard of proof for electoral irregularities is higher than the civil standard of balance of probabilities, but lower than the criminal standard of proof beyond reasonable doubt (*Raila Odinga v IEBC & 3 Others,* Supreme Court Petition No. 5 of 2013; and *Benard Shinali Masaka v Boni Khalwale & 2 Others,* Kakamega Election Petition No. 2 of 2008).

7.8.2.2 The *mere* proof or admission of electoral irregularities, without more, will not automatically vitiate an election. This means a petitioner who seeks to nullify an election on the ground of irregularities must show that the irregularities were of such a nature or magnitude as to substantially affect the result or integrity of the election (*Raila Odinga v IEBC & 3 Others,* Supreme Court Petition No. 5 of 2013). This rule, commonly referred to as '*the materiality test*,' requires an election court to strive to give effect to the will of the electorate and preserve an election. It applies even where there are significant breaches of the rules or duties of the election officials, if the irregularities in question have not affected the result of the election (s 83 of the Elections Act, 2011; *Raila Odinga v IEBC & 3 Others,* Supreme Court Petition No. 5 of 2013; and *Fitch v Stephenson* [2008] EWHC 501 (QB)).

7.8.2.3 While in the 2013 *Raila Odinga case,* the petition had been dismissed for failure to demonstrate how the irregularities affected the outcome, in *Raila Odinga v IEBC & Others,* Supreme Court Presidential Petition 1 of 2017, the apex Court asserted that the test for invalidity was a disjunctive one, and it was sufficient to prove non-compliance with the Constitution or electoral legislation.

> *In concluding this aspect of the petition, it is our finding that the illegalities and irregularities committed by the 1st respondent were of such a substantial nature that no Court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can, in good conscience, declare that they do not matter, and that the will of the people was expressed nonetheless. We have shown in this judgment that our electoral law was amended to ensure that in substance and form, the electoral process and results are simple, yet accurate and verifiable. The presidential election of 8th August, 2017, did not meet that simple test and we are unable to validate it, the results notwithstanding.*

7.8.2.4 Nevertheless, the Supreme Court indicated that it was still good practice to inquire into the potential effect of irregularities of an election:

> *373 ...At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this Country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no*

reasonable tribunal would uphold it.

> *374...even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.*

7.8.2.5 Irregularities and illegalities are not a sufficient basis for annulling the election if it was not established that they affected the election outcome (*Clement Waibara v Annie Wanjiku Kibeh & Another,* Supreme Court Petition 24 of 2018).

7.8.2.6 Some of the irregularities that are not sufficient of themselves to nullify an election result include failure to stamp statutory forms (*John Munuve Mati v RO Mwingi North & Others,* Kitui Election Petition 3 of 2017; *Kalla Jackson Musyoka v IEBC & 2 Others,* Machakos Election Petition 4 of 2017; *Mark Nkonana Supeyo & Another v IEBC & 2 Others,* Kajiado Election Petition 1 of 2017; *IEBC v Stephen Mutinda Mule,* Civil Appeal 219 of 2013; *Kakuta Maimai Hamisi v Peris Pesi Tobiko & Others,* Nairobi High Court Election Petition 5 of 2013); failure to sign statutory forms by candidates or agents (*Ahmed Abdullahi Mohamad & Another v Mohamed Abdi Mohamed & 2 Others,* Nairobi High Court Election Petition 14 of 2017 (consolidated with Garissa High Court Election Petition 3 of 2017); *John Murumba Chikati v Returning Officer Tongaren Constituency & 2 Others,* EP No. 4 of 2013); failure to comply with the assisted voting procedure (*Mohamed Mahamud Ali v IEBC & 2 Others,* Mombasa EP 7 of 2017; *Ahmed Abdullahi Mohammed & Ahmed Muhumid Abdi v Mohamed Abdi Mahamed, Patrick Gichohi & IEBC,* Nairobi EP 14 of 2017) and discrepancies between results of different elective posts (*Mohamed Mohamud Ali v IEBC & 2 Others,* Mombasa High Court Election Petition 7 of 2017; *Jackton Nyanungo Ranguma v IEBC & 2 Others,* Kisumu Election Appeal 1 of 2017; *Timamy Issa Abdalla v IEBC & 3 Others*, Mombasa Election Appeal No 4 of 2018).

7.8.2.7 Failure to use the prescribed form to declare results may lead to nullification of the results in the absence of a satisfactory explanation by IEBC, and where the effect is such that the results from the forms could not be said to be credible, accurate and verifiable due to lack of security features, serial numbers or where the form is unoriginal (*Raila Odinga v IEBC & Others,* Supreme Court Presidential Petition 1 of 2017; *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others,* Supreme Court Petition 7 & 9 of 2018 (consolidated)).

7.8.2.8 However, where the irregularity does not affect the results as declared in the polling station, courts will be hesitant to nullify the election result because the polling station remains the true locus of the expression of the will of the voters (*IEBC v Maina Kiai & 5 Others*, *Civil Appeal No. 105 of 2017*; *Timamy Issa Abdalla v IEBC & 3 Others,* Malindi High Court Election Petition 3 of 2017; *Alfred Nganga Mutua v Wavinya Ndeti & Another,* Supreme Court Petition 11 & 14 of 2018 (consolidated)). Where a deviation from the prescribed form does not affect the substance thereof or was not calculated to mislead, it will not render the said form void (s 26 Statutory Instruments Act).

7.8.2.9 Failure to sign a statutory form by a presiding or returning officer goes to the root of the petition and results from such an electoral area are declared null and void (*Raila Odinga v IEBC & Others,* Supreme Court Presidential Petition 1 of 2017; *Josiah Tarayia Kipelian Kores & Another v Joseph Jama Ole Lenku & 4 Others,* Kajiado Election Petition 2 of 2017; *Ahmed Abdullahi Mohamad & Another v Mohamed Abdi Mohamed & 2 Others,* Nairobi High Court Election Petition 14 of 2017 (consolidated with Garissa High Court Election Petition 3 of 2017); *Cyprian Awiti & Another v IEBC& 3 Others,* Kisumu Election Appeal 5 of 2018).

7.8.2.10 Electoral irregularities often revolve around errors and omissions in the filling, signing, and transposition of election results, and alterations, cancellations or overwriting on such results. Ideally, every alteration, cancellation and/or overwriting with respect to election results should be countersigned and stamped by the presiding officer (*William Odhiambo Oduol v IEBC & 2 Others,* Kisumu Election Petition No. 2 of 2013). Generally, election courts are reluctant to uphold election results which have multiple cancellations, alterations or overwriting unless the presiding officer countersigns them. In *Jared Odoyo Okello v IEBC & 3 Others,* Kisumu Election Petition No. 1 of 2013, the Court opined as follows:

> *...although the regulations do not explicitly state that every cancellation or alteration to the results declaration form has to be counter-signed, it should always occur to the presiding officer that a form containing results is a sacred document. He has to own the contents therein and to justify them in any litigation. A petition may be won or lost on the basis of such a declaration. The law requires him to complete it and sign it together with his deputy and candidates/agents present. If he has to correct any entry thereon this has to be brought to the attention of the candidates/agents present first for them to appreciate the need for the correction. Such correction has to be countersigned, dated and stamped.*

(See also *William Kabogo Gitau v George Thuo & 2 Others,* Nairobi Election Petition No. 10 of 2008)

7.8.2.11 Where there are discrepancies between the votes cast or voter turnout in two or more elections, which were held together, the election court may examine the returns made in the respective elections to establish whether a serious electoral malpractice may have occurred (*Dickson Mwenda Githinji v Gatirau Peter Munya & 2 Others,* Nyeri Civil Appeal No. 38 of 2013). In *William Kabogo Gitau v George Thuo & 2 Others,* Nairobi Election Petition No. 10 of 2008, the defunct Electoral Commission of Kenya published the total number of votes cast in the parliamentary, presidential and civil elections in Juja constituency as 114,808, 119,050 and 119,110 respectively. The petitioner alleged that the discrepancies in the total votes cast in the three elections, which were held together in the same polling stations as part of a general election, was sufficient proof that the parliamentary election had been rigged in favour of the 1st Respondent. The Court held as follows:

> *Having carefully evaluated the evidence adduced in this regard, it was clear to the court that the discrepancies between the presidential and civic elections on the one hand, and that of the parliamentary election on the other is such that it raises eyebrows. The said elections were conducted from one voters roll...The 3rd Respondent cannot simply explain away the discrepancies in the voter turnout between three elections that were held on the same day and in the same polling stations by stating that the discrepancies could be as a result of his failure to include certain results in the final tally as contained in Form 17A. This court takes judicial notice of the fact that in normal circumstances, the tally of the total number of votes cast in the presidential, parliamentary and civic elections is expected to be more or less the same. There may be instances where a voter makes a conscious choice to vote in a particular election and not in the other election. Such instances are, however, few. The difference of over 5,000 votes between the parliamentary vote on the one hand and the presidential and the civic vote on the other, in the circumstances of this petition, is evidence of serious electoral malpractice that was apparent during the conduct of the elections at Juja constituency.*

7.8.2.11 The examination or comparison of the results of two or more elections, however, is a matter at the discretion of the election court, to be exercised judiciously considering all relevant factors (*Dickson Mwenda Githinji v Gatirau Peter Munya & 2 Others,* Nyeri Civil Appeal No. 38 of 2013; *Mohamed Mohamud Ali v IEBC & 2 Others,* Mombasa High Court Election Petition 7 of 2017; *Jackton Nyanungo Ranguma v IEBC & 2 Others,* Kisumu Election Appeal 1 of 2017; and *Timamy Issa Abdalla v IEBC & 3 Others,* Mombasa Election Appeal No 4 of 2018).

CHAPTER 8

APPENDICES

APPENDICES

8.1 Timetable of Key Steps in Presidential Election Petitions

STEP	TIME WITHIN WHICH THE STEP MUST BE TAKEN	LEGAL PROVISION
1. Filing of Election Petition; • A petition shall conform be in Form A set out under the Second Schedule • Petitioner shall prepare 8 copies of the petition and all accompanying documents	• ***Seven days*** of the Declaration of Presidential Election Results • Where the petition is filed on the last eligible day of filing, the petition shall be presented at the Registry before 1400hrs of that day	• Article 140 (1) of the Constitution of Kenya, 2010 • Rule 6 of the Supreme Court (Presidential Election Petition) Rules, 2017
2. Deposit of Security for Costs by the Petitioner	***Before*** Filing of the Election Petition	Section 78 (1) of the Elections Act, 2011 Rule 7 (3) of the Supreme Court (Presidential Election Petition) Rules, 2017.
3. Furnishing of Election Materials and Documents to the Supreme Court	***At the time*** of lodging the Election Petition	Paragraph 5 of the First Schedule of the Supreme Court (Presidential Election Petition) Rules, 2017
4. Service of the Election Petition Directly or in a Newspaper of National Circulation	***24 hours*** of the Filing of the Election Petition	Rule 10 (1) of Supreme Court (Presidential Election Petition) Rules, 2017
5. Service of Election Petition by Electronic Means	***Six hours*** of the Filing of the Election Petition	Rule 10 (2) of the Supreme Court (Presidential Election Petition) Rules, 2017
6. Filing of Response to the Election Petition	***Four days*** of the Service of the Election Petition	Rule 11 (1) of the Supreme Court (Presidential Election Petition) Rules, 2017
7. Service of Response to Election Petition	***Four days*** of the Service of the Election Petition	Rule 11 (1) of the Supreme Court (Presidential Election Petition) Rules, 2017

STEP	TIME WITHIN WHICH THE STEP MUST BE TAKEN	LEGAL PROVISION
8. Filing and Service of Rejoinder	***Within twenty-four hours*** of being served with the response	Rule 11 A of the Supreme Court (Presidential Election Petition) Rules, 2017.
9. Filing and serving an interlocutory application	Filing at ***close of pleadings*** and service ***within 24 hours*** of filing	Rule 17 (2) of the Supreme Court (Presidential Election Petition) Rules, 2017.
10. Filing a response to an interlocutory application together with written submissions not exceeding five pages	***Within 24 hours*** of service	Rule 17 (3) of the Supreme Court (Presidential Election Petition) Rules, 2017.
11. Filing third party applications	***At close of pleadings***	Rule 17 A of the Supreme Court (Presidential Election Petition) Rules, 2017.
12. Pre-Trial Conference	***Eight days*** of the Filing of the Election Petition	Rule 14 (1) of the Supreme Court (Presidential Election Petition) Rules, 2017
13. Hearing of Election Petition	***Immediately after*** the Pre-Trial Conference	Rule 18 of Supreme Court (Presidential Election Petition) Rules, 2017
14. Determination of the Election Petition	***14 days*** of the date of the Filing of the Election Petition	Article 140 (2) of the Constitution of Kenya, 2010

8.2 Timetable of Key Steps in Parliamentary and County Election Petitions and Party List Petitions

STEP	TIME WITHIN WHICH THE STEP MUST BE TAKEN	LEGAL PROVISION
1. Filing of Election Petition (Form 1)	***28 days*** of the Declaration of the Results of the Relevant Parliamentary or County Election	Article 87 (2) of the Constitution of Kenya, 2010
2. Registrar's Acknowledgment of the Receipt of Election Petition (Form 2)	At the Time of the Filing of the Election Petition	Rule 8 (5) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017
3. Deposit of Security for Costs by the Petitioner	***10 days*** of the Filing of the Election Petition	Section 78 (1) of the Elections Act, 2011; Rule 13(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017;
4. Registrar's Issuance Receipt for Security and Filing of Duplicate thereof	Upon Confirming or Receiving Deposit of the Security for Costs	Rule 13 (3) (a) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017
5. Designation and Gazettement of the Judge or Magistrate to Hear Election Petition	Before or at the close of pleadings	Rule 6 (2) and (3) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017
6. Service of the Election Petition Directly or in a Newspaper of National Circulation (Form 3)	***15 days*** of the Filing of the Election Petition	Sections 76 (1) (a) and 77 (2) of the Elections Act, 2011; Rule 10 (1) (Parliamentary and County Elections) Petitions Rules, 2017.
7. Filing of Response to the Election Petition (Form 4)	***7 days*** of the Service of the Election Petition	Rule 11 (1) of the Elections (Parliamentary and County) Petitions Rules, 2017
8. Service of Response to Election Petition	***7 days*** of the Service of the Election Petition	Rule 11 (4) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017
9. Pre-Trial Conference	***7 days*** of the Filing of the Last Response to the Election Petition	Rule 15 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017
10. Filing of interlocutory applications	***On or before*** Pre-Trial Conference (*unless by its nature it could not be brought before*)	Rule 15 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017
11. Determination of Interlocutory Applications	Between the Pre-Trial Conference and the Commencement of the Trial of the Petition	Rule 15 (1) (c) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017
12. Issuance of directions as to the storage, handling and delivery of ballot boxes and other election materials and documents to election court	At the pre-trial conference	Rule 16 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017

STEP	TIME WITHIN WHICH THE STEP MUST BE TAKEN	LEGAL PROVISION
13. Registrar's Notice of the Time and Place for the Trial of the Election Petition	***7 days*** before the date fixed for the Trial	Rule 18 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017
14. Commencement of the Trial of the Election Petition	As Ordered by the Court and Notified by the Registrar	Rule 18 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017
15. Determination of the Election Petition	***6 months*** of the date of the Filing of the Election Petition	Article 105 (2) of the Constitution of Kenya, 2010

8.3 Timetable of Key Steps in Appeals to the Court of Appeal

STEP	TIME WITHIN WHICH THE STEP MUST BE TAKEN	LEGAL PROVISION
1. Filing of notice of appeal*	Within 7 days of decision	Rule 34 Elections (Parliamentary and County Elections) Petition Rules 2017; Rule 6 (2) of the Court of Appeal (Election Petition) Rules 2017
2. Filing of notice of cross-appeal	Within 5 days of service of the Record of Appeal	Rule 7 (4) of the Court of Appeal (Election Petition) Rules 2017
3. Service of notice of appeal	Within 5 days of filing	Rule 15 of the Court of Appeal (Election Petition) Rules 2017
4. Deposit of Security for Costs by the Appellant	***10 days*** of the Filing of the Record of Appeal	Rule 26 of the Court of Appeal (Election Petition) Rules 2017
5. Filing of Record of Appeal	Within 30 days	S 85A (1) (a) of the Elections Act; Rule 8 (5) of the Court of Appeal (Election Petition) Rules 2017
6. Filing of application to strike out notice of appeal or cross appeal	Within 7 days of service	Rule 17 of the Court of Appeal (Election Petition) Rules 2017
7. Filing and Service of Response to the Election Appeal*		
8. Pre-Trial Conference	***7 days*** of the Filing of the Last Response to the appeal	Rule 18 of the Court of Appeal (Election Petition) Rules 2017
9. Service of written submissions	Before or within seven days after lodging the submissions	Rule 20 of the Court of Appeal (Election Petition) Rules 2017
10. Determination of the Appeal	***6 months*** of the date of the Filing of the Election Appeal	s 85A Elections Act; Rule 22 of the Court of Appeal (Election Petition) Rules 2017

*While the rules are silent on this, the jurisprudence of the court indicates that this timeline applies to appeals against interlocutory applications

*Rules appear to be silent on timelines for filing and service of responses

8.4 Timetable of Key Steps in Appeals to the High Court

Step	Time within which the Step Must be Taken	Legal Provision
1. Filing of memorandum of appeal	Within 30 days of judgment	Rule 34 (3) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017
2. Service of memorandum of appeal	Within 5 days of filing of memorandum of appeal	Rule 34 (5) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017
3. Filing record of appeal	Within 21 days of filing of memorandum of appeal	Rule 34 (6) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017
4. Fixing a date for giving directions and hearing of the appeal	Within 30 days of lodging memorandum of appeal	Rule 34 (9) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017
5. Determination of the Appeal	***6 months*** of the date of the Filing of the Election Appeal	s 75(4) Elections Act.

8.5 Checklist for Parliamentary and County Election Petitions and Party List Petitions

Item	Relevant Legal Provision	Yes	No
Election Petition Substantially Complies with Minimum Requirements as to Contents and Form	Rules 8 and 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017		
Election Petition is Signed by the Petitioner or the Petitioner's Duly Authorised Agent	Rule 8 (4)(a) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017		
Election Petition is in Sufficient Number of Copies for the Court and all the Respondents named therein	Rule 8 (4)(c) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017		
Election Petition is Supported by an Affidavit Sworn by Petitioner or any of the Petitioners	Rule 8 (4)(b) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017		
Election Petition is Accompanied by Affidavits Sworn by the Petitioner's Witnesses	Rule 12 (3) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017		
Each Witness Affidavit is in Sufficient Number of Copies for the Court and all the Respondents named in the Petition	Rule 12 (11) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017		
The Petitioner Has Paid Court Filing Fees	Rule 32 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017		
The Petitioner Has Deposited Security for Costs within 10 days of Filing the Petition	Rule 13 (1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 Section 78 of the Elections Act, 2011		
The Petitioner's Advocate has a current Practising Certificate	Sections 2, 9 (c), 24, 31, 33 and 34, 34A and 34B of the Advocates Act		

8.6 Checklist for Responses to Parliamentary and County Election Petitions and Party List Petitions

Item	Relevant Legal Provision	Yes	No
The Response Substantially Complies with Minimum Requirements as to Contents and Form	Rule 11 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017		
The Response is in Sufficient Number of Copies for the Court and all the other Parties to the Election Petition	Rule 11 (3) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017		
The Response is Accompanied by the Respondent's Witness Affidavit(s)	Rule 12 (6) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017		
Each Witness Affidavit is in Sufficient Number of Copies for the Court and all the other Parties to the Election Petition	Rule 12 (11) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017		
The Respondent Has Paid Any Applicable Court Fees	Rule 32 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017		
Respondent's Advocate holds a current Practising Certificate	Sections 2, 9 (c), 24, 31, 33 and 34, 34A and 34B of the Advocates Act		

8.7 Scrutiny of the Ballot Boxes - TEMPLATE A

Name of Polling Station	Serial Number of Ballot Boxes	Ballot Box Status	Whether the Result Form A was Affixed	Serial Number of Seals (Before Opening)	Serial Number of the Seals as Per the Polling Station Diary	Serial NumberOf Seals(Used To Close The BoxAfterScrutiny)
				APPERTURE	APPERTURE	APPERTURE
				.....	.....	.....
				OTHERSEALS	OTHERSEALS	OTHERSEALS
				1.....	1.....	1.....
				2.....	2.....	2.....
				3.....	3.....	3.....
				4.....	4.....	4.....

General Observations:

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WitnessedBy:

Name	Designation(Petitioner/ Respondent's Agent,Petitioner/ Respondent'sAdvocate e.t.c)	IDNo.	Date	Signature

Confirmed by:

Deputy Registrar:

Name.....

Signature .....

Date.....

8.8 Recount of Ballot Papers in the Ballot Boxes - TEMPLATE B

Serial Number of the Ballot Box	Total No. of Registered Voters	Total number of Counter foils used	Total number of Spoilt Ballot papers		Total number of Rejected Ballot Papers	Total Number of Valid Votes Cast	Votes Garnered by Each of The Candidates				Total Number of Votes Cast
							Candidate A	Candidate B	Candidate C	Candidate D	
				As per the recount							
				As per the Result Form A in the box							

General Observations:

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Witnessed By:

Name	Designation (Petitioner/ Respondent's Agent, Petitioner/ Respondent's Advocate e.t.c)	IDNo.	Date	Signature

Confirmed by:

Deputy Registrar:

Name.....

Signature .....

Date.....

SCRUTINY OF THE POLLING STATION REGISTER

8.9 Scrutiny of the Polling Station Diary (PSD) – TEMPLATE C

NameofPollingStation	
No.of registred voters	
No.of voters identified manually where KIEMS did not work	
No.of Valid votes cast	
No. ofform 32 A sused (Used for voters who were assisted to vote)	

General Observations:

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Witnessed By:

Name	Designation (Petitioner/ Respondent's Agent, Petitioner/ Respondent's Advocate e.t.c)	IDNo.	Date	Signature

Confirmed by:

Deputy Registrar:

Name.....

Signature.....

8.10 Scrutiny of Original Result Form (34,35,36,37,38,39) - TEMPLATE D

SERIAL NUMBEROF THE RESULT FORM (34,35,36, 37,38,39) INDICATE THETYPE OF FORM	WHETHER OR NOTSIGNED BYTHEP.O	SecurityFeatures									
		Is there an IEBC logo visible onlyunder UV light		Is the word independent electoral and boundaries commission printed inmicrotext only visible under magnifying glass?		Is the form serialized with tapered number codes		Is there one generic watermark visible when visually examined undernormal light?		Is there visible anti-copy features such as:the word "Copy"written on the entiresurface	
		Yes	No	Yes	No	Yes	No	Yes	No	Yes	No

Votes Garnered by each of the Candidates as per the Original Result Form

S. No.	Name of Candidate	Votes Garnered as per the Result Form
1		
2		
3		
4		

General Observations:

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Confirmed by:

Deputy Registrar:

Name .....

Signature .....

Date .....

8.11 Scrutiny of Certified Result Form (34,35,36,37,38,39) - TEMPLATE E

SERIAL NUMBER OF THEBALLOT BOX	SERIAL NUMBER OF THERESULT FORM (34,35,36,37,38,39) INDICATE THE TYPE OF FORM	WHETHER OR NOTSIGNED BY THE P.O	Security Features					
			Is there a tapered Serialization		Is the word independentelectoral and boundariescommission printed inmicrotext visible even if not clear		Is the word COPY COPY COPY visible on the form? – being the product ofexposing the original formonphotocopying process	
			Yes	No	Yes	No	Yes	No

Votes Garnered by each of the Candidates as per the Certified Result Form

S. No.	Name of Candidate	Votes Garnered as per the Result Form
1		
2		
3		
4		

General Observations:

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Confirmedby:

Deputy Registrar:

Name.....

Signature.....

8.12 Scrutiny of SD Cards – TEMPLATE F – Presidential Results

Serial Number of the SD Card.....

a) Voters Details on the SD Card

No. of Registeredvoters	Voter turn out identification					Total number of voters who turned up to vote
	Biometric identification	Document search with biometrics	Document search without biometrics	Alphanumeric search with biometrics	Alphanumeric search without biometrics	

b) Scrutiny of the Scanned Result Form 34 A

SERIAL NUMBER OF THE RESULT FORM 34 A	WHETHER OR NOT SIGNED BY THE P.O	SecurityFeatures					
		Is there a tapered Serialization		Is the word independent electoral and boundaries commission printed in micro text visible even if not clear		Is the word COPY COPY COPY visible onthe form? – being the product of exposing the original form on photocopying process	
		Yes	No	Yes	No	Yes	No

c) Votes Garnered by each of the Candidates as per the Scanned Result Form

S. No.	Name of Candidate	Votes Garnered as per the Result Form
1		
2		
3		
4		

General Observations:

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Witnessed By:

Name	Designation (Petitioner / Respondent's Agent ,Petitioner/ Respondent's Advocatee.t.c)	IDNo.	Date	Signature

Confirmed by:

Deputy Registrar:

Name.....

Signature.....

Date.....

8.13 Scrutiny of the SD Cards to Confirm Voter Turnout - TEMPLATE G

(In respectto Gubernatorial, Senatorial, Women Rep, Member of National Assembly and Member ofCounty Assembly)

Serial Number of the SD Card.....

a) VotersDetailson the SD Card

No. of Registeredvoters	Voter turn out identification					Total number of voters who turned upto vote
	Biometric identification	Document searchwith biometrics	Document search without biometrics	Alpha numeric search with biometrics	Alpha numeric search without biometrics	

General Observations:

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Witnessed By:

Name	Designation (Petitioner / Respondent's Agent, Petitioner / Respondent's Advocatee.t.c)	IDNo.	Date	Signature

Confirmed by:

Deputy Registrar:

Name.....

Signature.....

Date.....

THE JUDICIARY

The Chief Registrar of the Judiciary Supreme Court Building,
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Judiciary Website: www.judiciary.go.ke
Instagram: judiciary_ke

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