ELECTION TECHNOLOGY LAW AND THE CONCEPT OF "DID THE IRREGULARITY AFFECT THE RESULT OF THE ELECTIONS?"

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ABSTRACT:

Four issues predominantly determine election integrity. These are: admission of eligible voters, collection of ballots from voters, counting of ballots, and public belief that the overall electoral process is transparent and accurate. If the public or any candidate has no confidence in the integrity of the election result, disputation arises. It is in this context that election disputes are inherent to elections. In any election petition, there is one critical issue that must be proved for the petition to succeed – that the alleged irregularity affected the result of the election. Failure to prove that the irregularity affected the result of the election means that the petition must fail. This paper explains the concept of irregularity affecting the results of the election and uses case law to illuminate which result must be affected and how it is affected. The paper offers a synopsis of election technology law in Kenya and emerging jurisprudence therefrom. It explores legal issues on computer foresincs and hacking of election technology equipment.

INTRODUCTION:

The electoral process is vulnerable to misuse in several ways and in the process, distorting the picture in which the obvious may be completely different from the real. Challenging an election, its conduct or its results, should not be perceived as a reflection of weakness … but proof of the strength, vitality and openness of the political system - the right to vote would be merely abstract if the right to sue to enforce it was not guaranteed in law. (As per Denis Petit (OSCE / ODIHR), Resolving Election Disputes, 2000). The contest in an election petition is really between the electoral constituency on one hand and the person or persons complained of on the other. Once the machinery of election dispute resolution has been activated, the petition continues for the benefit of the whole voting constituency. It is for this reason that *prima facie*, a petition once filed cannot be withdrawn. (See **Sheodhan Singh -v- Mohan Lal Gautam (1969) 3 SCR 417; (1969) 1 SCC 408);** see also **rule 21 (1)** of the **Kenya Elections (Parliamentary and County elections) Petition Rules, 2017).**

Election petitions fall within three, sometimes overlapping, categories: First, petitions alleging an error on the part of an election official (this includes a petition

based, for example, on a complaint that the votes were not correctly adjudicated as valid or invalid or not counted or not tallied accurately, or that some administrative error occurred in filling election Forms); second, petitions alleging that a candidate or agent of a candidate committed an electoral malpractice of a criminal nature; and third, that the electoral process did not substantially comply with the constitutional principles of the electoral system. In any of the three categories, an allegation of non-compliance and violation of constitutional principles of the electoral system is made. It is thus imperative to identify the constitutional principles and the legal framework underpinning Kenya's electoral system.

CONSTITUTIONAL PRINCIPLES ANDLEGAL FRAMEWORK FOR KENYA'S ELECTORAL SYSTEM

The legal framework for Kenya's electoral system is contained in Articles 81 and 86 of the Constitution. In addition, **Sections 39 (1) (C)** and **Section 44 (4),(5)** and **(7)** of the Elections Act as amended in 2016 make provision for technology in Kenya's electoral law. Further, **Section 44 (A)** of the **Election Act** as amended in 2017 underpins the regime for election technology law. Other provisions of the Election Act provide the regulatory framework for the conduct of elections.

Article 81 (e)of the Constitution establishes the principle of "free and fair elections" as the cornerstone of the electoral system in Kenya. The Article constitutionalizes and describes the environment in which elections are to be conducted. The elections must be conducted in a free and fair environment and the voting must be by secret ballot. Free and fair elections is defined to include an election that is free from violence, intimidation, improper influence and corruption; the electoral process must be transparent and administered in an impartial, neutral, efficient and accurate manner. The atmosphere in which the elections are conducted determines the quality, integrity and credibility of the electoral results.

Article 86 makes provision for the method, technique and instrumentalism through which elections are conducted on the voting day - whatever voting method is used, the system must be simple, accurate, verifiable, secure, accountable and transparent. The results of the votes cast must be announced promptly by the presiding officer at each polling station and such results must be openly and

accurately collated. In addition, appropriate structures should be put in place to eliminate electoral malpractices and there must be safekeeping of election materials.

The above Constitutional Articles represent the legal framework of the electoral system in Kenya. The grounds in support of any election petitions will invariable cite violation of these Constitutional Articles. Any Petition that is not grounded on the foregoing Articles is bad and misconceived in law. The election court must determine each and every allegation pleaded in the petition. In so doing, the court must make a determination on the contested issues of fact. As was stated in the Tanzania case of **Stanslaus Rugaba Kasusura & the Attoreny General -v-Phares Kabuye(1982) Tanzania Law Reports at 338**, a judgment that leaves contested material issues of fact unresolved is fatally defective because it decides nothing in so far as material facts are concerned; it is not a judgment which can be upheld or upset; it can only be rejected; the only course is for an appellate court to set it aside.

QUANTITATIVE AND QUALITATIVE PRINCIPLES OF KENYA'S ELECTORAL SYSTEM

Articles 81 (e)and **86** represent the quantitative and qualitative principles of Kenya's electoral system. Whereas **Article 81(e)** is essentially qualitative, **Article 86** is primarily quantitative. The requirement for an accurate, verifiable and accountable electoral system imposes a quantitative assessment of the electoral results. The concept that elections must be free from violence, intimidation, improper influence and corruption buttresses the qualitative aspects of the electoral process. Equally, the requirement that the electoral process must be transparent and administered in an impartial, neutral and efficient manner is qualitative in nature. It is noteworthy that as a general principle, qualitative requirements cannot be measured quantitatively. The essence of qualitative requirements is to appraise the entire electoral process prior to and during the voting day. Qualitative requirements evaluate whether the environment in which the election was conducted was free and fair within the meaning of **Article 81 (e)** of the Constitution. Substantial non-

compliance with the qualitative requirements render the entire electoral results void.

Justice Kimaru in **William Kabogo Gitau -v- George Thuo & 2 Others[2010] eKLR,** set out the principles on which qualitative approach operates. He opined that the court should look more into the effect of malpractices upon the systems and processes employed in the conduct of the elections. The number of votes by which the candidate won will not be the issue, for it is the integrity of the process which has been fundamentally dented by the electoral malpractices. Any malpractices which seriously impeach the process so also impeach the results coming from that process. Making the same observation, Lenaola, J. (as he then was) in **Masaka -v- Khalwale & 2 Others(2011) 1 KLR 390 at 392** expressed that "…where there was no way of authenticating an election by use of statutory documents, the results were irrelevant because the whole process was as crucial as the final results". Ina qualitative context, the election results are as good as the process that led to those results.

The quantitative requirements deal with the mathematical or arithmetic calculations of results of the election. Quantitative aspects relate to the counting, tallying, accuracy, verifiability and transmission of results. It also deals with whether a vote cast was rightfully labelled as valid, invalid, rejected or stray. In this context, the paper trail of the votes cast is critical in determining quantitative aspects of the electoral process. The quantitative requirement deals with numbers and figures. In the Uganda case of **Winnie Babihuga -v- MasikoWinnie Komuhamhia & OthersHCT-OO-CV-EP-004-2001**, Justice Musoke Kibuka expressed as follows:

> ***"The quantitative test was said to be most relevant where numbers and figures are in question whereas the qualitative test is most suitable where the quality of the entire election process is questioned and the court has to determine whether or not the election was free and fair"***

To supplement the human element in dealing with quantitative and qualitative aspects of electoral law, the use of technology is now part and parcel of Kenya's electoral system. Before examining in detail, the concept of "Did the irregularity

affect the result of the election" it is pertinent to decipher the scope, application and extent of election technology law in Kenya. This is relevant because the technology adopted may impact on the qualitative and quantitative aspects of the results of the elections.

ELECTION TECHNOLOGY LAW IN KENYA

Election technology law in Kenya is contained in **Sections 6A, 44** and **39** of the **Elections Act** as amended in 2016and **Section 44 A** of the **Elections Act** as amended in 2017 as read with **Article 86 (a)** of the Constitution that requires an electoral system that is simple, accurate, verifiable, secure, accountable and transparent. In **IEBC -v- Maina Kiai & 5 Others, Civil Appeal No. 105 of 2017,** the Court of Appeal expressed that the use of information technology is to guarantee the accuracy and integrity of the results of the election. The Court expressed at pages 70-71 of its judgment that:

> **"We are satisfied that the electronic transmission of the already tabulated results from the polling station is a critical way of safeguarding the accuracy of the outcome of the elections..."**

Section 6A (3) (b)of the **Elections Act** as amended in 2016 require the Electoral Commission to publish the **Register of Voters** online and in such other manner as may be prescribed by regulations. Under **Section38A** of the **Elections Act**, the total number of registered voters per polling station should not exceed seven hundred (700). The definition and contents of the Register of Voters as per **Section 4** of the **Elections Act** must be borne in mind. Under the Section, the Principal Register of Voters comprise of:

(a) a poll register in respect of every polling station;
(b) award register in respect of every ward;
(c) a constituency register in respect of every constituency;
(d) a county register in respect of every county and
(e) a register of voters residing outside Kenya.

The requirement to publish the Register of Voters online puts to rest the incessant arguments on where to find the Register of Voters. The on-line Register is critical in an election petition particularly where an allegation is made that the number of votes cast exceed the registered voters. A prudent petitioner out of abundance of

caution should have the on-line register as published in his/her possession. The provisions of the Evidence Act relating to hearsay, admissibility and authentication of electronic documents must be complied with. In case of doubt, a petitioner must at the earliest opportunity invoke the advice by the Supreme Court in the **Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others(Petition No 2B of 2014)**and apply to the Electoral Commission for a copy of the Register. In this case, the Supreme Court expressed that if an application is made, the Commission should provide the Register as a matter of course.

What is the election technology law in Kenya? **Section 44** of the **Elections Act** as amended in 2016 provides that:

> "(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) …….**
>
> **(6) …….**
>
> **(7) The technology used for the purpose of the first general elections upon the commencement of this section shall —**

(a) be restricted to the process of voter registration, identification of voters and results transmission; and

(b) be procured at least eight months before the general election."

Section 44 A of the **Elections Act** as amended in 2017 provides that: Notwithstanding the provisions of **Section 39** and **Section 44** of the Act, the Commission shall put in place *a complementary mechanism* for identification of voters and transmission of electoral results that is simple, accurate, verifiable, secure, accountable and transparent to ensure the Commission complies with **Article 38** of the Constitution.

Section 109 of the Elections Act provides that the complementary mechanism ought to be put in place by regulations with the approval of Parliament at least sixty (60) days before the general elections and only with the approval of Parliament to be granted within four (4) months before the general elections.

A factual and legal issue ensuing from the provisions of **Section 44 A** is what constitutes a *complementary mechanism*. Both the High Court and Court of Appeal have had occasion to consider the meaning and nature of complementary mechanism. Both courts have made a determination that the complementary mechanism envisaged under **Section 44 A** is a manual identification of voters and manual transmission of results. The two courts have held that the complementary mechanism is the one established by **Regulations 69 and 83 of the Elections (General) Regulations 2012 (as amended by Legal Notice No. 72 of 2012).**(See also **Nairobi HC Misc. JR. No. 4 of 2017, National Super Alliance (NASA)Kenya -v- The Independent Electoral and Boundaries Commission & 2Others**).

In the **Matter of National Super Alliance (NASA) -v- IEBC & others, Nairobi Petition No. 328 of 2017,** the Kenya High Court had occasion to consider **Section 44 A of the Elections Act** relating to complementary mechanism for identification of voters and transmission of electoral results. The Court expressed:

"80. A plain interpretation of section 44A shows that the legislature intended the establishment of a mechanism that is *complementary* to the

one set out in section 44 of the Act. The system under section 44 is an *integrated electronic electoral system* that enables biometric voter registration, electronic voter identification and electronic transmission of results. It places emphasis on the use of technology.

82. It follows therefore that the complementary mechanism in section 44A need not be similar, same, akin or *parallel* to the one set out in section 44 of the Act. All that is required for that mechanism is that it should add to or improve the electronic mechanism in section 44 of the Act. But at the same time, be simple, accurate, verifiable, secure, accountable and transparent. It should allow the citizens to fully exercise their political rights under Article 38 of the Constitution. This complementary mechanism only sets in when the *integrated electronic system* fails.

83. It was the petitioner's contention that the mechanism envisaged under section 44A is akin to the one in section 44 of the Act; that the debate in Parliament did not indicate that the complementary mechanism was to be manual. With greatest respect, we do not think that there is any *ambiguity* in the language used in section 44A to resort to the *Hansard of Parliament* in order to decipher the true intention of the legislature in this case. The language and meaning in that section is plain and clear. 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.

84. One other thing that buttresses our position that the mechanism contemplated in section 44A of the Act is independent of the one set out in section 44 of the Act, is the use of the words '*Notwithstanding the provisions of section 39 and section 44, …*'. The use of the term '*notwithstanding*' makes the mechanism in section 44A *independent* of what is contained in sections 39 and 44.

87. Accordingly, our determination on what constitutes the components of the complementary mechanism to be established under section 44A of the Act is: that the mechanism should be separate but which is meant to improve or augment the mechanism already set out in section 44. That mechanism has to be simple, accurate, verifiable, secure, accountable and transparent. It must also comply with Article 38 of the Constitution, that is, it must ensure that every citizen's right to register as a voter, vote at an election or vie for political office is safeguarded."

The Court of Appeal in **National Super Alliance (NASA) Kenya -v- The Independent Electoral and Boundaries Commission & 2 others Civil Appeal No. 258 of 2017**, considered the relevant provisions of **Regulations 69 and 83 of the Elections (General) Regulations 2012** and expressed as follows:

Regulation 69:

"(e) in case the electronic voter identification device fails to identify a voter the presiding officer shall:

(i) invite the agents and candidates in the station to witness that the voter cannot be identified using the device;
(ii) complete verification Form 32A in the presence of agents and candidates;
(iii) identify the voter using the printed Register of voters; and
(iv) once identified proceed to issue the voter with the ballot paper to vote."

Regulation 83:

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

(a) tally the final results from each polling station in a constituency for the elections of a member of the National Assembly and members of the county assembly;

(b) disregard the results of the count of a polling station where the total valid votes exceed the number of registered voters in that polling stations;
(c) disregard the results of the count of a polling station where the total votes exceed the total number of voters who turned out to vote in that polling station;
(d) collate and publicly announce to the persons present 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;
(e) complete the relevant Form 35B and 36B for the respective elective position set out in the schedule….
(f) Sign and date the relevant forms and publicly declare the results….
(g) ……..
(h) …….
(i) …….

Upon considering the provisions of **Regulations 69** and **83**foretasted, the Court of Appeal held that the High Court did not err in fact and law in finding that **Regulations 69 and 83** comprised the complementary mechanism contemplated under **Section 44 A of the Elections Act.**

Section 39 (1C) of the Elections Act stipulates that for purposes of a presidential election the Commission shall —

(a) electronically transmit, in the prescribed form, the tabulated results of an election 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.

The interpretation section of the Elections Act defines "biometric" to mean unique identifiers or attributes including fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves, DNA, and signatures. The “integrated electronic electoral system" is defined to refer to a system that includes biometric

voter registration, biometric voter identification and electronic result transmission system.

From the provisions of **Sections 6 (A) 3 (b)**; **39**;**44** and **44 A** of the **Elections Act** as amended; the election technology established in Kenya is six-fold namely:

(a) Biometric Voter Registration (BVR);
(b) Electronic Voter Identification (EVI);
(c) Electronic Transmission of Results (ETR)
(d) Kenya Integrated Elections Management System (KIEMS) and
(e) On-line publication of the Register of Voters.
(f) Publishing polling result forms of presidential elections on an online public portal maintained by the Commission.

For practical purposes, BVR is applied prior to the voting day and EVI is used during balloting/voting day and ETR is used for transmission of results after tallying.

A reading of **Section 44 (1)**of the **Elections Act** as amended clearly shows that the election technology law in Kenya does not establish electronic voting (e-voting) or electronic balloting. The Electoral Commission is not expected to conduct electronic voting. On the voting day, all that Commission is required to do is to use an electronic voter identification device (EVID) and then to transmit results electronically using ETS. On the Election Day, all the three electronic devices must be integrated through KIEMS.

To implement the provisions of **Sections 44 (5) and 109 of the Elections Act, 2011**; the Independent Election and Boundaries Commission (IEBC) has made regulations on election technology law. (See **The Elections (Technology) Regulations, 2017 – Legal Notice No. 68 of 2017).**

Regulation 3 (1) stipulates that the Commission shall regularly conduct a requirements analysis to determine the specific requirements to upgrade or supplement existing election technology, or to acquire new election technology with the purpose of enhancing the integrity, efficiency and transparency of the election process. **Regulations 6 and 7** enjoin the Commission to carry out regular inspection and servicing of the election technology, as well as establish a support

and maintenance contract with a service level agreement to ensure the serviceability, reliability and availability of the election technology. The Commission shall comply with the Public Procurement Disposal of Assets Act and the Regulations thereunder during disposal of election technology assets. Pursuant to **Regulation 17**, all electronic data relating to an election shall be retained in data retention and safe custody by the Commission for a period of three years after the results of the elections have been declared, and shall, unless the Commission or the court otherwise directs, be archived in accordance with procedures prescribed by the Commission subject to the Public Archives and Documentation Service Act and the Kenya Information and Communications Act, 1998.

Regulations 31 and 32 establish the Elections Technology Committee whose mandate is to advise the Commission on adoption and implementation of election technology.

TERMINATION OR SUSPENSION OF USE OF ELECTION TECHNOLOGY

The Kenya Court of Appeal in **IEBC -v- Maina Kiai & 5 others, Civil Appeal No. 105 of 2017** had occasion to discuss the rationale for electronic transmission of election results as provided for in the Elections Act. It was expressed:

> **"The electronic transmission of results was intended to cure the mischief that all returning officers from each of the 290 constituencies and 47 county returning officers troop to Nairobi by whatever means of transport, carrying in hard copy the presidential results which they had announced at their respective constituency tallying centres. The other fear was that some returning officer would in the process tamper with the announced result."**

Regulations 26 and 27 of the Technology Regulations have detailed provisions on termination or suspension of use election technology during elections. The Commission shall suspend or terminate the use of election technology if the reliability of a system cannot be assured according to the requirements of the Act

and Regulations. Before suspending or terminating the use of election technology, the clerk at the polling station shall inform the presiding officer of the failure of the technology; the presiding officer at the polling station shall retry the system to confirm the failure of the technology; the presiding officer at the polling station shall document the incident on an incident report in the polling station diary which shall be signed by all the agents; the presiding officer shall notify the returning officer of the failure and submit a copy of the incident report; the returning officer shall inform the director in charge of information communication and technology of the incident and the director shall investigate the incident and advise on the suspension or termination of the use of the election technology; the returning officer shall approve the request for suspension of the use of technology based on the advice from the Director of ICT and invoke the complementary mechanism.

Where the Commission suspends or terminates the use of the election technology, the Commission shall immediately notify the public and stakeholders of the suspension and of the measures put in place to restart the technology, or of any failure of technologies or procedures to be used according to the operations continuity plan. Where the Commission has made a decision to suspend the voting on where there is failure of the election technology, the Commission shall extend the hours of polling at the Polling Station where polling has been interrupted by the amount of time which has been lost. The Commission shall publish a notice, through electronic or print media of national circulation, or any other easily accessible medium, to notify the public of the suspension or termination or of failure of technologies or procedures to be used according to the operations continuity plan. The Commission shall inform the returning officer of the decision accordingly.

Regulation 27 requires any person or telecommunication network service provider who is or becomes aware of any election technology vulnerability, failure or challenge to immediately notify the Commission in writing or by any other means. Where a person or telecommunication network service provider is not able to make a notification in writing, the Commission shall prepare a written record of the notification.

A notable comparative jurisprudence on election technology is from the Supreme Court of India in the case of **A. C. Jose -v- Sivan Pillai & Others Civil Appeal No. 3839 of 1982.** In this case, there was no statutory law permitting electronic voting machines (EVM). However, the Indian Electoral Commission used EVM at 50 polling stations. The Supreme Court declared the election results in the 50 polling stations void as having been conducted contrary to law. The Court expressed:

> **"The Electoral Commission has to conduct elections according to law enacted by Parliament, it can supplement the law but cannot supplant it."**

BIOMETRICS IN ELECTION DISPUTE RESOLUTION

One of the factors affecting integrity of election results is admission of eligible voters. If an ineligible person votes, the results of the elections may be affected. Where a substantial number of ineligible voters vote, the integrity of the electoral process is affected. Use of biometrics in election seek to address the challenge in registering and authenticating voters. Biometrics improves implementation of the principle of "**one voter, one vote**" which is a necessary condition for free and transparent elections. Biometrics help in elimination of multiple registration through a systematic search for duplicates (based on biometric characteristics such as fingerprints) using an Automated Fingerprint Identification System (AFIS). Biometrics is thus first and foremost a tool for voter verification. It is a technology to identify and authenticate individuals reliably and quickly based on their unique physical characteristics. For voter authentication, the fingerprints are compared against reference fingerprints stored on an identity document or in a fingerprint database, which enables the owner to be securely authenticated as the holder of the document.

Identification answers the question*" Who are you?"* In this case, the person is identified as one among a group of others (1: N matching). The personal data of the person to be identified are compared with the data of other persons stored in the same database or possibly other linked databases.

Authentication also called verification answers the question*: "Are you really who you say you are?"* In this case, biometrics allows the identity of a person to be certified by comparing the data that they provide with pre-recorded data for the person they claim to be (1:1 matching).

Biometrics is useful in cases of electoral fraud related to identity theft where it is impossible to authenticate the voter or in the event of statistics on persons registered to vote that have been artificially inflated due to the introduction of fictitious voters. A caveat is necessary at this point - until cases of electoral fraud have been demonstrated and quantified, it remains difficult to establish what contribution the use of biometrics would make to the fairness of the ballot. Biometrics is only useful in cases where the civil register or population records are not able to fulfill the function of identifying voters.

Biometrics fulfils two primary objectives: it makes it possible to compensate for the lack of a mechanism for the identification of voters and guarantees the elimination of multiple enrollments on voter lists. A further caveat needs to be added - in a tense political context, where there is a total lack of trust between the different people involved in the electoral process, biometrics can itself become something of a double-edged sword. It may help to resolve problems with the identification of voters and prevent fraud of a certain type but it cannot, by itself, render an electoral process reliable, credible and transparent**.** It must take account of local specificities and impact of cultural and human factors on the limits of the technology. In the specific case where biometrics is introduced to compensate for the lack of a reliable civil register, it is not the electoral process which has to be biometric, but the national system for the identification of citizens.

What is the relevant comparative jurisprudence on violation of election technology law?

In the United States, courts have pronounced that "whatever the process used to vote and to count votes, differences in technology should not furnish a basis for disregarding the bedrock principle that the purpose of the voting process is to ascertain the intent of the voters" (See **Brown -v-Carr, 130 W. Va. 455, 460, 43 S. E. 2d 401, 404-405 (1947).** The overriding objective of the electoral process is to

determine the intent of the voter. In this context, whether a ballot shall be counted depends on the intent of the voter and not on the technology. It is the ballot that expresses the intent of the voter and it is the ballot as a valid vote cast that must be counted. It is not the mechanical devices or instruments used in the electoral process that determine the intent of the voter or will of the people.

In the Kenyan context, what is the emerging jurisprudence on violation of election technology law? Procurement issues and non-compliance with election technology law may arise in an election petition. In **Electoral Commission of Kenya -v- Attorney General & Another (2008) eKLR 596,** it was observed that the principles of transparency and accountability apply to the Electoral Commission; likewise, the provisions of the Public Procurement Act apply to the Electoral Commission. It was expressed that the objectives of the Public Procurement Regulations are not in conflict with the constitutional autonomy of the Electoral Commission as the objectives seek to provide checks and balances in a democratic society.

In **Revital Health (Epz) Limited -v- Public Procurement Oversight Authority & 6 Others, Constitutional Petition No. 75 of 2012,** Justice Edward Muriithi of the High Court sitting at Mombasa held that:

> ***"Procurement conducted outside the provisions of the Public Procurement and Asset Disposal Act was not necessarily unconstitutional. Constitutionality of a procurement process is to be assessed on the basis of Article 227 of the Constitution. Article 227 provided that procurement by a State Organ or public entity was to accord to a system that was fair, equitable, transparent, competitive and cost-effective."***

***In* Republic -v- Independent Electoral and Boundaries Commission &3 Others Ex-Parte Coalition for Reform and Democracy Misc. Application No 637 of 2016,** it was held that it is fallacious to urge that the Procurement Review Board lacked jurisdiction in matters that entailed applying and enforcing non-procurement laws such as the Election laws when in fact under the Elections Act, the Election Court was the High Court and appeals therefrom lay to the Court of Appeal. In this case, it was held that an award of tender for supply and delivery of

ballot papers for elections, election result declaration forms and poll registers should take into account the legislative procurement framework that has been put in place to ensure the constitutional threshold of good transparency was attained. It was further held that preparations leading to elections has to meet the minimum electoral principles and standards articulated in **Article 81 of the Constitution**. The standards are to the effect that an election system has to be free and fair, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

The Court further expressed that:

> **"Article 227 of the Constitution provided the minimum threshold when it comes to public procurement and asset disposal. Therefore, any procurement, before considering the requirements in any legislation, rules and regulations, had to meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. Any other stipulation in an enactment or in the tender document could only be secondary to what the Constitution dictated.….A person who felt that a procurement process did not meet the constitutional threshold provided for under Article 227 of the Constitution, and had no other recourse in law, would find recourse in the High Court. The High Court, under article 165(3)(d) of the Constitution, has jurisdiction to hear any question on the interpretation of the Constitution and to determine whether anything said to be done under the authority of the Constitution or of any law was inconsistent with, or in contravention of, the Constitution."**

In **Al Ghurair Printing And Publishing Llc -v- Coalition For Reformand Democracy & Another, Civil Appeal No. 63 Of 2017**, Musinga, JA of the Court of Appeal expressed that pursuant to Article 227 of the Constitution and the preamble to the Public Procurement and Asset Disposal Act 2015, a State Organ or public entity contracting for goods and services must do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective. He further

observed that public interest does not justify a contravention of the Constitution or statute and in this regard, public interest cannot override the Constitution.

What is the effect of non-compliance with election procurement law on the results of the elections?

It must be noted that the issue herein relates to effect of non-compliance with the Procurement Act and Rules on the results of the election. The assumption is that the elections has been conducted and results have been released. **Section 5 (1)** of the **Public Procurement and Asset Disposal Act (2015)** explicitly provides that the Act shall prevail in case of inconsistency between the Act and any other legislation or government notice or circular in matters relating to procurement and asset disposal. The legal issue in relation to election dispute resolution is whether the provisions of the Procurement Act override the provisions of the Elections Act on procurement of election technology equipment.

The constitutional and legal consequences for non-compliance with electoral technology law are subject to the test in Section 83 of the Elections Act namely whether such violations or non-compliance affect the result of the elections. The Supreme Court in **Raila Odinga -v- IEBC & Others SC Petition No. 5 of 2013**stated:

> **"[130] Is electronic facilitation for the election mandatory, or discretionary…**
>
> **[131] An objective reading of the Regulations …does not reveal a contemplation of elections conducted solely by electronic means. The elections… are not envisaged to be conducted on a purely electronic basis. Regulation 59 provides that voting is done by marking the ballot paper, or electronically. Thus, the voting system envisioned in Kenya appears to be manual. Regulation 82, and Section 39 of the Elections Act, which deal with electronic transmission, operate on the basis that electronically transmitted results are only provisional. Can there, therefore, be an**

invalidation of final results, because of the non-transmission of provisional results?(Emphasis mine).

[132] The Petitioners assert that this is so. Provisional results, for them, are the basis of verification of results. The Respondents, by contrast, assert that this is not so. Verification, for them, means comparing the final results on Form 34 from a polling centre with Form 36 at the National Tallying Centre. Their contention appears to be supported by Article 86(c) of the Constitution, describing the procedure of verification as the collation and announcement of results by the Returning Officer (Chair of IEBC), based on results from polling stations.

[133] It is rightly argued by the Respondents, in our opinion, that the Court must be alive to the fact that most polling stations are in the rural areas, where the primary-school polling stations are dilapidated, and the supply of electricity, to-date, is a distant dream. Yet voters still go to such polling stations to exercise their right to vote, and to discharge their civic duty. Of this fact, the Court will take judicial notice, in deciding whether Presidential elections can be invalidated due to non-compliance with regulations requiring electronic transmission.(Emphasis mine).

[231] The main Petition before this Court is founded, significantly, on the contention that the Petitioner was prejudiced by an inconsistent application of electronic devices and, in particular, by IEBC's abandonment of such technology and resort to the manual electoral procedure. While there is sufficient evidence to guide the Court in this matter, it is apposite to set out relevant principles on the application of electronic technology in elections.

[232] Failure of technology is relied upon by the Petitioners, on the footing that it disrupted the transmission of election results, and so, these results ceased to be in keeping with the secure standards required by law. The Petitioners contend that section 39 of the Elections Act, 2011 as read with Regulation 82 of the

Elections (General) Regulations, 2012 creates a mandatory obligation to provide for the electronic transmission of the results.

[233] We take judicial notice that, as with all technologies, so it is with electoral technology: it is rarely perfect, and those employing it must remain open to the coming of new and improved technologies. Analogy may be drawn with the traditional refereeing methods in football which, as their defects became apparent, were not altogether abandoned, but were complemented with television-monitoring, which enabled watchers to detect errors in the pitch which had occurred too fast for the referees and linesmen and lineswomen to notice.

[234] In the instant case, there is evidence that the EVID and RTS technologies were used in the electoral process at the beginning, but they later stalled and crashed. Different reasons explain this failure but, by the depositions of Dismus Ong'ondi, the failure mainly arose from the misunderstandings and squabbles among IEBC members during the procurement process – squabbles which occasioned the failure to assess the integrity of the technologies in good time. It is, indeed, likely that the acquisition process was marked by competing interests involving impropriety, or even criminality: andwe recommend that this matter be entrusted to the relevant State agency, for further investigation and possible prosecution of suspects.

[235] But as regards the integrity of the election itself, what lawful course could IEBC have taken after the transmission technology failed? There was no option, in our opinion, but to revert to the manual electoral system, as was done. (Emphasis supplied).

[236] We note from the evidence that the said manual system, though it did serve as a vital fall-back position, has itself a major weakness which IEBC has a public duty to set right. The ultimate safeguard for the voter registration process, namely "the Green Book", has data that is not backed-up, just in case of a fire, or

other like calamity. We signal this as an urgent item of the agenda of the IEBC, and recommend appropriate redressive action.

[237] From case law, and from Kenya's electoral history, it is apparent that electronic technology has not provided perfect solutions. Such technology has been inherently undependable, and its adoption and application has been only incremental, over time. 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. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. This negates the Petitioner's contention that, in the instant case, injustice, or illegality in the conduct of election would result, if IEBC did not consistently employ electronic technology. It follows that the Petitioner's case, insofar as it attributes nullity to the Presidential election on grounds of failed technological devices, is not sustainable." (Emphasis mine).

REMEDY FOR VIOLATION OF PROCUREMENT RULES – JUST AND EQUITABLE REMEDY

A critical legal issue to be addressed is what is the remedy for violation of procurement rules in the context of general elections. Should violation of procurement rules automatically lead to nullification of the election results? Is there any other remedy that the court can give?

In **Republic -v- Independent Electoral and Boundaries Commission & 3 others Ex Parte Coalition for Reform and Democracy Misc. Application No 637 of 2016**, it was held that a person aggrieved by the actions of a procuring entity would not be left without a remedy. **Section 174** of the Public Procurement and Asset Disposal Act allowed such a person to seek alternative remedies under other provisions of law. **Section 83** of the

Elections Act requires the effect of the violation of procurement rules on the results of the elections should be demonstrated and determined.

The South African Constitutional Court has taken the approach of a just and equitable remedy. The Court has held that when constitutional principles and procurement rules are violated leading to a national crisis, a declaration of invalidity of the tender can be made and the said declaration suspended. In such an event, "No party has any claim to profit from the threatened invasion of people's rights. At the same time no one should usually be expected to be out of pocket for ensuring the continued exercise of those rights." (See **Black Sash Trust -v- Minister of Social Development and Others [2017] ZACC 8).**

The Kenya courts can decide to borrow a leaf from South African jurisprudence and craft a just and equitable remedy or an appropriate relief in the circumstances. In the South African case of **Freedom Under Law (RF) N PC –v- National Director of Public Prosecutions [2015] ZAGPPHC 759 at paras 45-6**, it was observed that as a general rule, self-created urgency should not usually be countenanced. **Section 103 (2) (b) of the Kenya Public Procurement and Asset Disposal Act** seem to echo this position by stating that direct procurement is not justifiable when the circumstances giving rise to the urgency to use direct procurement method were foreseeable by the procuring entity or the urgency is a result of dilatory conduct on the part of the entity.

In **Black Sash Trust -v- Minister of Social Development and Others [2017] ZACC 8 ,** the pertinent facts were as follows:

> On 3 February 2012, South Africa Social Security Agency (SASSA) concluded a contract with Cash Paymaster Services (Pty) Limited (CPS) to provide services for the payment of social grants for a period of five years. On 29 September 2013 the Constitutional Court held that the award of the tender to provide services for payment of social grants to CPS was constitutionally invalid. In the remedial order, the Court suspended the declaration of invalidity. The declaration was based on the premise that either a new five-year tender would be awarded after a

proper procurement process or SASSA would itself take over the payment of social grants when the suspended contract with CPS came to an end on 31 March 2017. SASSA was ordered to report to the Court on progress in respect of the new tender process and its outcome. In November 2015 SASSA finally reported that it had decided not to award a new tender, it would itself take over the payment of social grants and it would be able to meet the deadline of 31 March 2017.

On accepting this assurance the Court discharged its supervisory order. But this assurance turned out to be without foundation. Since April2016 the responsible functionaries of SASSA were aware that the company could not comply with the undertaking to the Court that it would be able to pay social grants from 1 April 2017. The Minister said she was informed of this only in October 2016. There is no indication on the papers that she showed any interest in SASSA's progress before that. Despite repeated warnings from advising counsel and CPS, neither SASSA nor the Minister took any steps to inform the Court of the problems they were experiencing. Nor did they see fit to approach the Court for authorization to regularize the situation. The Minister and SASSA tell us that CPS is the only entity capable of paying grants for the foreseeable future after 31 March 2017.

This Court and the country as a whole are now confronted with a situation where the executive arm of government admits that it is not able to fulfil its constitutional and statutory obligations to provide for the social assistance of its people. And, in the deepest and most shaming of ironies, it now seeks to rely on a private corporate entity, with no discernible commitment to transformative empowerment in its own management structures, to get it out of this predicament.

In a constitutional democracy like ours, it is inevitable that at times tension will arise between the different arms of government when a potential intrusion into the domain of another is at stake. It is at times like these that courts tread cautiously to preserve the comity between the judicial branch of government and the other branches of government. But there was no constitutional tension about social grants in November 2015. There was no legitimate reason for the Court not to accept the assurance of

an organ of state, SASSA, under the guidance of the responsible Minister, that it would be able to fulfil an executive and administrative function allotted to it in terms of the Constitution and applicable legislation. There was no threatened infringement to people's social assistance rights and no suggestion that the foundation of the Court's remedial order would be disregarded. Now there is.

SASSA will not be able to take over the payment of social grants by 1 April 2017 and may not be able to do so for some time to come. It intends to enter into a contract with CPS without a competitive tender process as required by section 217 of the Constitution in order to continue the payment of social grants. In so doing it has walked away from the two fundamental pillars of this Court's remedial order. That is serious enough, but it has also broken the promise in its assurance to this Court in November 2015, that it would take over the payment of social grants by 31 March 2017, which formed the basis of the withdrawal of the supervisory order.

There must be public accounting for how this was allowed to happen. Accountability is a central value of the Constitution. It accompanies the conclusion of procurement contracts for the procurement of public functions. This judgment is the judicial part of that accounting. It is founded on the commitment to openness and responsiveness the Constitution requires. It is important to note that this particular role, at this particular time, is not one of the Court's choosing. The sole reason for the litigation leading to this judgment is the failure of SASSA and the Minister to keep their promise to this Court and the people of South Africa.

What needs to be understood, however, is that it is not this Court's standing or authority, for their own sakes, that are important. Judges hold office to serve the people, just as members of the executive and legislature do. The underlying danger to us all is that when the institutions of government established under the Constitution are undermined, the fabric of our society comes under threat.

Enforcement and remedy

SASSA failed to honour its assurance to this Court that it will be in a position to make payment of social grants after 31 March 2017. It and CPS failed to timeously conclude a lawful contract to provide for that payment. These circumstances provide a different context for the enforcement of a just and equitable remedy. The context then was a breach of the constitutional and legislative framework for fair, equitable, transparent, competitive and cost-effective procurement. The constitutional defect here lies elsewhere. The primary concern here is the very real threatened breach of the right of millions of people to social assistance in terms of section 27(1)(c) of the Constitution. It is that threatened breach that triggers the just and equitable remedial powers the Court has under section 172(1)(b)(ii) of the Constitution, not only the potential invalidity of the proposed new contract that SASSA and CPS seeks to conclude. The need to intervene under these and similar circumstances was aptly captured by Mogoeng CJ in Mhlope in these terms:

> ***"It bears emphasis that this is an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis which could have grave consequences. It is about the upper guardian of our Constitution responding to its core mandate by preserving the integrity of our constitutional democracy. And there explains the unique or extraordinary remedy we have crafted . ..."***

This Court's extensive powers to grant a just and equitable order also permit it to extend the contract that would otherwise expire on 31 March 2017. Since the contract was declared invalid in AllPay I, if we extend the contract, it will be necessary to also extend the declaration of invalidity and the suspension of that declaration for the period of extension of the contract. In Allpay 2 we tied up the suspension of the declaration of invalidity to the period of the invalid contract. That was done, in order "to allow the competent authority to correct the defect" and to avoid disrupting the provision of crucial services that it was constitutionally obliged to render.

As the judgment of my brother Madlanga, J shows, there is another valid way of arriving at an identical outcome, but I do not think there is any harm in declaring, to the extent necessary, the continued suspension of the invalid contract.

All that remains then is the just and equitable remedy to ensure that the reciprocal obligations between SASSA and CPS for payment of the social grants are properly identified and circumscribed. CPS says that can be done only by way of a consensual contract concluded between it and SASSA. *But once it is accepted that the constitutional obligations of SASSA and CPS are not sourced in any contract still in practical existence, but in their mutual constitutional obligation to ensure that the right to social assistance of the many people that have been dependent on past payment through CPS are not rendered nugatory, the logic of private consensual agreement as the only way to determine the content of their respective reciprocal obligations in respect of payment falls away.* It is then for the Court in the exercise of crafting a just and equitable remedy to spell out the content of those obligations. Can this be done outside the fair and equitable procurement framework put in place under the authority of section 217 of the Constitution? All parties agreed that it could, for the very reason that the constitutional and legal source is that of section 172(1)(b)(ii) of the Constitution and not section 217.

No party has any claim to profit from the threatened invasion of people's rights. At the same time none should usually be expected to be out of pocket for ensuring the continued exercise of those rights. That equilibrium was the premise of the Court's previous remedial order. It is just and equitable to continue on that basis. Our order below reflects that SASSA and CPS should continue to fulfil their respective constitutional obligations in the payment of social grants for a period of 12 months as an extension of the current contract. To the extent necessary, our earlier declaration of invalidity of that contract will be further extended, as well as the suspension of that declaration of invalidity. … It is necessary to be frank about this exercise of our just and equitable remedial power. That power is not limitless and the order we make today pushes at its limits. It is a remedy that must be used with caution and only in exceptional circumstances. But

these are exceptional circumstances. Everyone stressed that what has happened has precipitated a national crisis. The order we make imposes constitutional obligations on the parties that they did not in advance agree to. But we are not ordering something that they could not themselves have agreed to under our supervision had an application been brought earlier, either by seeking an extension to the contract that would have expired on 31 March 2017 or by entering into a new one.

The South African jurisprudence is in contrast to the Kenyan High Court jurisprudence in **Republic -v- Independent Electoral and Boundaries Commission & 3 others Ex Parte Coalition for Reform and Democracy Misc. Application No 637 of 2016,** it was expressed:

> "**On the question of public interest, the IEBC asserted that there was need to hold the next General Elections by August 8, 2017 and that failure to do so would expose the country to serious injury and loss akin to the 2008 post Election Violence. It was trite law that a contravention of the Constitution or a statute could not be justified on the plea of public interest as public interest was best served by enforcing the Constitution and statute. Under article 10 of the Constitution, the making and implementation of public policy decisions was to be undertaken in accordance with the national values and principles of governance which included the rule of law. Any alleged public policy or interest which was contrary to the rule of law would not be upheld.**
>
> **Public or national interest was a consideration that Courts had to take into account when determining disputes before them where there was a conflict between private interest and public interest by balancing the two and deciding on where the scales of justice tilted. Hence, the principle of proportionality was part of Kenyan jurisprudence. In making such a consideration, the Court would opt for the lower rather than the higher risk of injustice. In the instant suit, there were two competing public interests. The first was the necessity to comply with timelines while the second was the constitutional requirement for the**

election system to be free and fair; and administered in an impartial, neutral, efficient, accurate, verifiable, secure, accountable and transparent manner. It had not been contended that if the Court was to grant the orders sought herein it would be impossible to conduct the elections on August 8, 2017. To the contrary the Public Procurement and Asset Disposal Act, provided for circumstances under which restricted and direct tendering processes could be resorted to where applicable as long as the law was complied with. While it was within the IEBC's mandate to ensure that unnecessary obstacles did not prevent the conduct of General Elections on August 8, 2017, it was the Court's mandate to ensure that the elections were conducted in accordance with the Constitution and the law. The Court would not allow itself to be a rubberstamp for a process that was clearly flawed and whose result was unlikely to meet the constitutional and legal threshold. The Special Conditions of Contract relating to the contract signed by the IEBC and the 1st Interested Party provided that the contract "cannot under any circumstances be terminated for convenience." However, the termination of a procurement contract by the Court for failure to adhere to the Constitution was not a convenience situation. The democratic rights of Kenyans would not be sacrificed on the altar of the 1st Interested Party's financial interests. Similarly, the Court would not delve into the issue of the financial losses occasioned to the taxpayer. The principle of independence of Constitutional Commissions did not prohibit the Court from addressing questions on whether the Commission was functioning within its mandate and whether it had violated the Constitution. A Commission's independence would remain valid and insurmountable where the Commission was operating within its legislative and constitutional sphere."

PUBLIC PARTICIPATION IN GOVERNANCE and ELECTORAL MATTERS

In Kenya, public participation in governance and decision making is provided for in various Constitutional Articles. **Article 1(2)** stipulates that all sovereign power belongs to the people of Kenya. In this context, the people may exercise their

sovereignty directly or through their elected representatives**. Articles 94 (1), 129 (1) and 159 (1)** stipulates that the legislative, executive and juridical authority respectively is derived from the people of Kenya. **Article 73 (1)(a)** provides that authority assigned to a State Officer is a public trust to serve the people.

Article 10 (2) a, b and c provides for national values and one of the values is democracy and participation of the people. Whereas **Article 33** provides for **p**ublic participation in respect the freedom of expression of all participants, **Article 35**guarantees the right to access information by citizens. **Article 61** gives the public, individually or as a group, a say in matters of land including acquisition, management, transfer, disposal, or ownership of private, public and/or community land. **Article 69(1)** (d) obliges the State to encourage public participation in the management, protection, and conservation of the environment. At the legislative level, **Article 118** (1) enjoins Parliament to conduct its business in an open manner and its sittings and those of its committees shall be open to the public. Parliament is to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees. **Article 119(1)** provides that **e**very person has a right to petition Parliament to consider any matter within its authority, including enacting, amending, or repealing any legislation. Parliament may not exclude the public, or any media, from any sitting, unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion. Other relevant Articles on public participation include: **Articles 174 (c) (d); 184 (1); 196; 201 (a); 232 (1) (d) and the Fourth Schedule to Part 2 (14).**

The **County Government ActNo. 7 of 2012** *vide***Sections 93, 94 and 95** provide that counties are to establish mechanisms to facilitate public communication and access to information with the widest public outreach using media.**Sections 100 and 101** of the same Act providethat county governments should create an institutional framework for civic education. Under the **Urban Areas and Cities Act, No. 13 of 2011** the overarching theme is participation by the residents in the governance of urban areas and cities. The **Second Schedule of the Act** provides for the rights of, and participation by residents in affairs of their city or urban areas.

The **Public Finance Management Act, No.18 of 2012** also contains various provisions on public participation. The relevant provisions are **Sections 10 (2); 35 (2); 125 (2); 175 (9)** and **Section 207**.

The **Public** P**rocurement and Disposal Act 2015 vide Sections 3, 68(3), 125(5), 138,** and **179** also provide for public participation. Emphasis is laid on transparency of the procurement process including requirements for procuring entities to publicly avail procurement records after closure of proceedings, publicize notice of intention to enter into contract on websites and public notice boards, publish, and publicize all contract awards. (For discussion on public participation in procurement, see Court of Appeal decision in **Independent Electoral and Boundaries Commission -v- The National Super Alliance (NASA) & 6 Others, Civil Appeal No. 224 of 2017).**

Inelectoral matters, the Constitution has elaborate provisions on public participation. **Article 38 (3)** provides that every adult citizen has the right, without unreasonable restrictions, to be registered as a voter.**Article 138 (3) (a)** provides that all persons registered as voters are entitled to vote.**Article 81 (a)** enshrines the freedom of citizens to exercise their political rights under **Article 38** of the Constitution. One such political right is the right of every citizen to free, fair and regular elections based on universal suffrage. The requirement in **Articles 81 and 86 of the Constitution** that the IEBC conducts free, fair, transparent and accountable elections is an embodiment of the spirit of public participation in the electoral process.

The provisions in **Article 257** pertaining to Amendment of the Constitution by popular initiative as well the right to recall a member of Parliament as provided for in **Article 104 of the Constitution** all reflect the letter and spirit of public participation in governance and electoral matters.

In theory and practice, public participation strengthens democracy and governance. Through public participation, the public exercise their constitutional rights and decision making process becomes more representative. Openness to the public

provides a platform in which the public presents their concerns and engages with government. Further, public participation improves transparency and accountability of the social, political, cultural, economic, and environmental impacts of policies, laws and development plans and of how the costs and benefitswill impact on different segments of society

Public participation helps to ensure that governments are accountable for their actions and responsive to public interests. By linking the public with decision-makers, public confidence and support of decision making processes is enhanced. Public participation enables governments to understand different opinions and concerns and ensures that policies, laws and development plans are more robust because they have been tested through a comprehensive process of review and revision before being approved. It provides additional skills, knowledge, concerns, and ideas that might not have otherwise been considered. Public participation helps alleviate social conflicts, by bringing different stakeholders and interest groups. It helps assesassess theirimpacts ofconflictand reach a consensus. Investment inpublic participation at an early stage helpsminimize both thenumber and the magnitude of social conflicts arising over the course of theimplementation of policies, laws and development plans.Public participation legitimizesimplementation processes.

Without significant public participation, the public may feel manipulated and suspicious, which mayundermine effective dialogue and create distrust. Such participation protectspublic interests, by reducing public conflict andsafeguardsagainst future risks. . Insufficient public engagement limits the power of the people to participate in democratic governance.

In **Communication Commission of Kenya& 5 others -v- Royal MediaServices & 5 Others Petition No. 14 of 2014 (consolidated with Petition Nos.14 A, B, and C of 2015)**the Supreme Court at paragraph 381 of its judgment expressed that public participation calls for the appreciation by State, Government and all stakeholdersthat the Kenyan citizenry is adult enough to understand what its rights are.In **Kituo Cha Sheria -v- Central Bank of Kenya Nairobi Petition No. 191 of 2011 Consolidated with Petition No. 292 of 2011**, the High Court correctly noted that every case in which an allegation of lack of public participation is alleged

must be considered in the peculiar circumstances of the case.In**Meru Bar, Wines & Spirits Owners Self Help Group** (*Suing through its secretary*)**Ibrahim Mwika -v- CountyGovernment oF Meru Petiton No. 32 of 2014; [2014] eKLR** the learned judge expressed herself thus:

> **"48. Under the new Constitutional dispensation, public participation is a requirement in the formulation of legislation. The participation of people is one of the National values and principles of governance** under Article 10(2) (a) of the Constitution of Kenya, 2010. …

In **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others -v- County of Nairobi Government & 3 Others [2013] eKLR**, the High Court observed that:

> **"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."**

In **Glenister vs. President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) Sa 347 (Cc); 2011 (7) BCLR 651 (Cc) (17 March 2011)** as adopted in **North Rift Motor Bike Taxi Association (NRMBTA) vs. Uasin Gishu County Government [2014] eKLR** that:

> **"For the opportunity afforded to the public to participate in legislative process to comply, the invitations must give those wishing to participate sufficient time to prepare."**

This position was adopted by Majanja J's decision in **Commission for The Implementation of the Constitution vs. Parliament of Kenya & Another & 2 Others & 2 Others** (supra) when he expressed himself as follows:

> **"The National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is affected will vary**

from case to case but it must be clear that a reasonable level of participation has been afforded to the public. Indeed, as Sachs J observed in Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) at para. 630, "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."

CONCEPT OF "DID THE IRREGULARITY AFFECT THE RESULT OF THE ELECTIONS?"

Having surveyed the constitutional and legal framework for conducting elections in Kenya as well as election technology law and emerging jurisprudence thereon, and having assessed the legal regime for public participation in governance, it is now opportune to consider the concept of "did the irregularity affect the result of the elections?"

Success of an election petition hinges the legal effect of violating the provisions of **Article 81(e)** and **86** of the Constitution and the impact of non-compliance with the provisions of election technology law.

Violation of the constitutional provisions and non-compliance with election technology law *ipso facto*denotes that there has been irregularity in the conduct of the elections –i.e. that the elections as conducted did not conform tothe legalframework enshrined in the Constitution and Elections Act and Regulations.In the case of **Zachary Okoth Obado -v- Edward Akongo Oyugi & 2 OthersSC Petition No. 4 of 2014**at paragraph 126 of its Judgment, the Supreme Court observed that a Court is to consider the effect of the alleged irregularities on the election result, before nullifying an election.It is only upon a finding that the irregularities proven affected the declared election results, that a Court will nullify an election.

What are the constitutional and legal consequences of non-compliance and manifestation of election irregularities?The concept of"Did the Irregularities Affect

the Results of the Election" considers and addresses the issue. The concept is embodied in **Section 83** of the **Elections Act**. For purposes of case law analysis in this paper, **Section 83** of the **Elections Act** was previously **Section 28** of the repealed **National Assembly and Presidential Elections Act (See Section 111 of the Elections Act)**.

Case law on interpretation and application of the concept "did irregularities or malpractices affect the result" abound. The Supreme Court in**Gatirau Peter Munya -v- Dickson Kithinji Mwenda(SC Petition No. 2B of 2014)**at paragraph 210B of its judgment alluded to the concept and expressed as follows:

> **"210B] In this case, as in other election matters coming up before the Courts, the question as to the nature or extent of electoral irregularities, and as to their legal effect, repeatedly arises. The crisp issue is: how do irregularities and related malfunctions affect the integrity of an election?**

In **Morgan -v- Simpson(1975) 1 Q.B 151,** Lord Denning summarized the essence of the concept"did irregularity affect the result"as embodied in **Section 37** of Britain's Representation of the People Act, 1949 (which is couched in similar language to **Section 83** of Kenya's **Elections Act**) in three propositions:

a. **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.**

b. **If the election was 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-provided that it did not affect the results of the election.**

c. **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 election is vitiated.**

The dictum by Lord Denning has been adopted as electoral jurisprudence in Kenya in various cases. (See for example **Masaka -v- Khalwale & 2 Others(2011) 1 KLR 390 at 424**; see also **Raila Odinga -v- IEBC & OthersSC Petition No. 5 of 2013).**

PRESUMPTION OF VALIDITY OF ELECTION RESULTS

Kenyan and comparative electoral jurisprudence point to existence of a rebuttable presumption of validity of election resultsas declared by the Returning Officer. Underlying this presumption is the burden of proof *to wit*he who alleges that an irregularity affected the election result must prove the same. In **Singh -v- MotaSingh & Another, (2008) 1 KLR 1**, it was stated that an election was a matter of importance not to be lightly set aside. The Supreme Court of India in the case of **Jeet Mohinder Singh -v- Harminder Singh Jassi, AIR 2000 SC 256,** stated that:

> **"The success of a candidate who has won at an election should not be lightly interfered with. Any person seeking such interference must strictly conform to the requirements of the law. Though the purity of the election process has to be safeguarded and the court shall be vigilant to see that people do not get elected by flagrant breaches of law or by committing corrupt practices, the setting aside of an election involves serious consequences not only for the returned candidate and the constituency, but also for the public at large in as much as re-election involves an enormous load on the public funds and administration."**

In **Masaka -v- Khalwale & 2 Others, (2011) 1 KLR 390,** it was expressed that the Courts would strive to preserve an election as being in accordance with the law, even where there had been significant breaches of official duties and election rules, provided the results of the election were unaffected by those breaches. This is because where possible, the Courts should give effect to the will of the electorate.

In the case of **Ponnala Lakshmaiah -v- Kommuri Pratap Reddy & Ors**. **[Civil Appeal No. 4993 of 2012 arising out of S.L.P. (C) No. 20013 of 2010**, Justice Thakar of India Court of Appeal observed that:

> **"There is no denying the fact that the election of a successful candidate is not lightly to be interfered with by the Courts. The Courts generally lean in favour of the returned candidates and place the onus of proof on the person challenging the end result of an electoral contest. That approach is more in the nature of a rule of practice than a rule of law and should not be unduly stretched beyond a limit. We say so because while it is important to respect a popular verdict and the courts ought to be slow in upsetting the same, it is equally important to maintain the purity of the election process.**
>
> **An election which is vitiated by reason of corrupt practices, illegalities and irregularities……cannot obviously be recognized and respected as the decision of the majority of the electorate. The Courts are, therefore, duty bound to examine the allegations whenever the same are raised within the framework of the statute without being unduly hyper-technical in its approach & without being oblivious of the ground realities. Experience has shown that the electoral process is, despite several safeguards taken by the Statutory Authorities concerned, often vitiated by use of means, factors and considerations that are specifically forbidden by the statute."**

CONSTITUTIONAL AND LEGAL CONSEQUENCES OF VIOLATING ELECTION PRINCIPLES – THE TEST OF SUBSTANTIAL NON-COMPLIANCE

Elections results should capture and reflect the will of the people. **Article 94 (2) of the Constitution** provides that Parliament manifest the diversity of the nation and represents the will of the people. A general allegation or sheer proof of violation or non-compliance with constitutional principles and election laws without more is not sufficient to invalidate an election. Two requirements must be satisfied if an

election is to be invalidated for reason of non-compliance with provisions of the Constitution or Elections Act. First,that the election was not conducted *substantially* in accordance with the constitutional principles and second, the *non-compliance must have substantially or materially affected the result of the election.* The burden of satisfying the election court that the alleged non-compliance substantially affected the result of the election or that the election was not conducted substantially in accordance with the constitutional principles is on the person who seeks to invalidate the election on grounds of non-compliance. It must be noted that the two requirements must be fulfilled in a Petition allegingnon-compliance or violation of election technology law.

The above statements are extrapolated from the provisions of **Section 83** of the **Elections Act**. The Section stipulates:

> **"83. No election shall be declared to be void by reason of non-compliance with any written law relating to that election <u>if it appears</u> that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the <u>non-compliance did not affect the result of the election</u>.**" (Emphasis mine).

The Kenya Supreme Court in **<u>Raila Odinga -v- IEBC & Others</u> SC Petition No. 5 of 2013)** in its judgment at paragraphs304 and 305 expressed the test for non-compliance as follows:

> **"Did the Petitioner clearly and decisively show the conduct of the election to have been so *devoid of merits*, and *so distorted, as not to reflect the expressionof the people's electoral intent?* It is this *broad test* that should guide…in deciding whether we should disturb the outcome of an election. Does the evidence *disclose any profound irregularity* in the management of the electoral process, or does it gravely impeach the *mode of participation* in the electoral process by any of the candidates who offered himself or herself before the voting public?"**

In **<u>Joho -v- Nyange & Another</u>[2008] 3 KLR** (EP) 500, Maraga J.(as he then was) stated as follows:

> ***"The law is therefore clear as to when an election can be nullified. An election will be nullified if it is not conducted substantially in accordance with the law as to elections. It will also be nullified, even though it is conducted substantiallyin accordance with the law as to elections, if there are errors or mistakes in conducting it which, however trivial, are foundto have affected the results of the election."***

Stephenson J. in **Morgan -v- Simpson[1974] 3 All ER 722** at page 731 expressed as follows: -

> ***"For an election to be conducted substantially in accordance with the law there must be a real election by ballot and no such substantial departure from the procedure laid down by Parliament as to make the ordinary man condemn the election as a sham or a travesty of an election by ballot. Instances of such substantial departure would be allowing voters to vote for a person who isnot in fact a candidate or refusing a qualifiedvoters candidate on some illegal ground or disenfranchising a substantial proportion of qualified voters."***

The Kenya Court of Appeal in **James Omingo Magara -v- MansonOnyongo Nyamweya & Others, Civil Appeal No.8 of 2010**at Kisumu had occasion to consider the implications of **Section 28** in a case where three ballot boxes were inexplicably missing, some ballot boxes had broken seals and there was no explanation; some ballot boxes had only the votes of two of the seventeen candidates and the returning officer offered no explanation; there had been attempt to burn down the building in which the ballot boxes were being kept; and the process of scrutiny and recount had disclosed numerous irregularities, among them unsigned, and therefore, unauthenticated Forms 16A. The appellant had won with 9832 votes and his argument was that that represented the will of the electorate. Omollo, JA read the majority decision in which he stated as follows:

> "**In my view these irregularities could not have been curedunder section 28 of the National Assembly and PresidentialElections**

Act. That section cannot be used to cover a situationwhere even the source of the votes in the ballot boxescannot be conclusively determined. Again to use the section to cover the disappearance ofballot boxes, irrespective of the number of 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 whichwe 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."

Adopting the dictum by Omollo JA., it is observed that **Section 83** of the **Elections Act** cannot and should not be used to whitewash all manner of sins and irregularities which may occur during the electoral process. The Section should not be used as a technical provision to render all malpractices and irregularities immaterial. It must be borne in mind that the Constitution in **Article 159 (2) (d)** enjoins courts of law to administer substantive rather than technical justice. The dictum in **James Omingo Magara -v- MansonOnyongo Nyamweya & Others, Civil Appeal No.8 of 2010**should be contrasted with dicta in **Joho -v- Nyange(2008) 3 KLR 500**, where it was held that failure by the Electoral Commission to keep a proper record of or account for the ballot papers supplied to them or failure to show which seals were used to seal the ballot boxes after counting were minor omissions that did not affect the result.

Justice Lenaola (as he then was) in **Masaka -v- Khalwale & 2 Others(2011) 1KLR 390** expressed that where a court is faced with a situation where the process, from voting to tallying could not have been validated, it would be a dereliction of duty for that Court to say that the process was fair and the will of the electorate should be left to stand. In **Ahmed -v- Mbugua & 2 Others [2011] 1 KLR 483** it was held that where the method used in arriving at the results of the election is not transparent, the results announced cannot be credible as the method of arriving at the figures obtained is not reliable.

In **Bisigye -v- Museveni Election Petition No 1 OF 2001** the Uganda Supreme Court held that:

> **"...the expression "non-compliance affected the results of the election in a substantial manner"...can only mean that the votes thecandidate obtained would have been different in a substantial manner, if it were not for the non-compliance substantially. That means that, to succeed, the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that his winning majority would have been reduced. Such reduction however would have to be such as would have put the victory in doubt."**

Kenya and comparative jurisprudence reveals that non-compliance with constitutional principles and election laws governing the conduct of elections does not automatically nullify or vitiate the election result. There must be substantial non-compliance to vitiate the result. In order to vitiate the election results, there must be substantial or material non-compliance.It is this substantial non-compliance that the Kenya Supreme Court in **Raila Odinga -v- IEBC & OthersSC Petition No. 5 of 2013)** stated to be an election conducted in a manner so devoid of merits and so distorted and being an election in which the evidencediscloses profound irregularity in the management of the electoral process which gravely impeach the mode of participation by any of the candidates. The Petitioner must lead evidence to prove the substantial non-compliance. Case law illustrating substantial non-compliance include**Reuben Ndolo -v- DickWathika & 2 Others, EP 11/2008; Masaka -v- Khalwale & 2Others(2011) 1 KLR 390; William Kabogo Gitau -v- GeorgeThuo & 2 Others [2010] eKLR**and**Musikari Nazi Kombo -v- Moses Masika Wetangula & 2 Other, Bungoma High Court Election Petition No. 3 OF 2013.**

COMMENTARY ON APPLICATION AND INTERPRETATION OF SECTION 83 of the ELECTIONS ACT

Section 83 of the Elections Act was enacted prior to the 2010 Kenya Constitution. The section has its roots in the United Kingdom (UK) case of **Morgan (supra)** which case was decided decades before the progressive 2010 Constitution of

Kenya. The UK statute upon which the dicta in **Morgan (supra)** are **Section 13 of the 1872 UK Ballot Act** and the**1949 Representation of Peoples Act** which were enacted decades before the progressive 2010 Kenya Constitution.

The 2010 Kenya Constitution has values and principles which were not in vogue in 1949 when the UK Representation of Peoples Act was enacted. Likewise,the case of **Morgan (supra)**thatwas decided in 1974 does not reflect the values and principles of the Kenya Constitution. In addition, the letter, spirit and historical context of **Section 83** of the Elections Act does not embrace the values and principles of the 2010 Kenya Constitution. It can be argued that when Kenyan courts interpret **Section 83** of the Elections Act, the values and principles enshrined in the 2010 Constitution must be incorporated and applied and jurisprudence on **Section 83** prior to the 2010 Constitution should not be adopted lock stock and barrel in the name of *stare decisis* and doctrine of precedent. It is thus urged that case law interpreting **Section 83** of the Elections Act does not reflect the values and principles of the progressive 2010 Constitution. The superior courts of Kenya are urged to ignore jurisprudence grounded on pre-2010 interpretation and application of **Morgan Case (supra)** and in its place embark on progressive and indigenous interpretation of **Section 83** of the Elections Act while giving pre-eminence to the values and principles of the 2010 Constitution. The historical context in which election technology law was introduced into Kenya must be taken into account in interpreting and applying **Section 83** of the Elections Act.Emphasis should be placed on the need to institutionalize and cement the practice to hold elections that is free and fair devoid of manipulation or alteration of results.

It is important to bear in mind that **Section 13** of the UK 1872 Ballot Act is the grandfather clause to **Section 83** of the Kenya Elections Act. In substance the two piece of legislation are similar except the use of the word **and** in the UK statute which is replaced by **or** in the Kenyan legislation. The provisions are as follows:

Section 13 of the Ballot Act of 1872

> "No election shall be declared invalid by reason of a non-compliance with the rules contained in Schedule 1 of this Act, or any mistake in the use of the forms in Schedule 2 of this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance

with the principles laid down in the body of this Act, **and** that such non-compliance or mistake did not affect the result of the election."

Section 83 of the Kenya Elections Act:

"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 so 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 that election.

The hypothetical issue is why did the drafters of **Section 83** of the Kenya Elections Act change the AND in the Ballot Act to an OR? What is the effect of the "OR" in **Section 83** of the Kenya Elections Act vis-à-vis the AND in the ancestor statute? In changing the AND to OR, the legal effect is that the provision was changed from one about when an election may not be invalidated (i.e. when either one of the two stated conditions is met) to one about when an election must be invalidated (i.e., when both conditions are not met). As a matter of grammaticalconstruction, a party seeking to get an election result invalidated pursuant to **Section 83** will succeed only if he is able to show BOTH that the non-compliance amounted to substantial non-compliance AND it did affect the result of the elections because as per the original language in the BALLOT Act, a court may not invalidate the election if there is substantial compliance or the result is not affected. It can also be argued that **Section 83** introduces a two pronged approach of which either can invalidate elections result. The two approaches are: (i) that there was substantial non-compliance or (ii) the non-compliance affected the results of the elections. The Kenyan courts should come out clear and clarify whether **Section 83** of the Elections Act requires proof of both or either of the two limbs in the section.

BURDEN OF PROOF IN ELECTION PETITIONS

Two presumptions of law and one dictumunderpin burden of proof in election petitions. These are the presumption of validity of all official acts and presumption of validity of the declared election results. The dictum is encapsulated in the principle that he who alleges must prove the allegation. These presumptions and dictum place the burden of proof in an election petition on the petitioner. In the

Nigerian case of **Abubakar -v- Yar'adua[2009] All FWLR (Pt. 457) 1 S.C.,** it was expressed that the burden is on the Petitioner, to prove non-compliance with electoral law, and to show that the non-compliance affected the results of the election.In the Uganda case of **Col. Dr. Kizza Besigye -v- Museveni Yoweri Kaguta & Electoral Commission, Election Petition No. 1 of 2001,** the majority on the Supreme Court Bench stated that the burden of proof in election petitions lies on the Petitioner to prove his case to the satisfaction of the Court and the only controversy surrounds the standard of proof required to satisfy the Court.In the Canadian case, **Opitz -v- Wrzesnewskyj2012 SCC 55-2012-10-256** itwas stated an applicant who seeks to annul an election bears the legal burden of proof throughout.

The Kenya Supreme Court in**Raila Odinga -v- Iebc & OthersSC Petition No. 5 of 2013)** expressed itself on the burden of proof in election petitions as follows:

> **"[195] There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made.**
>
> **[196] …. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been noncompliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta*: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."**

Discourse on the burden of proof in election petitions must be understood in the following contexts:

(a) Constitutional responsibility to conduct free, fair, accurate and transparent elections;

(b) Legal burden of proof;

(c) Evidentiary burden of proof and

(d) Shifting burden of proof.

Under **Article 88 (4)** of the Constitution, the constitutional responsibility to conduct elections is vested upon the Independent Electoral and Boundaries Commission (IEBC). IEBC is responsible for conducting elections to any elective body and any other elections prescribed by an Act of Parliament. **Article 84 (5)**enjoins the Commission to exercise its powers and perform its functions in accordance with the Constitution and national legislation.**Articles 81** and **86** of the Constitution enjoins IEBC to conduct free, fair, transparent and accurate elections. The constitutional responsibility to conduct an election that substantially complies with the Constitutional principles and values and the election law is vested upon IEBC. This constitutional responsibility is a constitutional burden. A reading of **Article 88 (4)** aptly demonstrates that the IEBC has the constitutional responsibility to ensure that elections are free, fair and substantially in compliance with the Constitution and any written law. Unless expressly provided for in the Constitution, a constitutionalmandate or responsibility can neither be delegated nor shifted. In applying the concept of burden of proof in election petitions, failure to appreciate the distinction between the constitutional responsibility and legal or evidentiary burden of proof can be root cause of discordance in application of the doctrine of burden of proof in electoral disputes. It must be appreciated that a constitutional responsibility exists in countries where there is a written constitution. Jurisprudence founded on common law where there is no written constitution cannot capture the concept of constitutional responsibility for the conduct of elections. The common law jurisprudence only captures the legal and evidentiary burden of proof.

The Supreme Court aptly captured this constitutional responsibility on the part of IEBC when in the **Raila Odinga -v- IEBC & OthersSC Petition No. 5 of 2013)** it stated:

> **"[197] IEBC is a constitutional entity entrusted with specified obligations, to organize, manage and conduct elections, designed to give fulfilment to the people's political rights [Article 38 of the Constitution]. The execution of such a mandate is underpinned by specified constitutional principles and mechanisms, and by detailed provisions of the statute law. While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting."**

The Supreme Court re-emphasized the constitutional responsibility of IEBC in **Gatirau Peter Munya -v- Dickson Kithinji Mwenda (SC Petition No. 2B of 2014)** at paragraph 252 where it is expressed:

> **"[252] The constitutionally-mandated agency for electoral management, the *IEBC*, must demonstrate *competence, impartiality, fairness, and a remarkably high sense of accountability to the public, and the parties who are its primary customers.* It must embrace high *disclosure standards*, and must avoid conduct such as hoarding of information and data that the public has the right to, both as a matter of course, and also as a matter of *Article 35 of the Constitution.* Materials that are in the possession of the IEBC are not private property; they are *public resources.* The IEBC is not funded by private money; it draws its money from the public purse. Its subject matter in elections and boundaries are extremely public issues, attended with considerable emotions. Its decisions determine the fates, and interests, at both private and public levels.**

[253] The IEBC, therefore, must demonstrate an instant readiness to respond to public concerns, whenever these are raised, and to maintain a *public-accountability* posture at all times. Public confidence in the electoral agency will only be realized if two tests are constantly met: the test of *openness* in the management of the entire electoral process, and two, the test of *competence.*"

THRESHOLD AND STANDARD OF PROOF IN ELECTION PETITIONS

Section 3 (2), (3) and **(4)** of the Evidence Act (Chapter 80 of the Laws of Kenya) states that "a fact is proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists."Conversely, "a fact is disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist.""A fact is not proved when it is neither proved nor disproved."

Whether a fact is proved or disproved is determined by the standard or threshold of proof. Standard or threshold of proof is the level of certainty and the degree of evidence necessary to establish proof of existence or non-existence of a fact in issue.

Common Law knows (at least) two different standards of proof, the "preponderance of the evidence" (or "balance of probabilities" in English law) for civil cases and "proof beyond reasonable doubt" in criminal cases. In US law, a further intermediate standard of proof known as "clear and convincing evidence", which is applicable in certain civil cases (e.g., civil fraud), is well-established. However, it is a matter of controversy whether English law (and by extension Kenyan law) recognizes such an intermediate standard of proof. In **R (McCann) -v-Crown Court at Manchester [2003] 1 AC 787**, Lord Steyn said at para 37:

"I agree that, given the seriousness of matters involved, at least some reference to the heightened civil standard would usually be necessary"

Case law has established that in civil matters, the standard of proof is on 'balance *of probabilities'*. This is a lesser standard than the proof required in relation to criminal matters. (Criminal allegations must be proven '*beyond reasonable doubt'*). Preponderance of the evidence, also known as **balance of probabilities**, is the standard required in most civilcases. The standard is met if the proposition is more likelyto be true than not true. The standard is satisfied if there is greater than fifty percent chance that the proposition is true. Lord Denning, in **Miller -v- Minister ofPensions *[*1947] 2 All ER 372 at 374**, described it simply as "more probable than not." This requires the investigator to compare competing versions of events from various witnesses to determine which version is more probable. Yet it is not enough that a particular version of events has a mathematically higher probability of occurring. According to the English judge, Lord Simon of Glaisdale in **Davies – v- Taylor *[*1974] AC 207 at 219; [1972] 3 All ER 836 at 844,** the standard requires satisfaction of odds at least a 51 % to 49% that the events occurred. However, in the Australian case of **Briginshaw -v- Briginshaw(1938) 60 CLR 336** the High Court cautioned against a purely mechanical comparison of mathematical probabilities and stated at pages 361–2 that the balance of probabilities test required the tribunal to:

> *"feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality … [A]t common law … it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal"*

Generally speaking, in the United States of America, the evolution of law on standard of proof has produced three standards or levels of proof for different types of cases. At one end of the spectrum, is the typical civil case involving a monetary dispute between private individuals. Since society has a minimal concern with the outcome of such private suits, the plaintiff's burden of proof is a mere preponderance of the evidence (balance of probabilities). The litigants thus share the risk of error in roughly equal fashion. In a criminal case, on the other hand, the

interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. This is accomplished by requiring the state prove the guilt of an accused beyond a reasonable doubt.

In USA, a third standard is the intermediate standard which lies between balance of probabilities and proof beyond reasonable doubt. The intermediate standard, which usually employs some combination of the words "clear," "cogent," "unequivocal" and "convincing," is less commonly used, but nonetheless "is no stranger to the civil law." (See**Woodby -v- INS, 385 U.S. 276, 285 (1966); see also C. McCormick, Evidence 320 (1954); 9 J. Wigmore, Evidence 2498 (3d ed. 1940)).**

One typical use of the intermediate standard in the USA is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. USA courts have used the intermediate "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases. See, e. g., **Woodby -v- INS**, **supra, at 285** (deportation); **Chaunt -v- United States**, **364 U.S. 350, 353 (1960)** (denaturalization); **Schneiderman -v- United States, 320 U.S. 118, 125, 159 (1943)** (denaturalization).

The jurisprudence from USA shows that clear and convincing evidence is a higher level of burden of persuasion than "preponderance of evidence". It is employed intra-adjudicatively in administrative court determinations, as well as inciviland certain criminal proceedings. Clear and convincing proof means that the evidence presented by a party during the trial must be highly and substantially more probable to be true than not and the trier of fact must have a firm belief or conviction in its factuality. The standard for reaching a decision that is "clear and convincing evidence" means that the winner needs to prove that his version of the facts is highly likely. It is an intermediate degree of proof, more than

"preponderance of the evidence" but less than the certainty required to prove an issue "beyond a reasonable doubt" (the standard in criminal cases). In this standard, a greater degree of believability must be met than the common standard of proof in civil actions, which only requires that the facts as a threshold be more likely than not to prove the issue for which they are asserted.The intermediate standard is also known as "clear, convincing, and satisfactory evidence"; "clear, cognizant, and convincing evidence"; and "clear, unequivocal, satisfactory, and convincing evidence", and is applied in cases or situations involving an equitable remedy or where a presumptive civil liberty interest exists. (See *Calderon v. Thompson*, **523U.S.538 (1998); see also Quinlan -v- New Jersey,** and**Cruzan -v- Director, Missouri Department of Health, 497 U.S. 261 (1990).**

In the United Kingdom, prior to the decision of the House of Lords in ***Re B (A Child)*** **[2008] UKHL 35**there had been some confusion – even at the Court of Appeal – as to whether there was some intermediate standard, described as the 'heightened standard'. In **Re B (A Child)*Baroness Hale***said:

> "70. ... Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."
>
> "72. ... there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog."

> The task for the tribunal then when faced with serious allegations is to recognize that their seriousness generally means they are inherently unlikely, such that to be satisfied that a fact is more likely than not the evidence must be of a good quality. But the standard of proof remains 'the balance of probabilities'.

The decision in ***Re B (A Child)*** **[2008] UKHL 35** clarifies that there is no heightened standard of proof in English Law. (See also Article by **Mark Schweizer, "The civil standard of proof – what is it, actually? July 2013; Preprints of the Max Planck Institute for Research on Collective Goods Bonn 2013/12).**

In considering the standard of proof required in presidential elections, the Kenya, Supreme Court in **Raila Odinga -v- IEBC & OthersSC Petition No. 5 of 2013) stated** that:

> **"[297] The evidence laid before the Court has to be considered on the basis of relevant principles of law. From the case law, it is clear that an alleged wrong in the electoral process cannot be rectified on the basis of the conventional yardsticks of civil or criminal law."**

The Court continued and stated that the standard of proof in election petitions is the intermediate standard. The Court expressed:

> "[**203] The lesson to be drawn from the several authorities is, in our opinion, that this Court should freely determine its standard of proof, on the basis of the principles of the Constitution, and of its concern to give fulfilment to the safeguarded electoral rights. IEBC as the public body responsible for elections, like other public agencies, is subject to the "national values and principles of governance" declared in the Constitution [Article 10]; judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise. But at the same time, a petitioner should be under**

> **obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, *be above the balance of probability,* though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in Article 138(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it *beyond any reasonable doubt*."** (Emphasis mine).

In **Bernard Shinali Masaka -v- Bonny Khalwale & 2 Others [2011] eKLR,** Lenaola, J(as he then was) held as follows in regard to the standard of proof that should be applied in Election Petitions:

> ***"Further, I agree with the preposition grounded on the decision in Mbowe – Vs- Eliufoo [1967] EA 240 that any allegations made in an election petition have to be proved to the "satisfaction of the court". Like Rawal J in Onalo, I am certain that the standard of proof, save in matters where electoral offences are alleged, cannot be generally beyond reasonable doubt, but because of the quasi-criminal nature of some election petitions, it almost certainly on a high degree than merely on a balance of probabilities, the latter being the standard in civil cases."***

In **Waibara -v- Mburu & 2 Others, [2011] 2 KLR 103** the Court of Appeal held that the standard of proof in election matters was one beyond any reasonable doubt; that it was higher than that on a balance of probabilities because election offences attract serious sanctions and proof of any breach of election laws and procedures has to be clear without equivocation. This decision should be contrasted with the High Court decision in **Mwakesi -v- Mwakwere & 2Others [2010] 1 KLR 758 at 761** (M. K. Ibrahim J, as he then was) where he opined that the standard of proof in election petitions was slightly higher than the one adopted in civil cases but not as high as in criminal cases.

Comparative jurisprudence reveals that unlike the burden of proof, the standard of proof applicable inpresidential elections is not uniform across countries – it varies from one jurisdiction tothe other. (**See Miriam Azu, "Lessons from Ghana and Kenya on why presidential election petitions usually fail" in African Human Rights Law Journal pp 151 at 162).** For example, in Ghana, presidential election disputes are civil innature and the standard of proof is on the preponderance ofprobabilities. It is only when crime is alleged in a presidential election petitionthat the criminal elements of the case are required to be proven beyondreasonable doubt. In the Ghana case of **Nana Addo Dankwa Akufo-Addo & 2 Others -v- John DramaniMahama & 2 Others (Writ 1/6/2013) at 459-460,**Justice Anin Yeboah of the Supreme Court stated:

> ***"The petition is simply a civil case by which petitioners are seeking to challenge the validity of the presidential elections. From the pleadings and the evidence, no allegations of fraud or criminality were ever introduced by the petitioners. The standard of proof of allegations in civil cases is proof by preponderance of probabilities. It is only when crime is pleaded or raised in the evidence that the allegation sought to be proved must be proved beyond reasonable doubt.***

The position is the same in India. In **Shri Kirpal Singh -v- Shri VV Giri (1970) 2 (SCC) 567,** it was held that allegations of corrupt practices have to be proved beyond anyreasonable doubt. In**M Narayan Rao -v- G Venkata Reddy&Another, (1977) (AIR) SCC 208,** the Indian Supreme Court explained that this is so becauseallegations of corrupt practices are quasi-criminal in nature and must be proven according to the criminal standards. In Tanzania, the standard of proof in election petitions is beyond reasonable doubt. In **ChabangaM. Hassan Dyamwale -v- A;haji Musa Sefu, 1982 Tanzania Law Reports at 69,** the Tanzania High Court expressed:

> *The standard of proof required for the avoidance of an election is proof beyond reasonable doubt.*

In some other jurisdictions, the standard of proof in presidential election disputes goes beyond the preponderance of probabilities but fallsslightly below the criminal standard. For example, in the Zambia case of**Lewanika & Others -v-Chiluba(1999) 1LRC 138**, it washeld that the standard of proof in presidential election petitions is a degreehigher thanthat of the civil standard. However, in the subsequent case of **Anderson Kambela Mazoka & 2 Others -v- Levy PatrickMwanawasa & 2 Others (Case CCZ71/2013),** the Zambian Supreme Court reviewed its position and held that the applicable standard of proof must depend on the allegations contained in the petition.

EXTRA-LEGAL CONSIDERATIONS IN THE RESOLUTION OF PRESIDENTIAL ELECTION DISPUTES

Presidential election disputes are important because they trigger all the three arms of government into action simultaneously: they constitute achallenge to the highest executive office of a country which the judiciary mustresolve based on laws enacted by the legislature. That notwithstanding,presidential election disputes are not foreign to the law; they are instituted withconstitutional or legal backing. Further, they are not extraordinary because thejudiciary has the authority to dispose of them in accordance with the rules of evidence, just like all other cases.(**See Miriam Azu, "Lessons from Ghana and Kenya on why presidential election petitions usually fail" in (2015) 15 African Human Rights Law Journal pp 150-166 at 164; see also O'Brien Kaaba "The Challenges of adjudication presidential election disputes in domestic courts in Africa", (2015) 15 African Human Rights Law Journal 329-354).**

However, somejurisdictions have created the impression that presidentialelection disputes are a special breed of cases. This lends credence to the concept of judicialization of politics. Judicialization of politics is a collective term referring to the deployment of courts and judicial processes to resolve core political, public policy and moral disputes; it entails the extension of the mandate of the judiciary into public policy formulation and shaping the political and moral landscape. (See Ran Hirschl, 'The New Constitution and the Judicialization of Pure

Politics Worldwide', Fordham Law Review, Volume 75/Issue 2 Article 14 at page 1).

In **Peters -v- Attorney-General (2002) 3LRC 32 CA 101;**for instance, Sharma JA said that election petitions are *'sui generis'*. The Ghana Court ofAppeal in **Chris Nwebueze -v-Peter Obi& 436 Others (2006) 18 WRN 33** remarked thatelection petitions are 'peculiar from the point of view of public policy'; theKenyan Supreme Court in the **Raila Odinga -v- IEBC &OTHERS SC Petition No. 5 of 2013** at paragraph 230 of its judgment expressed that a presidentialelection dispute consists of 'special circumstances'.

In the Ghana**Nana Akufo-Addo case**, the presidential election disputes were variously described as 'seriousand volatile', of a 'peculiar nature and potential effects', and 'multidimensional'with 'several legitimate interests at stake which cannot be ignored'. Akoto-Bamfo JSC, for instance, took into consideration the evolving phenomenon of democracy and the imperfect nature of elections and observed that '[w]e should exercise reluctance in striking down every single vote just by reference to a provision of the law'. Adinyira JSC went a step further and attributed the general reluctance of judges to void election results to public policy. According to her, since it is a very serious matter to overturn election results, 'public policy favours salvaging the election and giving effect to the voter's intent, if possible. Similarly, the president of the court, Atuguba JSC, also noted that 'the judiciary in Ghana, like its counterparts in other jurisdictions, does not readily invalidate a public election but often strives in the public interest to sustain it'. The use of these adjectives in the description of presidential election disputes justifies anenquiry into whether the courts are influenced by extra-legal considerationswhen resolving presidential election disputes.

In **Bush -v-Al Gore, 531 US (2000), the** United States Supreme Courtexpressed itself thus:

> **"None are more conscious of the vital limits on judicial authority than arethe members of this Court, and none stand more in**

admiration of theConstitution's design to leave the selection of the President to the people….. and to the political sphere."

In Kenya, the Supreme Court in the **Raila Odinga -v- IEBC & OthersSC Petition No. 5 of 2013** expressed at paragraph 298 that:

> [298] An alleged breach of an electoral law, which leads to a perceived loss by a candidate, as in the Presidential election which has led to this Petition, takes different considerations. The office of President is the focal point of political leadership, and therefore, a critical constitutional office. This office is one of the main offices which, in a democratic system, are constituted strictly on the basis of majoritarian expression. The whole national population has a clear interest in the occupancy of this office which, indeed, they themselves renew from time to time, through the popular vote.
>
> [299] As a basic principle, it should not be for the Court to determine who comes to occupy the Presidential office; save that this Court, as the ultimate judicial forum, entrusted under the Supreme Court Act, 2011 (Act No. 7 of 2011) with the obligation to "assert the supremacy of the Constitution and the sovereignty of the people of Kenya" [s.3(a)], must safeguard the electoral process and ensure that individuals accede to power in the Presidential office, only in compliance with the law regarding elections.

MEANING OF "AFFECT THE RESULT OF THE ELECTION"

No election is a hundred per cent compliant with electoral rules and principles. Minor deviations will always occur. Irregularities or non-compliance with the electoral law will not necessarily lead to invalidity of an election unless the irregularityor non-compliance affects the result of the election. In **Joho -v- Nyange(2008) 3 KLR 500,** it was held that some errors in an election are nothing than what is always likely in the conduct of human activity. If the errors are not fundamental, they should be excused or ignored. But when deliberate irregularities

or forgeries are committed, different considerations should be given as to the effect.

For an election irregularity to vitiate the result, the result must be affected. Which result must be affected? There is only one result that must be affected - the result that "A" is the winner of the election. "Result" means the success of one candidate over another and not merely an alteration in the number of votes given to each candidate. (See **Clare, Eastern Division, Case (1892) 4 O'M&H 162 at 164; see also Islington – v – West Division, Case (1901) 5 O'M&H 120).**For an election petition to succeed, evidence must be led to prove that the result and conclusion that "A" is the winner of the election is affected by the irregularities or non-compliance with the constitutional principles and electoral law. The evidence led must demonstrate that the irregularities or non-compliance raise doubt as to whether "A" is the winner and better still that the irregularities or non-compliance prove that "A" is not the winner.

How is the result affected? The word "affect "in **Section 83** of the Elections Act is primarily used as a verb - it means to negatively influence the electoral process or raise doubt as to the integrity, verifiability or accuracy of the quantitatively and qualitatively declared result.

But what exactly is the meaning of the clause "affect the result of the election"? Courts have held that it refers to the question of which person is elected, as opposed to the number of votes cast for each candidate. Therefore, if a consequence of irregularity is that a candidate would have polled more or less than what was recorded at the count, but the same candidate would still have been elected, the result would not have been affected.

The Supreme Court in **Gatirau Peter Munya -v- Dickson Kithinji MWENDA (SC Petition No. 2B of 2014)**at paragraph 221 observed that when electoral irregularities occur, the correct question to ask is "***Did these errors/discrepancies affect the result and/or the integrity of the election? If so, in what particulars?" At para 224,*** the Court noted that to nullify the electoral result, such errors and irregularities must *demonstrably be shown to have reversed the result*. At paragraph 206, the Court stated that in order to affect the result, there must be evidentiary justification and a demonstration of how the final statistical vote-

outcome had been compromised by the irregularities. This is a quantitative approach. This dictum resonates with the High Court decision in **Ole Lempaka -v- Komen & Another(2008) 2 KLR 83** where it was held that a petition which alleges breach of law, rule or regulation which complain of any malpractice must be proved by evidence and if no evidence is offered, the petition shall be dismissed.

Both quantitative and qualitative test must be applied to determine whether the result has been affected. This was recognized long ago in the English case of **Islington West Division Case**, quoted in**Medhurst -v- Lough And Gasquet (1901) 5 O'M & H 120, 17 TLR 210, 230** where Kennedy J, held that:

> ***"An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election, where the court is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, i.e. the success of the one candidate over the other, was not, and could not have been, affected by those transgressions. If, on the other hand, the transgressions of the law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether these transgressions may not have affected the result, and it is uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void."***(Emphasis mine).

In **Opitz C -v-Wrzesnewskyj (2012) 3 S.C.R 76** Rothstein and Moldaver JJ had the following to say about the effect of irregularities upon an election.

> ***"Atissue in this appeal are the principles to be applied when a federal election is to be challenged on the basis of 'irregularities'. We are dealing here with a challenge based on administrative***

errors. There is no allegation of any fraud, corruption or illegal practices. Nor is there any suggestion of wrong-doing by any candidate or political party. Given the complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the job-experience, and the short time-frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can easily be annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election."(Emphasis mine).

In **MBOWE -v-ELIUFOO [1967] EA 240**, at page 242, GEORGESCJ in the Court of Appeal of Tanzania said:

"In my view in the phrase "affected the result" the word "results" means not only the result in the sense that a certain candidate won and another lost. The result may be said to be affected if after making adjustments for the effect of proved 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."

In **Chabanga M. Hassan Dyamwale -v- Alhaji Musa Sefu, 1982 Tanzania Law Reports 69 at 73**, the learned judge expressed that:

"The question whether non-compliance affect the result of an election would depend on the nature of the particular complaint or irregularity and on the margin of victory. Where a specific irregularity has been proved and the number of votes affected established with some precision, then allowance should be made for that and if after the adjustments have been made the successful candidate still retains some margin of victory, then

> ***the irregularity has not really affected the result of the election. <u>Where however the complaint goes to the root of free elections and it appears that a substantial number of votes were obtained by the irregularity, since the extent of such wrong practice may never be known, the court may be inclined to hold that it affected the result of the election without proof of actual reversal of the result.”</u>(Emphasis mine: contra Kenya Supreme Court judgment in Gatirau Munya case that election results cannot be voided on** *conjecture and speculation).*

In **<u>Chabanga M. Hassan Dyamwale -v- Alhaji Musa Sefu,</u> 1982 Tanzania Law Reports at 69,** the Tanzania High Court observed that:

> **“Although a few irregularities had been proved, they could not be said to have affected the result of the election because even if the adversely affected votes were added to the petitioner, the first respondent would still have won the election by a big margin.”**

In determining the effect of the irregularities ***an arithmetical error that does not fundamentally alter the outcome of the resultcannot lead to the nullification of an election result.***In **Re Presidential Election Petition <u>Akufo-Addo,Bawavumia & Obetsebi-Lamptey -v- Mahama</u>, Electoral Commission & National Democractic Congress (No.4) [2013] SCGLR 73)** Justice Sophia Adinyira JSC (as she then was and now Chief Justice of Ghana) in dealing with arithmetic errors, expressed:

> The petitioners have not led sufficient evidence for me to come to the conclusion that there was clearly a mathematical chance that the results could change….

The Uganda Supreme Court in **<u>Rtd Col. Kizza Besigye -v- YoweriKAGUTA Museveni & Election Commission</u> (Presidential Election Petition No.102 of 2011) Mulenga JSC** explained the meaning of the phrase **“affected the result of the election in a substantial manner”** as follows:

"To my understanding therefore, the expression non-compliance affected the result of the election in a substantial manner as used in section 58(6)(a) can only mean that the votes candidatesobtained would have been different in a substantial manner, if it were not for the non-compliance substantially. That means that to succeed the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that the winning majority would have been reduced. Such reduction howeverwould have to be such as would have put the victory indoubt."

Mwongo Jin **Ferdinand Ndungu Waititu -v- IEBC AndEvans Kidero & Others(Election Petition No. 1 of 2013),** at paragraph 71 of his judgment expressed that to constitute a void election on account of non-compliance with the law, the evidence of irregularities and discrepancies in the election must be of such nature as to disclose through clear and weighty evidence, any one or more of the following:

a) An attempt to establish a winner otherwise than in compliance with the Constitution; and or

b) An attempt to suppress, alter or undermine the will of the voters exercising their rights under Article 38 in such a manner as to affect the overall outcome of an election; and or

c) A failure by or of the electoral system, or in the processes used therein, such as to constitute non-compliance with the general principles of the electoral system under Article 81 of the Constitution; and or

d) Such clear and glaring flaws in the conduct of the elections as substantially render any of the aspirations of Article 86 (a), (b), (c) or (d) to be meaningless; and or

e) That the non-compliance with the electoral law or regulations was substantial enough to, and did in fact, affect the result of the election.

In**Joho -v- Nyange(2008) 3 KLR 500 at 513 line 26** it was expressed that "the result of an election is affected when the cumulative effect of the irregularities reverses it. For instance, when a large proportion of the voters are by some blunder in the conduct of the elections as happened in **HarrisonGarama Kombe -v- Ali Omar & OtherS, Civil Appeal No. 52 of 2006 (CA)** do not turn up to vote, the result is said to be affected.

In **Josiah & 4 Others -v- Ogutu & Another(2008) 1 KLR 73**, the court expressed as follows:

> **"By and large, the ballot papers, which the court had scrutinized, were free from irregularities and any discrepancies were minimal and could be accounted for by unintentional human error and not by intentional design or any other sinister motive. The minimal discrepancies could not and did not affect the result of the election in which the 1st respondent had scored a substantial and legitimate majority over his rival."**

In the case of **Rishad Hamid Ahmed Amana -v- IEBC & OthersMalindi EP No. 6 of 2013** the court held that irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. In **Wavinya Ndeti -v- IEBC & 4OTHERS Machakos EO 4/2013** it was held that the task of conducting elections is undertaken by human beings and not programmed machines. Given the strenuous conditions and long working hours involved, it is quite feasible that such errors

would occur. An allowance must be made for such human errors which are innocent mistakes that do not fundamentally affect the results.

In **Omar & Another -v- Mbuzi & Another(2008) 3 KLR 270,** it was held that a ballot paper is an integral part of the election and a defect on a ballot paper which misleads voters is an important defect and an election in such a case does not comply with the written law; and such an election cannot be said to be free and fair. A defect in the ballot paper goes to the foundation of any election and it is not the kind of defect that can be cured by **Section 28** (now **Section 83**) of the Elections Act. In this case, there was a defect in the ballot papers in that a party which sponsored a candidate had its symbols missing from the ballot papers and instead another party's symbol was assigned to the candidate. In**Issak -v- Hussein & Another(2008) 1KLR (EP),** it was stated that it would be subverting multi-party democracy or promoting political trickery or deceit if distinct symbols for each participating party or candidate is not used.

In the Nigerian case, of **Ibrahim -v- Shagari & Others(1985) LRC(CONST.) 1**, the Supreme Court held:

> **"The Court is the sole judge and if it issatisfied that the election has been conducted substantially in accordance with…the Act it will not invalidate it. The wording of Section 123 is such that it presumes that there will be some minor breaches of regulations but the election will only be avoided if the non-compliance so resulting and established in Court by credible evidence is substantial. Further, the Courtwill take into account the effect if any, which such non-compliance with [the] provisions ofPart II of the Electoral Act, 1982 has had on the result of the election…."**

The Kenya Supreme Court in **Gatirau Munya Case (PETITION NO 2B of 2014)**expressed as follows in relation to "affect the result".

> "[218] **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. Otherwise, procedural or administrative irregularities and other errors occasioned by**

human imperfection, are not enough, by and of themselves, to vitiate an election. (Emphasis mine).

[219] **Byway of example, if there would be 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 on account of such shortfalls, to nullify such an election. However, 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. Examples of irregularities of a magnitude such as to affect the result of an election, are not however, closed."**

The above position is amply illustrated in "**Fitch -v- Stephenson and OTHERS[2008] EWHC 501(QB)"**. In this case, the petitioner proved failure by election officials to count 45.8 per cent of votes cast. Nevertheless, the court declined to nullify the election, stating that the petitioner had failed to prove that the result would have been any different if not for the irregularity. The judges stated:

"…the courts will strive to uphold an election as being substantially in accordance with the law, even where there have been serious breaches of the rules, or of the duties of the election official providing that the result of the election was unaffected by those breaches. The availability of proportionate judicial remedy for rectifying the result and declaring the true result of the election following scrutiny and a recount prevents the necessity to choose between vitiating the entire election and allowing an erroneous election to stand."

In **Lamb -v- Mcleod(1932) 3WWR 596**, the subject matter of the complaint was the validity of 17 votes in an election where the margin of victory between the candidates was only 5; the court annulled the election on the grounds, inter alia, that: "It cannot be said that there was an electing of a Member of Parliament by the

majority" as the intrusion by wrongdoers made "it impossible to determine for which candidate the majority of qualified votes were cast".

The India Supreme Court case of **Markio Tado -v- Takam Sorang CIVILAppeal No. 8260 OF 2012** considered the issue of affect the result and expressed as follows:

> **"…at best, the case of the first respondent was that there were double entries of voters in 1304 names. The allegation was only with respect to two polling stations. In those polling stations, the appellant had received 1873 votes. Even if these 1304 votes were to be deleted, it would not affect the result materially since the appellant had won with a margin of 2713 votes."**

In **Bura -v- Stewart(1967) EA 254**, the petitioner received 8,476 ballots and the respondent 9,002, a majority of 526. The court observed that allowing that the 480 spoilt votes had been improper, the respondent would still have a majority of 46 or so votes. In this context, the result was not affected. It was expressed that if "a specific irregularity has been proved and the number affected established with near precision, once allowance has been made for that, the petitioner is compensated".

In Kenya, the High Court has in several cases considered whether a proven irregularity affected the result. In **Wabuge -v- Limo & Another(2008) 1 KLR (EP) 417 at 421 line 26** the court observed as follows in a petition where the margin between the winner and loser was a difference of 593 votes.

> **"We now deal with the matter of an increase in the number of rejected ballot papers from 660 to 1,695 an excess of 1,035 ballot papers. Most of these ballot papers we found were rejected for, double marking i.e. after the ballot paper has been used with distinct intention and an adequate sign indicating such an intention, a further mark is made to nullify the effect of the voter and with a view of rendering the ballot paper invalid. We say this as we observed with our own eyes ballot paper after ballot paper**

having been tampered with in this fashion. We also observed that in most of these cases writing instrument of more than one type was used…. For example, use of different colour and types of inks. We have no doubt, in our minds and we find, that due to this tampering, the 2nd respondent's majority of votes cast was appreciably reduced from the ballot papers cast and so counted as 10,789 – this figure was reduced to 9,671, a decrease of 1,181. …. As already noted there are a number of glaring anomalies and inconsistences in the facts obtained by the Court at the time of scrutiny and recount and at the hearing of the petition. To this we cannot shut our eyes and ignore completely the irregularities and shortcomings. (Contra, Supreme Court dicta at paras 221 and222 in Gatirau Munya case stating that this is a wrong approach i.e. to say that the court cannot shut its eyes)."

In **Gatirau Peter Munya case** at paragraphs 223 and 244 of its judgment, the Supreme Court expressed that there should be no extrapolation of errors or malpractices to arrive at a conclusion that an error or malpractice in one polling station is symptomatic of similar errors in other polling stations. It was stated that discrepancies in one polling station should not be extrapolated to other polling stations and it is a misdirection to presume that an error in one polling station is a pointer topossibility of similar errors in other polling station. It was observed that extrapolation of errors is speculative. The Supreme Court emphasized that the test to be applied in determining the effect of irregularities on an election cannot be a speculative one and cannot be based on extrapolation of limited-scale irregularity to the broad expanse of all polling stations.It is manifest that in order to contest election results, the petitioner must show that, but for the irregularity or inaccuracy claimed, the result of the election would have been different, and he or she would have been the winner; that it is not enough to show a reasonable possibility that election results could have been altered by such irregularities, or inaccuracies, rather, a reasonable probability that the results of the election would have been changed must be shown. There must be credible statistical evidence or other competent substantial evidence to establish by a preponderance of a reasonable probability that the results would be different from the result which has been

declared. (*See herein, the Supreme Court resorting to balance of probability as the standard of proof*).

In the case of **Lenno Mwambura Mbaga and Another -v- IndependentElectoral and Boundaries Commission and Another(2013) eKLR** the petitioner contended that the gubernatorial election in Kilifi county was conducted in an atmosphere of violence and fear, as a result of which some polling stations did not open, while others opened late and closed early. The petitioner also alleged mishandling of ballot papers after voting. All this, the petitioner argued, compromised the integrity of the elections as due procedures for the handling and counting of ballot boxes and ballots such as sealing and the participation of agents could not be complied with in the obtaining circumstances. The court found that there were indeed acts of violence on the eve of Election Day and that some polling stations did not open. Despite these findings, the court did not nullify the election. It was held that since there had been a high voter turnout in the county, the petitioner had failed to demonstrate how the violence and procedural anomalies had affected the result.

Does failure to sign election forms affect the result? In **Gitau -v- Thuo & 2Others, [2010] 1 KLR 526,** it was held that a Form 16A which was not signed by a Presiding Officer could not constitute valid results capable of being accepted for tallying by a Returning Officer. Further, a Form 16A which was not authenticated by the stamp of the electoral body could not be said to contain valid results. This decision should be contrasted with **Ndolo -v- Mwangi & 2 Others[2010] 1 KLR 372 at 375** where it was stated that lack of signature could not affect the election and the omission to sign was of a serious nature which could cast doubt on the validity of the results declared.

In **Ahmed -v- Mbugua & 2 Others[2011] 1 KLR 483,** it was held that although it was mandatory for the candidate's agents to sign Form 16A, it was important for the presiding officer to record the reasons for the agent's refusal to sign the Forms confirming the results of the election in each centre before the results are transmitted.

In the case of **James Omingo Magara -v- Manson Onyango Nyamweya & 2 Others(2010) eKLR**, Justice Erastus Githinji, while considering the failure by the presiding officer to sign Form 16A stated:

> ***"Reasonable compliance as opposed to strict or absolute compliance with the procedures set out in the legislation is the standard for considering procedural matters… Secondly, it is my view that the mere failure by a presiding officer to sign Form 16A is a procedural anomaly which does not invalidate the results announced in a polling station… The complaint by the appellant that the election court relied on generalities regarding Form 16A and 17A without quantifying the gravity of those anomalies is valid. In my view, the election court should have addressed itself to specific Form 16As and 17As, examined the anomalies and ultimately determined what impact the anomalies had in the overall results of the elections…. those anomalies were in counting or rather in the reconciliation or tallying process. They are post-election anomalies which, in my view, did not affect the vote."***

It is important to contrast the above dicta with the dicta in **Masaka -v-Khalwale & 2 Others, (2011) 1 KLR 390**, where on the issue of errors in electoral Forms it was stated:

> **"In this case, it was an important factor to consider that the results of the election showed that the first respondent had won the election by a margin of 265 votes. This was a very narrow margin and too close a call to have allowed all manner of errors to impinge on the total tally. Had the gap between been very wide, then one could argue that the errors and anomalies may not have affected the result. In this case, the errors affected every single polling station and the results of every single candidate. The Court could not have ignored the fact that there was nexus between all the Form 16As and the single Form 17A which meant**

that the final tally of the election results was based on erroneous documentation."

The trial court in nullifying the result, observed at page 422 paragraph 52 that:

"I have shown elsewhere above that the 3rd respondent inserted some votes in Form 17A which had no basis in any Form 16A. How can that be called a tally? Once Form 16A were discredited, as they were in this case, there was no proper tally and the whole election was rendered a sham."

In **Bura -v- Stewart(1967) EA 254**, it was held that the transfer of voters and their admission to vote at polling stations other than those allotted to them constituted non-compliance but such non-compliance did not affect the result of the elections. The court noted that there is a clear obligation to assign voters to polling stations. This obligation envisages that there will be at each polling station a register of voters and that the voter's names will be checked against the register as they present themselves to vote. This system has advantages for it is possible to know exactly how many people will be at each polling station and to provide a number of ballot papers which will be sufficient though not excessive. Greater security is thus provided for the ballot papers. It also helps to make personation more difficult. The reason why the court held that the transfer of voters did not affect the result is that first there was no complaint of personation or double voting; second, the conditions were the same for all candidates and third there was no credible evidence to prove that the transfer was done for ulterior motives to facilitate a proven malpractice.Likewise, in this case it was held that the exclusion of the polling agent from the polling station was non-compliance but it was not substantial and there was no reason to think that it could in any way have affected the result.

In **Vitus Vita Pancras Magingi -v- The Attorney General and Mustafa SalimNyanganyi (1982) Tanzania Law Reports 8** it was held that "non-publication of a polling station in a gazette does not affect the result of the elections in that the voter's choice is not affected thereby. Of course, it will affect the result if the non-publication disenfranchised a substantial number of voters."

In the Indian case of **Bakarganj, D.E.C., Vol. 1 Case NO. 22**, it was held that where circumstances change and there is good reason to change the location of the polling station, polling need not be held at the exact place that is gazetted and if inspite of the change of the place of polling it is not proved that any voter was misled or disenfranchised, the irregularity, if any, is immaterial. (See also **Punjab Trade Union Constituency, I.E.C.D., Vol. 11, page 226).**

In **Salem And Coimbatore Cum North Arcot D.E.C., Vol. 11 Case NO. 168,** the place of polling was changed, but a nearer place was selected and due notice was given to the voters of the change. It was held that this did not materially affect the result of the election. The case will however be different in case no effective steps were taken to notify the change of polling station. The casting of votes at an election depends on a variety of factors. Mere change of the place where the polling is to take place would in itself not lead to holding that the result of the election was materially affected. (See **Paokai Haokip – v- Rishang, AIR 1969 SC 663; the dictum of Grove J. in Hackney Case, Gill – v- Reed and Holms, (1974) 31 LT at 71,72** was applied).

Comparative jurisprudence from Ghana on failure to sign Forms is illuminating. In the **Ghana Presidential Election Petition 2012, (In Re Presidential Election Petition Akufo-Addo, Bawavumia & Obetsebi-Lamptey -v- Mahama, Electoral Commission & National Democractic Congress (No.4) [2013] SCGLR 73)** on the issue of absence of signatures on pink sheets (Election Forms) by the Presiding Officers, SC Justices Atuguba, Adinyira, Gbadegbe, Baffoe-Bonnie and Akoto-Bamfo dismissed the petition on the ground that the failure of Presiding Officers to sign the pink sheets was simply the result of administrative errors that could not affect the validity of the election results**.** Justice Atuguba observed that, "signature in itself has no magic about it; it is judicially acknowledged that failure to sign an official document could be due to administrative error, this category of irregularity is outside the domain of the voter, as it is caused solely by an error or omission on the part of the presiding officer." Justice Baffoe-Bonnie expressed that "failure to sign the document ought to be seen as irregularity that does not affect any party or conduct of the polls." Justice

AkotoBamfo noted that "visiting sins of some public officials on innocent citizens…runs counter to the principle of universal adult suffrage and it follows that the omissions of the presiding officer should not disenfranchise the voter".

Justice Anin Yeboah of the Ghana Supreme Court at pages 484-5 of his judgment had an emphatic answer to the position taken by the majority and expressed:

> **"From the evidence on record apparent on the pink sheets many political parties did not send agents or representatives to many of the polling stations. None of the parties herein is making a case out of that, in that, the interpretation one can put on Article 49(3) is that political parties are not bound under the constitution to send agents to the polling stations. Their absence at any polling station and for that matter not signing any pink sheets as representatives or agents of the political parties would not amount to any irregularities or malpractice in the electoral process. A close reading of regulation 19 Of C.1 75 that is The Public Elections Regulations 2012, in my view shows the limited role the polling agents play at the polling stations. The polling agent does not have any major role to play in course of the elections. It is clear under regulation 44 of C. l 7 (sic) that the nonattendance of the polling agent shall not invalidate the act or a thing done. The role of the polling agent is to detect impersonation and multiple voting and certifying that the poll was conducted in accordance with the laws and regulations governing elections."** (Emphasis added).

The Justices of Ghanaian Supreme Court maintained that to annul an election based on failure to have a signature, the said law or the constitution must: (a) in explicit statutory language state that the provisions are mandatory; (b) in explicit statutory language specify that the election is voided because of the failure; (c) state that the violation affected an essential electoral component; (d) state that the violation changed the election's outcome or rendered it uncertain. According to Justice Atuguba "It would be unfair and fraudulent for the petitioners to authenticate the results through the polling agents' signatures and turn around to

seek to invalidate [them] on purely technical grounds of absence of presiding officers' signature."

A further irregularity normally raised in petitions is that the polling station was opened late. In **Munyao -v- Munuve & 4 Others(2008) 2 KLR 20 at 27**, the Court of Appeal observed that on the irregularity that the polling stations were opened late, we find that the only direct evidence shows that the latest time a polling station was opened was around 10.00 am and that they were closed after all who desired to vote had so voted. The court observed that the law does not appear to make provision for the opening time for polling stations and as long as those who desire to vote are given time to vote, an election official cannot be said to have infringed any law.To succeed on the ground that a polling station was opened late, it must be established that there was disenfranchisement of voters and this affected the result. This statement is in line with dictum by Stephenson J. in **Morgan -v- Simpson[1974] 3 All ER 722** at page 731 where he stated that an election is not conducted substantially in accordance with the law where there is disenfranchising of a substantial proportion of qualified voters.

In **Ntwiga -v- Msyoak& 3 Others(N0.2) (2008) 2 KLR 276 at 278** it was held that though some polling stations had opened late, there was no evidence adduced to show that the late opening was aimed at frustrating the petitioner's election though the late opening affected all the candidates it was an irregularity since time was not extended and the effect of it was that some voters did not exercise their constitutional right to vote.

On a comparative basis, in the Indian case of **Bulandshahr District East, D.E.C., Vol. 1 (CASE NO. 49),** it was held that if the polling is conducted for a lesser time than that required under the rules, the election cannot be set aside unless it is proved that the result of the election has been materially affected by such irregularity. Temporary suspension for small time of the polling is not very material. In such cases, the election cannot be set aside merely because the polling was stopped before due time. In **Akyab West, D.E.C., Vol 1 Case No. 9**it was held that the mere closing of the poll in an irregular manner or before the due time is not enough to warrant the setting aside of an election, unless the result of the election is proved to have been materially affected.

The issue of effect of violence on free and fair elections has been considered by the Kenyan courts. In **KAJEMBE V NYANGE & 3 OTHERS(2008) 2KLR 1,** it was held that the election was not free and fair due to excessive violence in which a person was killed at a polling station and few injured. The court observed that on account of the irregularities of late opening and early closure, shortage of ballot papers as well as merger of polling stations without notice and the widespread violence in the constituency during the voting day, the election result was invalid. In allowing the petition, the learned judge expressed himself thus:

> ***"It was noted that due to the excessive violence which erupted in the early hours of the voting day, many people were prevented from voting. If those who were kept away by violence had voted, we do not know how they would have voted but could have affected the final result if they had say choose to vote for the runner up to the winner of the election as they were over 1500. It was noted that about 1,500 people did not vote and although the inability of such a large number of voters to vote cannot of its own be said to have affected the outcome of the election, it nonetheless could have affected the election if all those alleged not to have not voted were to vote for the runner up in the election."***

In **Joho -v- Nyange(2008) 3 KLR 500** it was held that though there were incidences of violence, the voting exercises was not affected. In **Ochwada -v- Ojiambo & Another (2008) 1 KLR 90**, it was held that it was unlikely that the persons prevented from voting by the disturbance had any effect on the results of the election.

Another common ground in election petitions is undue influence. Undue influence manifests itself in various forms such as bribery, administration of oaths, intimidation, compulsion and witchcraft. When does undue influence affect the result of the election? Undue influence is complete if and when the inducement or compulsion is proved to have taken place. It must also be established that the respondent took part in the undue influence.

In **Mbondo -v- Galgalo & Another(008) 1 KLR (EP) 142**, the High Court had occasion to consider intimidation as an aspect of undue influence. The allegation in

thepetition was that the 1st respondent instigated a crowd of about 1000 people to compel and coerce the petitioner by any means to withdraw his nomination and that the 2nd respondent threatened the petitioner's life unless he withdrew his nomination. The petitioner claimed that as a result he lost his nerve and withdrew his candidature. It was held that there was evidence that the petitioner was compelled to withdraw. The petition was allowed. In the **Dudley Case (1874) 2 O'M&H 155**, it was expressed that intimidation that prevents free voting voids an election.

Bribery is a common allegation of electoral malpractice within the rubric of undue influence. The **Halsbury's Laws of England 4th Edition Volume 15 at Paragraph 695**on voter bribery states as follows:

> **"…. 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"**

In the case of**Simon Nyaundi Ogari & Another -v- Hon. Joel Omangwa Onyancha & 2 Others[2008] KLR** Musing, JA held that:

> ***"Clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient. It is true that it is not easy to prove bribery more especially where it is done in secrecy. In such cases, perhaps bribery may be inferred from some peculiar aspects of the case but when it is alleged that bribery took place publicly and in presence of many people, the court cannot be satisfied with anything less than the best evidence which is always direct evidence given first hand."***

In the case of **Musikari Nazi Kombo -v- Moses Masika Wetangula & 2 Other, Bungoma High Court Election Petition No. 3 Of 2013**, Judge Gikonyo at paragraphs 173 and 174 of the judgment expressed that where the candidate is the one who has been found to have committed an election offence of bribery of voters,his election becomes void; that a single incident of commission of bribery by the candidate is sufficient to invalidate an election and it will not be necessary

to prove a series of bribery of voters for such an election to be declared void. (See ***Halsbury's Laws of England, Vol 15 paras 113 and 114***.) However, in cases where the offence of bribery of voters is committed by the agents of the candidate, the law affords the affected candidate an opportunity to claim exoneration from the acts of his agents. Equally, a claim based on bribery of voters by agents or other persons may require to be shown that the acts of bribery of voters were so extensive that they affected the results.

Administration of oaths to induce persons to vote in a particular way is an election malpractice involving undue influence.In thecase of **Issak -v- Hussein & Another(2008) 1KLR (EP)** it was held that for one to be said to have administered an oath or for another to have taken, that person must be made to carry out actions intended to induce him to carry out certain action. The oath must have been administered to the witness testifying. In **Kiano -v- Matiba PetitionNo. 6 of 1979** it was stated that the "authenticity of the oath is irrelevant. A candidate wishing to bind people to vote for him would not necessarily follow strictly the procedure of a well-known traditional oath. All he requires is something which will sufficiently resemble a traditional oath to influence voters". In **Elima -v- Ohare & Another(2008) 1 KLR 771** it was expressed that it must be proved that the oath took place and the respondent had participated in the administration of the oath with the intention to bind voters to vote for him. In **Wambua -v- Galgalo & Another (2008) 1 KLR (EP) 43** it was held that "on the evidence adduced, the court was satisfied that an oath was administered to a crowd and the numbers were large enough to nullify the election; that it would be dangerous in a democracy to allow an election to be determined even partially by an oath; that an oath compelling people to vote or not to vote for one of several candidates constituted undue influence."

A common malpractice alleged as an election irregularity is where votes casts exceed the number of registered voters. To prove this allegation, the petitioner must first prove the total number of registered voters in the specific polling station as per the Register of Voters. This is proved by producing the voter's register for the specific polling station. The second fact to be established and proven is the total number of votes casts in the specified polling station. This is established by

producing valid election return Forms for the polling station. These facts must be proved by authentic, verifiable and admissible statutory documents.

In the case of**Moses Wanjala Lukoye -v- Bernard Alfred Wekesa Sambu & Others, Bungoma Election PetitionNo. 2 of 2013** an allegation that votes cast exceeded registered voters was made. The trial court in considering the allegation expressed as follows at paragraphs 78 and 79 of the Judgment: -

> **"This allegation was visible in the pleadings particularly the petition and was even presented in a tabular form. The various polling stations where the irregularity emerged are identified in the table provided in the petition. The question is: was there evidence in support of the allegation as required by law? The Petitioner gave his testimony on the alleged votes cast exceeding the registered voters. He referred to documents at page 81-82 of his petition as being the source of his information. He claimed those documents were issued by IEBC to him at a meeting of political parties' agents. But in cross-examination he confirmed that the said documents were not the Principal Register of Voters, they did not bear any mark or feature of a Principal Register of Voters. The Principal Register of Voters was produced in court as earlier ordered by the court and agreed among the parties. It was the document appearing at pages 31-130 of the documents filed by IEBC.**
>
> **[79] Nothing could be further from the truth; the documents presented by the Petitioner and which he relied on as the source of information he brought before the court were not the Principal Register of Voters for the Webuye East Constituency. The Principal Register of Voters was presented in court by IEBC. It could be quite unfortunate if IEBC could have issued out the documents the Petitioner relied upon as the Principal Register of Voters. But, it was upon the Petitioner to prove that those documents were indeed issued by IEBC, the purpose for which they had been issued and that they were the documents that were used in the election in dispute. That is the only way the Petitioner**

will prove that the votes cast exceeded the registered voters. The kind of evidence that the Petitioner needs to prove that fact was to be tendered by him. From the record, the court finds that those documents provided by the Petitioner are not the Principal Register of Voters under the Elections Act. The Petitioner did not demonstrate by way of evidence that the votes cast exceeded the number of registered voters. The official Principal Register of Voters produced in court clearly showed that the votes cast were less than the registered voters in the polling stations identified by the Petitioner. That ground was, therefore, not proved to the legal standards. It fails."

Conceptually, whenever there are excess votes, an issue arises whether the elections were conducted by ballot and if the conduct of elections was transparent. Elections must be conducted by ballot. It can be argued that the excess votes are not ballots and the election was thus not conducted by ballot but by some other capricious or arbitrary method. The issue of transparency comes into play because how else could the votes cast exceed registered voters if the principle of one voter one vote was adhered to? When votes cast exceed registered voters, the issue of eligible voters come to fore. Did ineligible persons vote in the elections? If so, for whom did they vote? Are their votes valid? How do we isolate and ascertain these ineligible votes? Who allowed them to vote?

In principle, results of election have to be based on valid notes. A vote is valid if it is properly marked and cast by an eligible and registered voter. (See Indian Supreme Court in **Hari Vishnu -v- Ahmad Ishaque, AIR 1955, SC 233 (1955) 1 SCR 1104).**

In **Pillling -v – Reynolds (2009) 1 All ER 163**, it was expressed that "the voter's franchise should not lightly be lost by declaring a vote to be bad if there is a clear intention shown as to what the voter intended to do". The fact that a voter has written in handwriting the name of his chosen candidate clearly show that he intended to vote for that candidate, on the correct ballot paper and in the correct place and this should not invalidate the ballot paper at all. (See also **Gloucester County, Cirencester Division Case, (1893) 4 O'M&H 194**; see also Lord

Denning in **Ruffle -v- Roggers (1982) 3 All ER 157**). The fact that a ballot paper is not stamped should prima facie not invalidate the ballot. However, stamping of the ballot paper may be required to authenticate and verify legitimately issued ballot papers.

On the issue of discrepancy of votes casts in various elections, Justice S.N. Riechi in**Ronald Melkizedek Milare -v- Frankline Imbenzi & Another, ELECTION PETITION APPEAL NUMBER 45 OF 2017**expressed as follows:

> ***"The evidence on record is that there was glaring discrepancy in the votes cast at Lumumba Social Hall Polling Centre. This is more so when it is shown that the total votes cast at the Polling Centre for Women Representative 313 and Parliamentary seat 320 are significantly different from all the votes cast for MCA 423 votes. This discrepancy would mean that there were voters who voted for MCA but did not vote for Women Representative and Parliamentary candidates. This in my view is not possible and lends credence to Appellant submissions that the votes at Lumumba Social Hall Polling Station were inflated in favour of the 1st Respondent."***

The Supreme Court in **Gatirau Peter MunyA Case**(supra) at paragraph 182 of its judgment expressed as follows on the issue of votes cast exceeding registered voters:

> **"**[182] **The allegation that the total number of votes cast exceeds the number of registered voters is such a serious one, that an election court would not treat it lightly. If proved, such an occurrence would call into question the integrity of the electoral process. *The person who makes such an allegation must lead evidence to prove the fact.* She or he bears *the initial legal burden of proof* which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden."**

In **Gitau -v- Thuo & 2 Others, [2010] 1 KLR 526 at 531**, Kimaru J expressed that "in normal circumstances, the variation in the tallies of the total votes cast for all the civic, parliamentary and presidential candidates would be marginal. The difference of over 5,000 votes between parliamentary vote on the one hand and the presidential and the civic vote on the other was evidence of serious electoral malpractice." In **Ndolo -v- Mwagni & 2 Others, [2010] 1 KLR 372** at**374** Rawal J (as she then was) observed that the "difference of about 10,000 votes cast between presidential and parliamentary election was not usual and would lead to the conclusion that all was not well."

On the issue of votes cast exceeding registered voters, Justice Adinyira of Ghana Supreme Court in Presidential Petition 2012 expressed himself thus:

> ***"Over-voting should never be a factor for annulling any election result unless it can be shown to have in fact affected the result. The Petitioners have not led sufficient evidence for me to come to the conclusion that there was clearly a mathematical chance that the results could change then the votes would have to be annulled and a re-run held. But then in many instances the over-voting was either one or two, and certainly that cannot lead to annulment of the entire votes."***

In **Mbogori -v- Kangethe & Another(2008) 1 KLR (EP) 168** the election court upon recount found that there was an excess of over 3000 votes unaccounted for and no explanation was given by the Returning Officer. Counsel for the petitioner submitted that the discrepancy in the number of votes cast shows that there was something seriously wrong with the conduct of the election; so serious that if no satisfactory explanation is given it is fatal to the whole election. In rejecting this argument, the election court held that the evidence did not show one way or the other how this admittedly substantial error occurred. It could have happened either before the ballot boxes reached the counting hall or in the course of the figures being transmitted from one person to another after counting had commenced. In either case, we do not think that the error *ipso facto* shows that the election was conducted so badly. The court concluded the error was not fatal to the elections.

The holding in **Mbogori -v- Kangethe & Another(2008) 1 KLR (EP) 168** should be contrasted with the decision in **Gunn -v- Sharpe(1974)2 All ER 1058**, whereit was held that where there are excess votes, such errors at the polling station are so great as to amount to conduct of the election which was not substantially in accordance with the law. In **KK HC EP NO 6 OF 2013 Justus Gesito -v- IEBC & 2 Others**Justice Eric Ogolla expressed himself thus:

> ***"It is possible that a voter chooses to vote for only one elective position, say Presidential, and leaves the rest. The outcome is that the results of the six elective posts will not tally. For that reason alone, the Court cannot delve into the results of other elective posts in comparison to that of the Member of National Assembly, for doing so will be setting a dangerous precedent."***

A practical critique of the precedent from the Ghana Supreme Court and like dicta in relation to over voting is that if in an election at a polling station is shown to have been affected by over-voting, it is not possible to determine which of the votes cast constitutes the invalid votes and, therefore, which votes cast count as the lawful votes. It would be good practice to annul all the results of the polling stations where over voting is proven to have occurred. The Ghanaian approach ignores the fact that once there is evidence of over-voting, even if it is by one vote, the credibility of the election should be treated as compromised.

The foregoing judicial decisions and precedents on the legal effect of votes cast exceeding registered voters is subject to **Regulation 83 of the Elections (General) Regulations 2012** which stipulates as follows in the relevant excerpt:

Regulation 83:

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

(j) tally the final results from each polling station in a constituency for the elections of a member of the National Assembly and members of the county assembly;

(k) disregard the results of the count of a polling station where the total valid votes exceed the number of registered voters in that polling stations;

(l) disregard the results of the count of a polling station where the total votes exceed the total number of voters who turned out to vote in that polling station; (Emphasis mine).

In the Kenyan context, the centrality of the polling station in the conduct of elections cannot be gainsaid. The Court of Appeal in **IEBC -v- Maina Kiai &5Others,Civil Appeal No. 105 of 2017** expressed at page 74 of its judgment thatthe polling station is the true locus for the free exercise of the voter's will. The counting of the votes at the polling stations with its open, transparent and participatory character using the ballot as the primary material means that the count at the polling station must be clothed with finality and not exposed to any risk of variation or subversion.

BENFORD'S LAW AND FORENSIC VERIFICATION OF ELECTION RESULTS

In **Raila Odinga -v- IEBC &Others SC Petition No. 5 of 2013**the Supreme Court at paragraph 107 of its Judgment observed that verification involves comparing the provisional results with the final tallies and comparing the final results from a polling centre with the results as recorded at the National Tallying Centre. The Court observed that comparison of results is supported by Article 86(c) of the Constitution which describes the procedure of verification as the collation and announcement of results by the Returning Officer (Chair of IEBC), based on results from polling stations.

In electoral context, verification has two main purposes:

(a) to ensure and demonstrate that all ballot papers issued at a polling station and all returned ballot papers have been accounted for and

(b) to provide the figures with which the count outcome should reconcile.

Verification process is dependent on paper trail audit. Effective verification must be timely and the secrecy of the vote must be maintained at all times. The security of ballot papers and other stationery is vital in verification and the exercise must be transparent with clear and unambiguous audit trail. Verification produces an accurate result if the number of ballot papers in all boxes either matches the number of ballot papers issued for the polling station or if it does not, the source of the variance must be identified and can be explained. If the result is not accurate, the ballot papers must be recounted at least twice, until the same number of ballot papers is counted on two consecutive occasions. An election count produces an accurate result where the total number of votes cast for each candidate and rejected, stray and spoilt votes plus unused ballot papers matches the total number of ballot papers issued for the polling station.

Collation and tallying of election results is a mathematical or arithmetic exercise. Quantitatively, election results are verifiable through analysis and verification of the paper trail involving ballot papers, votes cast, rejected votes, stray ballots, spoilt ballots, ballot papers issued for a particular polling station and comparing the total aggregate with the results of the election. Whenever there is ballot stuffing or over-voting, or when the votes cast exceed the number of registered voters, the accuracy of the election results is put in issue. Statisticians have developed a tool that may be used to quickly evaluate if collation and tallying of election results is accurate. The tool may also point as to whether ballot stuffing has taken place. This tool is known as Benford’s Law.

Benford’s law is also known as the first digit law, first digit phenomenon, or leading digit phenomenon. Using the digits 1 to 9 as basic numerical digits,Benford's law states that in listings or tables of statistics, the digit 1 tends to occur 30 per cent more than any other digit. The law states that in many naturally occurring collections of numbers, the leading significant digit is likely to be small.For example, in sets which obey the law, the number 1 appears as the most significant digit about 30% of the time, while 9 appears as the most significant digit less than 5% of the time. By contrast, if the digits were distributed uniformly, they would each occur about 11.1% of the time. Benford's law also makes

(different) predictions about the distribution of second digits, third digits, digit combinations, and so on.

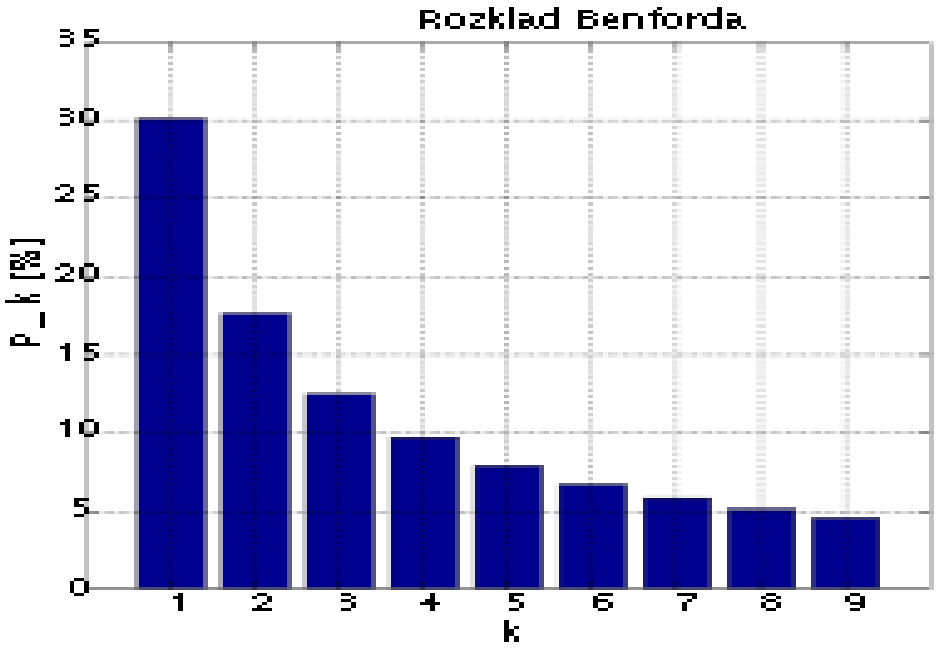

TABLE: The distribution of first digits, according to Benford's law. Each bar represents a digit, and the height of the bar is the percentage of numbers that start with that digit.

Using Benford’s law, it is possible to tell that a number is wrong just by looking at it.Using Benford's law—a mathematical phenomenon that provides a unique method of data analysis— one can spot irregularities indicating possible error, fraud, manipulative bias or processing inefficiency. Benford's law is used to determine the normal level of number duplication in data sets, which in turn makes it possible to identify abnormal digit and number occurrence.

During one bank audit, the auditors analyzed the first two digits of credit card balances written off as uncollectible. The graph showed a large spike at 49. An analysis of the related dollar amounts (that is, from $480 to $499 and from $4,800 to $4,999) showed that the spike was caused mainly by amounts between $4,800 and $4,999, and that one officer was responsible for the bulk of these write-offs. The write-off limit for internal personnel was $5,000. It turned out that the officer

was operating with a circle of friends who would apply for credit cards. After they ran up balances of just under $5,000, he would write the debtsoff.

Biases in corporate data. In one company's accounts payable data, there was a large first-two-digit spike (excess of actual over expected) at 24. An analysis showed that the amount $24.50 occurred abnormally often. The audit revealed that these were claims for travel expenses and that the company had a $25 voucher requirement. Employees were apparently biased toward claiming $24.50.

Ducking authorization levels. Sometimes managers concentrate their purchases just below their authorization levels so their choices won't be scrutinized. Managers with $3,000 purchasing levels might have a lot of invoices for $2,800 to $2,999, which would show up in data analysis by spikes at 28 and 29.

Legal Status of Benford's Law

In the United States, evidence based on Benford's law has been admitted in criminal cases at the federal, state, and local levels. (See *From Benford to Erdös". Radio Lab. Episode 2009-10-09. 2009-09-30*.) Benford's Law has been invoked as evidence of fraud in the 2009 Iranian elections, (See Stephen Battersby Statistics hint at fraud in Iranian election*New Scientist* 24 June 2009) and also used to analyze other election results. However, other experts consider Benford's Law essentially useless as a statistical indicator of election fraud in general. (See Joseph Deckert, Mikhail Myagkov and Peter C. Ordeshook, (2010) *The Irrelevance of Benford's Law for Detecting Fraud in ElectionsArchived 17 May 2014 at the Wayback Machine*, Caltech/MIT Voting Technology Project Working Paper No. 9). See also Benford's Law and the Detection of Election Fraud by Joseph DeckertMikhail Myagkov · Peter C Ordeshook Published in Political Analysis, 2011; See also Election Forensics: Vote Counts and Benford's Law by Walter R. Mebane, Jr.July 18, 2006).

On rare occasions, interesting facts arise for determination by the election court. In **Ngethe -v- Njeru & Another(No.2) (2008) KLR 286**, the petitioner had established that the petition could not be heard and determined in a fair and just manner and that it would not be possible for him to properly prosecute his petition in the absence of vital documents which by law are required to be placed before the

court within 48 hours before the hearing of the petition. The unusual circumstance was the loss or misplacement of election materials and records in respect of which the petition was filed. In the absence of these material, the petitioner was unable to prosecute his petition. It was held that it was not possible for the court to arrive at a fair and just decision due to inability of the Electoral Commission to present the materials before the Court and this considerably prejudiced the petition.It was held that the petition was not proved; the election results remained unchallenged and the relief the petition got was costs against the Electoral Commission.

In **Julius Billie –V – R (1981) Tanzania Law Reports 333,** it was held that as a general rule, the best evidence rule has no application to the admissibility of evidence of things and that the non-production of a thing which is the subject matter of court proceedings goes only to the weight and not to the admissibility of the testimony concerning or relating to it. This decision is relevant taking into account the amendment to the Supreme Court Act which requires the Electoral Commission to place before the Supreme Court all election materials for presidential elections within 48 hours of service of the petition. An issue that requires clarification is what constitutes election materials that need to be placed before the Supreme Court? Should all electoral Forms such as Form 34As and all Form 34Bs from all the polling stations duly signed by presiding and returning officers across the entire country be placed before the Court? Does election material referred to mean only one document being Form 34C prepared by the National Tallying Centre for presidential elections. It remains unclear what constitutes election materials for presidential elections.

On a comparative basis, in Austria, the Constitutional Court overturned presidential election result that declared Alexander Van der Bellen's as having a narrow victory over his opponent in May 2016 presidential election. While the court emphasized that there was no evidence of the outcome of the election having been actively manipulated, the confirmed irregularities had affected a total of 77,926 votes that could have gone to either Hofer or Van der Bellen – enough, in theory, to change the outcome of the election. (see Guardian Newspaper July 1st 2016).

The Austrian Judgment should be contrasted with the Kenya Supreme Court *dicta* in ***Gatirau Peter Munya case*** **(supra)** where the Court at paragraph 205 stated:

> **"[205] The appellate Court had been content to conclude that the "statistically small margin" would have been "significantly impacted", but without taking into account the numerical alignment of votes. It would have been necessary for the appellate Court to demonstrate how a figure of 3, 436 win-votes would have so diminished as to reverse the victory-outcome in favour of *the petitioner*. Without such a demonstration, the scenario is one in which an election was annulled on the ground of "what might have been" and not necessarily, "what was". This, in truth, amounts to invalidating an election on speculative grounds, rather than proven facts."**

COMPUTER FORENSICS: HACKING OFELECTION TECHNOLOGY EQUIPMENT AND THE BEST EVIDENCE RULE

Section 44 (3) of the Elections Act requires the Electoral Commission to ensure that the technology used in election shall be simple, accurate, verifiable, secure, accountable and transparent. Implementation and actualization of this objective creates trust in the results of the election. Voting systems rely on trust. Voters have to trust that their own vote is recorded and counted accurately; they also have to trust that the overall count is accurate, and that only eligible voters were allowed to vote. When an ineligible voter casts a vote, it cancels out the vote of a legitimate voter every bit as much as if his or her ballot had simply been shredded.

In practice, the problem is that electronic systems cannot possibly provide the anticipated degree of trust and reliability. The system can be hacked and alterations are too easy to conceal. When you cast a paper ballot, all sorts of other information is captured along with the vote. The color of ink you used, individual variations in handwriting, even the condition of the paper one is writing on. Changing individual ballot papers across large numbers of ballots without being obvious is hard and requires physical access to the ballots. Alterations and changing results on a computer is a matter of a few keystrokes, and can be done from any corner of the world if internet connectivity or electronic transmission is involved.

In Kenya, the electionlaw providesfor use of technology. The technology is electronic and computer based. The integrity of the data generated by the electronic technology may be challenged. To validate, corroborate, authenticate andconfirmthe integrity and credibility of data generated fromelection technology and computer based systems, computer forensic is resorted to.

Computer forensics is the application of investigation and analysis techniques to gather and preserve evidence from a particular computing device in a way that is suitable for presentation in a court of law. Computer forensics (also known as computer forensic scienceis a branch of digital forensic science pertaining to evidence found in computers and digital storage media. (See *In a 2002 book Computer Forensics authors Kruse and Heiser define computer forensics as involving "the preservation, identification, extraction, documentation and interpretation of computer data".They go on to describe the discipline as "more of an art than a science", indicating that forensic methodology is backed by flexibility and extensive domain knowledge).*

The goal of computer forensics is to examine digital media in a forensically sound manner with the aim of identifying, preserving, recovering, analyzing and presenting facts and opinions about the digital information. Although it is most often associated with the investigation of a wide variety of computer crime, computer forensics may also be used in civil proceedings. The discipline involves similar techniques and principles to data recovery, but with additional guidelines and practices designed to create a legal audit trail.

The scope of a forensic analysis can vary from simple information retrieval to reconstructing a series of events. Evidence from computer forensic investigation is usually subjected to the same guidelines and practices of other digital evidence.

Computer forensics can be tough. How do we know that anything has been done on a computer? Generally, we use log files, but if a machine has been completely compromised, then a hacker would have access to those logs (assuming that are not stored on some other...non-hacked machine). Maybe you could verify the date/time stamp on the log file, but that can be forged as well. Maybe the backdoor program installed a rootkit that hides its very existence from the Operating System (OS), in which case you will need to boot the machine to a different OS for instance using a bootable USB drive to analyze the files.

Just like proving that someone broke into your house depends entirely on how they broke in, proving a computer has been hacked depends entirely on how it was

hacked. If the hacker was smart and the only trace of the hack is in the memory, which will be eliminated once the computer reboots, then you're going to have a hard time. If the hacker was dumb and left a file called HackerBackdoor.exe in C:\Windows, then proving you have been hacked is fairly simple.

Typically, you are going to need some detailed logs (network and system) to correlate causes with effects. Logs on potentially compromised systems cannot be trusted absolutely.If you need to provein court that a computer has been hacked, there is need for an independent expert in computer forensics. They would need to demonstrate that indeed the computer had been hacked and the evidence is not faked by oneself.

Proving that you have not been hacked is harder, nearly impossible. You would have to account for every executable binary and script on the computer, and verify by hash and digital signature that it had not been tampered with. Seeing as many newer applications update themselves over the internet (which is a good thing, in general - patching their own vulnerabilities) it is probably impossible to find a list of hashes.

To preserver digital evidence to prove hacking, the following need to be demonstrated:

1. Do not turn off the system. Data that's in volatile memory (RAM) will be lost.

2. Do disconnect the system from the network. If it stays connected, a hacker could cover his tracks by deleting log files and other evidentiary data.

3. Do not use the system to do anything. Do not run any programs. You could inadvertently overwrite evidentiary data. In some cases, the hacker might have planted a program that will erase data when triggered by some event (such as opening or closing a program).

4. Do not open files to examine them. This modifies the date/time stamp.

The best way to preserve digital evidence in its original state is to connect the computer to another computer onto which the digital information can be copied. This can be done through a private network connection between the two computers. Data can be transferred over an Ethernet connection between the two

computers (by connecting them both to a private hub that is not connected to any other network) or through a serial or USB connection.

The contents of the original (source) computer's memory should be transferred to the second (target) computer. Transfer the memory contents in small increments so as not to overwrite what is already in memory. The contents of the source computer's hard disk should be copied to the target computer as a bit level image; that means the image is an exact copy of all information on the source disk, including slack space. It is best to use software designed specifically for forensic purposes. Programs used by law enforcement forensics experts include EnCase, made by Guidance Software (which offers a graphical interface) and the command line tools made by New Technologies, Inc. (NTI). Some investigators also use programs such as Symantec's Ghost, which can make bitstream images using the "ir" or "image raw" switch.

The results of a computer forensic audit must be tendered in evidence by an expert as expert opinion evidence. Prima facie, a trial court is not bound to conclusively accept and adopt the findings of the expert. Under **Section 2 of the Kenya Information and Communications Act**, 'computer' means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, software and communication facilities which are connected or related as a system or network.

Article 260 of the Constitution defines documents to include an electronic file. **Section 65(5)(c) of the Evidence Act** incorporates computer print outs as primary evidence contained in a document**. Section 106 B as read with Section 65(6-9) of the Kenya Evidence Act, Chapter 80 of the Laws of Kenya,** provides that an electronic recording in a computerized system shall be deemed to be a document and admissible as evidence in court if it meets the following requirements:

a) That the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out.

(b) That the information of the kind contained in the electronic record was regularly fed into the computer in the ordinary course of the said activities.

(c) That the computer was operating properly at the material time.

(d) That the information contained in the electronic record was fed into the computer in the ordinary course of the said activities.

(e) That a certificate signed by a person occupying a responsible position in relation to the operation of the relevant device or the manager of the relevant activities identifying the electronic record and the manner in which it was produced and giving the particulars of any device involved in the production of the recording be produced by that person in Court.

Two legal principles are pertinentto tendering digital evidence. First is the law on expert evidence. More often than not, expert opinion shall be required to prove computer hacking. The rules on admissibility of expert evidence must be complied with. Second, the law on admissibility of digital evidence must be complied with. In the case of **Republic -v- Wilfred Machage, Fred Kapondi Chesebe &Christine Nyagitha Miller Criminal Case No. 1140 of 2010** the Court ruled on questions of electronic evidence as per the requirements of **Section 106B of the Evidence Act** and noted that electronic evidence must be adduced in its original form without human interference to the computer or devices.In the case of **REPUBLIC -v- BARISA WAYU MATUGUDA [2011] eKLR** the court observed that:

> **"any information stored in a computer. . . which is then printed or copied... shall be treated just like documentary evidence and will be admissible as evidence without the production of the original. However section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied."**
>
> **The court went on that:**
>
> **"This provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied**

by a certificate in terms of section 106B (4). Such certificate must in terms of S.106B (4) (d) be signed by a person holding a responsible position with respect to the management of the device.... Without the required certificate this document is inadmissible as evidence."

On a comparative basis, the Nigeria Supreme Court in **Kubor -v- Dickson(2014) 4 NWLR Pt 1345, pages 534-594**, examined the provisions of Section 84 (2) of the Nigeria Evidence Act, 2011 regarding the concept of a 'document' and the admissibility of electronic evidence. Section 84 (2) is *in pari materia* to Section 106B of the Kenya Evidence Act. The Nigeria Supreme Court stated the following:

> "There is no evidence on record to show that the appellants in tendering exhibits "D" and "L" satisfied any of the above conditions. In fact they did not as the documents were tendered and admitted from the bar. No witness testified before tendering the documents so there was no opportunity to lay the necessary foundations for their admission as e-documents under section 84 of the Evidence Act, 2011. No wonder therefore that the lower court held at page 838 of the record thus:-
>
> > 'A party that seeks to tender in evidence computer generated document needs to do more than just tendering same from the bar. Evidence in relation to the use of the computer must be called to establish the conditions set out under section 84(2) of the Evidence Act 2011.'
>
> I agree entirely with the above conclusion. Since the appellants never fulfilled the pre-condition laid down by law, Exhibits "D" and "L" were inadmissible as computer generated evidence."

Is evidence on computer hacking admissible and relevant in election dispute resolution?

Hacking an election is more of a social and political challenge than a technical one. You need conspiracy to achieve such a goal. Whenever a hacking allegation is made, it is never a good thing to be unable to demonstrate to the public's satisfaction that votes were counted correctly.Technically, any technology can be tampered with, but you have to have sufficient grounds for raising doubts.

The **Kenya Information and Communication Act, Chapter 411 A of the Laws of Kenya,**as well as the Constitution have provisions relevant to hacking of computers and admissibility of illegally obtained computer evidence.

Article 50 (4) of the Constitution provides that:

> "Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice."

In reading **Article 50 (4),** it must be noted that **Article 38 (2)** that provides for free, fair and regular elections as well as **Article 38 (3) (b)** that entitles every adult citizen to vote in an election are part of the Bill of Rights. It must further be noted that evidence to prove election technology hacking even if obtained illegally may not be excluded on account that it may be detrimental to the administration of justice. In fact, it may be admissible as it promotes governance, accountability and the concept of free and fair elections.

The **Kenya Information and Communication Act in Section 83U** thereof provides that:

> '(1) …. any person who causes a computer system to perform a function, knowing that the access he has secured is unauthorized, shall commit an offence and shall on conviction be liable to a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding two years or both."

Section 83V of the Act provides that:

> "(1) Any person who causes a computer system to perform any function for the purpose of securing access to any program or data held in any computer system, with intent to commit an offence under any law, shall commit an offence and shall, on conviction be liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding two years or both."

Section 83W of the Act provides that:

> "(1)……. any person who by any means knowingly— (a) secures access to any computer system for the purpose of obtaining, directly or indirectly, any computer service; (b) intercepts or causes to be

intercepted, directly or indirectly, any function of, or any data within a computer system, shall commit an offence."

Section 84A of the Act provides:

"Any person who knowingly manufactures, sells, procures for use, imports, distributes or otherwise makes available a computer system or any other device designed or adapted primarily for the purpose of committing any offence under sections 83U to 83Z, shall commit an offence."

With the foregoing provisions in mind, whereasevidence of hacking of election technology equipment is relevant, the hacking is not conclusive that the election results has been affected. So long as there is no electronic voting and electronic counting of the ballot papers, the will of the people is expressed through the ballot paper.It is the ballot paper that must be counted to determine the will of the people and the result of the election. The Indian Supreme Court in **Dr.SubramanianSwamy -v- Election Commission of India, Civil Appeal No. 9093 of 2013**expressed that paper tail is an indispensable requirement of free and fair elections and the confidence of voters can only be achieved by paper trail.

If a computer is hacked and data manipulated or altered, the best evidence is to resort to the raw data from which the information was derived and keyed into the computer.The will of the people is determined by the results of the election. Events occurring after the balloting (polling) day do not determine the will of the people. Election result transmission system and tallying of votes are administrative and operational activities that do not determine the will of the people. If there is any tampering with the transmission system or inaccurate tallying, the examination of the computer raw data as well as scrutiny and verification of election results is paramount. A caveat is necessary bearing in mind the witticismattributed to Joseph Stalin that *"It's not the people who vote that count. It's the people who count the votes."*Further, he stated *"Those who cast the votes decide nothing. Those who count the votes decide everything."* Likewise, Tom Stoppard's philosophical play, *Jumpers*, first produced in 1972 is significant. He stated that "It's not the voting that's democracy; it's the counting."With the foregoing caveat, let it not be institutionalized that those who vote decide nothing and that it is the integrity of

those who count the votes and the goodwill of the incumbent President that decides everything.

The raw data containing the results of the elections is the Form signed by the presiding officer and agents at the polling station. Whenever there is an allegation of computer hacking or tampering with electronictransmission of results, the best evidence is the raw data in the Form duly signed and authenticated at the polling station. Verification should ensure the secure transfer of voter's selection into the computer. Adequate and provable electronic security makes certain that the vote tallies reflect the voters intention. By keeping the election results Forms that were duly signed at the polling station, the electoral agency have the option to audit the election results. If there is uncertainty after an election, either because of the possibility of tampering or just the possibility of error or malfunction, the paper trail audit is the best evidence that is crucial to resolving any kind of uncertainty or dispute that might arise. The security of the ballot paper and election result declaration Forms is paramount because you cannot hack a piece of paper.In considering the raw data contained the results of the elections at a polling station as captured in the Form signed at the Polling Station, one must bear in mind Lord Denning's dicta in **Garton -v- Hunter [1969] 1 All ER 451, [1969] 2 QB 37**where he stated that "…Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight and not to admissibility."

In law, the relevance and probative weight attached to the raw data is captured by the best evidence rule. The best evidence rule holds an original copy of a document to be superior evidence. The rule specifies that secondary evidence, will be not admissible if an original document exists and can be obtained. While considering the evidence revealed by the paper trail and the declaration Form signed at the polling station, the audit and verification of the Form signed at the polling station should be compared and contrasted with the transmitted result and scrutinized Form for Form, line for line and vote count for vote count. The evidence contained in the Form signed at the polling station is prima facie conclusive and is clothed with the presumption of validity of the election results. Whereas evidence of hacking of election technology equipment is admissible, such evidence has little probative value when compared and contrasted to the entries contained in the election results Forms filled and signed at the polling stations.

Even if hacking is proved, to annul or invalidate the results of the election it must be proved that the hacking affected the results of the elections. The requirement of **Section 83** of the Elections Act (supra) must be complied with.

As ananecdote to computer hacking to alter election results, the following record of computer hacking in South Africa's 1994 election is informative.

> *In his book, Peter Harris writes: 'The hacker went in between 05:56 and 06:41 on the morning of 3 May [1994] and made changes to the vote count of three parties…I meet with Michael Yard of the forensic investigation team in my office at eight o'clock on Wednesday morning, 4 May 1994. He is exhausted, his eyes bloodshot and outlined by thick black lines of fatigue. He hands me a two-page report. 'Is that it?' I ask. 'That's all you need,' he replies, an unhealthy rasp in his voice. 'I'll talk you through it. The hacker went in between 05:56 and 06:41 on the morning of 3 May and made changes to the vote count of three parties,' he says. 'Neil Cawse picked up early that morning that there was a significant increase in the number of total votes counted nationwide (in the order of one to four million).' 'Surely this couldn't have been easy to do. I mean, the administration division told us that this was an incredibly sophisticated system, foolproof, the Fort Knox of systems, completely impregnable. You can't just get into a highly protected IT network and change national election results.' But Harris is further told: 'The total votes for all parties at each counting station was also changed, but doesn't match the sum of the vote totals for individual parties after the changes to these figures were made. The new total for all parties per counting station is in between the original correct figure and the sum of the votes per party for the counting station after the changes. So the programme was doctored to increase the votes of the three parties by about point thirty-three percent.' It turns out that the changes upward are between 2.5 per cent and four per cent for the Freedom Front, approximately three per cent for the National Party and between four and five per cent for the Inkatha Freedom Party. Harris writes: 'There it is. Silence. I break it. "You and the team are sure of the extent of these changes?" "Oh, absolutely. These were consistent across our data sample and there are always increases to the vote count." It is worse than I thought.' Harris is only reassured when another officer comes in and tells him: 'This is history, it is*

already past,' she says. 'We are fixing this. We have no choice but to go on and make it happen. We will get to an honest result.' They do give the nation an honest election result. But they need to find out who the hacker was. Harris writes: 'I turn to Michael Yard. "Can you find out who did this?" He points me to the report. "The NT file server on the network is capable of generating a log of who logged onto or out from the network, and the time that this happened. We checked this log and found that this information is only recorded from 18:10 on 3 May. From this we conclude that this logging process was either cleaned out as of this time, or was only turned on at that time." "Nice … very nice," I say, bitterly. "So we can't trace who did this. It is a successful 'hit and run'," Harris adds.

The unknown hacker managed to penetrate their computer system and up the share of the vote for three parties. Among the parties who benefited were the National Party, which had led South Africafrom 1984, whose vote share increased by around three per cent and the right-wing Freedom Front party which saw its vote share pushed up by between 2.5 per cent and four per cent. In the end, the tampering was not able to change the overwhelming support for Mr. Mandela's ANC. When the final results were announced on May 6, the ANC had won 62.6 per cent of the vote, the National Party 20.4 per cent and the IFP 10.5 per cent. (See The terrifying prospect of election-stealing in Africa Published on Pambazuka News (https://www.pambazuka.org) Source URL:https://www.pambazuka.org/node/66453 ; See also Book by Peter Harris, Birth: The Conspiracy to Stop the '94 Elections, EAN9781415201022)

WHEN SCRUTINY AND RECOUNT AFFECTS THE RESULT

Scrutiny and recounts are an integral part of the election process. For one's vote, when cast, to be translated into a true message, that vote must be accurately counted, and if necessary, recounted. Scrutiny and recount of votes is one of the tools used to determine the accuracy and verifiability of election results. It determines the credibility and integrity of the electoral process. Integrity is particularly crucial at the tabulation stage because many elections occur in extremely competitive jurisdictions, where very close election results are always

possible. In addition, voters and the media expect rapid and accurate tabulation of election returns, regardless of whether the election is close or one sided. Nonetheless, when large numbers of votes are to be counted, it can be expected that some error will occur in tabulation or in transmission of results.

In its judgment at paragraph 219 in the case of **Gatirau Peter Munya**, (supra) the Supreme Court expressed that:

> **"[219]** By **way of example, if there would be 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 on account of such shortfalls, to nullify such an election. However, 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…."**

Scrutiny is a court supervised forensic investigation into the validity of the votes cast and subsequent determination of who ought to have won the election**(Halsbury Laws of England, (1990) 4th Ed. 12, 45**). The applicant for scrutiny and recount must lay sufficient basis and foundation for scrutiny or recount. In **Hassan Mohamed Hassan & Another v. IEBC & 2 Others**High Court atGarissa, **Election Petition 6 of 2013**, it was expressed that whereas a party has liberty to apply for scrutiny and recount at any stage of the proceedings for the purposes of establishing the validity of the votes cast, the court has to be satisfied that there is sufficient reason for it to order for scrutiny or recount of votes. In **Raila Odinga -v- Uhuru Kenyatta & 3 Others, Petition 5 of 2013,** the Supreme Court stated that the purpose of the scrutiny was to understand the vital details of the electoral process, and to gain impressions on the integrity thereof. In **Philip Mukwewasike -v- James Lusweti Mukwe,High Court at Bungoma, Petition No. 5 of 2013**, the petitioner sought scrutiny and recount of allpolling stations in Kabuchai Constituency. Omondi J noted, while adopting the decision by Kariuki J (as he then was) in **William Maina Kamanda -v- Margaret Wanjiru Kariuki****Nairobi Election Petition No. 5 of 2008** that the purpose of scrutiny is to:

i. Assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.

ii. Assist the court in determining the valid votes cast in favour of each candidate.

iii. Assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process.

In **Gideon Mwangangi Wambua & Another -v- IEBC & 2 Others, Mombasa Election Petition No. 4 of 2013** (consolidated with Election Petition Cause No. 9 of 2013), Odunga, J observed:

> ***"The aim of conducting scrutiny and recount is not to enable the Court [to] unearth new evidence on the basis of which the petition could be sustained. Its aim is to assist the court to verify the allegations made by the parties to the petition which allegations themselves must be hinged on pleadings. In other words, a party should not expect the Court to make an order for scrutiny simply because he has sought such an order in the petition. The petition ought to set out his case with sufficient clarity and particularity and adduce sufficient evidence in support thereof in order to justify the court to feel that there is a need to verify not only the facts pleaded but the evidence adduced by the petitioner in support of his pleaded facts. Where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on the documents filed pursuant to Rule 21 of the Rules, the Court would be justified in forming the view that the petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition.***

In **Mercy Kirito Mutegi -v- Beatrice Nkatha Nyaga & IEBC, Meru High Court, Election Petition No. 5 of 2013,** Lesiit, J. remarked that one may apply for an order of scrutiny for purposes of establishing the validity of the votes cast.

In Kenya,**Section 82 of the Elections Act** is the legal foundation for scrutiny. An election court may, on its own motion or on application by any party to a petition, during the hearing of an election petition, order for scrutiny of votes to be carried out in such manner as the election court may determine.At the conclusion of the

scrutiny exercise, the Registrar makes a report of findings. Such report is taken into consideration in the determination of the petition in question.

An order for scrutiny is not automatic, sufficient reason has to be shown before an election court can order scrutiny and recount. Scrutiny and recount is limited to specific polling stationspleaded in the petition. A petitioner cannot use a prayer forscrutiny and recount to go on a fishing expedition to gather evidence of irregularities to bolster the petition. Majanja, J in **Wavinya Ndeti -v- The IEBC&4 Othersin Machakos High Court Election Petition No. 4 of 2013**expressed that the petitioner must not be permitted to launch a fishing expedition under the guise of an application for scrutiny in order to discover new evidence upon which to foist his or her case to invalidate an election.In **Ledama ole Kina -v- SamuelKuntai Tunai & 10 Others, Nakuru High Court, Election Petition No. 3 of 2013** the petitioner claimed to have laid a basis for scrutiny; however, Wendo J wondered whether sufficient cause had been established, to warrant an order for scrutiny for the whole of Narok South Constituency. The learned Judge stated:

> ***"An application for scrutiny of all of Narok South Constituency lacks specificity, is a blanket prayer that, in my view, cannot be granted. The applicant needed to be specific on which polling stations he wanted a scrutiny done [in]. If he wanted scrutiny in all the polling stations, then a basis should have been laid for each polling station. The rationale is clear, the process of scrutiny is laborious, time-consuming, and the applicants cannot be let at liberty to seek ambiguous prayers and waste precious court's time and incur unnecessary costs. They must be specific. For the above reason, the court cannot give a blanket order for scrutiny of Narok South Constituency because such order will be prejudicial to the respondent now that the evidence of witnesses has already been taken. The respondent would not have an opportunity to respond to any new issues that may be unraveled during scrutiny."***

Also in **Musikari Nazi Kombo –v- Moses Masika Wetangula,** Gikonyo J, in declining to allow a scrutiny and recount of votes cast in all polling stations in Bungoma County for the senatorial elections, noted:

> ***"There was no evidence before the court that all polling stations were affected by the irregularities and malpractices complained of by the Petitioner. It will not, therefore, be supported in law to make a general order for scrutiny or re-count of all the votes cast in the election for Senator for the County of Bungoma. That kind of extravagant exercise of discretion will also be an affront to the constitutional policy that election petitions must be determined expeditiously, not later than six months from the date of filing. It will also have unnecessary cost on the public."***

In **Philip Ogutu -v- Michael Aringa & 2 Others Busia HC Election Petition No. 1 of 2013(unreported)**, the court held as follows; -

> **"An order for scrutiny will not be made as a matter of course. In the words of Rule 33(2) of the Election Petition Rules, the court must be satisfied that there is sufficient reason to require an examination of the ballots. This rule codifies a long held judicial opinion that scrutiny may only be ordered where a foundation or basis has been laid...."**

Rule 33(4) of the Election Petition Rules provides that:

> Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of —
>
> (a) the written statements made by the presiding officers under the provisions of the Act;
>
> (b) the copy of the register used during the elections;
>
> (c) the copies of the results of each polling station in which the results of the election are in dispute;

(d) the written complaints of the candidates and their representatives;

(e) the packets of spoilt papers;

(f) the marked copy register;

(g) the packets of counterfoils of used ballot papers;

(h) the packets of counted ballot papers;

(i) the packets of rejected ballot papers; and

(j) the statements showing the number of rejected ballot papers.

Section 82 (2) of the Elections Act identifies the votes that shall be struck off upon scrutiny. It is provided that the vote of a person whose vote was procured by bribery or undue influence should be struck off. It is a herculean task for a petitioner to succeed in striking off votes in a scrutiny. Cogent and verifiable evidence must be led to prove that the vote should be struck off. Upon such striking off, it must be proved that after striking off the votes, the results of the election is substantially affected.

In **Rishad Hamid Ahmed Amana -v-IEBC & OTHERS – Election Petition No.6/2013 Malindi -** Justice Kimaru held thus:

> ***"In this regard, scrutiny cannot be ordered where the Petitioner has not specifically pleaded for scrutiny in his petition. It will not do for the Petitioner to aver in the petition that he desires scrutiny and recount to be undertaken in respect of all the polling stations in the electoral areas that is the subject of the dispute. The Petitioner must plead in sufficient detail why he requires the Court's intervention to order scrutiny. In that regard, the Petitioner has to state the specific polling stations that he alleges there were irregularities and therefore should be scrutinized".***

In the case of **Rishad Hamid Ahmed Amana-v-IEBC and 2 Others (2013) eKLR,** the court held that scrutiny should not afford a petitioner the opportunity to embark on a fishing expedition to discover new or fresh evidence. A similar finding was made in the case of **Philip Munge Ndoro -v- Omar Mwinyi**

Shimbwa And 2 Others Mombasa HC Election Petition NO. 1of 2013 where the court held as follows; -

> **"There is need to guard against a party using the exercise of scrutiny and recount as a "fishing" expedition so to speak as a means to uncover new or fresh evidence"**

In **Richard Kalembe Ndile -v- Patrick Musimba Mweu (Machakos HC Election Petition No. 7 of 2013),** where sufficient evidence of alterations and errors in Forms 35 and 36 which affected the election result was adduced, the court ordered scrutiny of the election materials. In **Abdalla Albeity -v- Abu Chiaba & Another (Malindi HC Election Petition No. 9 of 2013**), the Court held that when authenticity of the Forms used is in issue, scrutiny may be ordered. In **Dickson Daniel Karaba -v- John Ngata Kariuku & 2 Others (2014) 5 KLR (EP) 388**, where the Returning Officer conceded he had wrongly tallied the votes from various polling stations and as a result declared the respondent, instead of the petitioner, as the winner, the court ordered a scrutiny that confirmed the evidence and voided the election. In **William Maina Kamanda -v- Margaret Wanjiru Kariuki & 2 Others Nairobi High Court Election Petition No. 5 of 2008,** on evidence being adduced that several Forms 16A and 17A had alterations that were not countersigned by the Presiding Officers thus casting aspersions on their authenticity, scrutiny was ordered. In **Karaba -v- Kariuki & 2 Others, [201] 2 KLR, 380 at 381** it was held that a Returning Officer has no discretion or powers to vary or override the results captured in Forms 16A from the polling station; he has no power to change or substitute the result of the candidate as reflected in Form 16A from the polling station.

TYPOLOGIES OF VOTES: VOTES CAST, VALID VOTES, SPOILT BALLOT, DISPUTED VOTE, REJECTED VOTES AND STRAY VOTES

Balloting on the voting day is not the end of the election process. Cast votes have to be assembled, scrutinized, counted, recount claims considered and result declared. The conduct of the election ripens into a voter's choice only when the cast vote is processed, examined, counted and tallied. **Article 138 (4)** of the

Constitution provides that a person shall be declared to be elected as President if the candidate receives 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. The meaning of votes cast has been the subject of legal argument before the courts. Whether votes cast have the same meaning as valid votes is debatable. Other categories of votes have emerged during the counting and verification of votes. These include spoilt votes, rejected votes, stray votes and objected rejected votes. The legal question is which of these categories of votes should be considered in tallying, announcing and declaring the election results?

In electoral law, there is a difference between a rejected ballot and a spoilt ballot.The interpretation section of the Elections Act states that a 'ballot paper' "means a paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for purposes of electronic voting". The Elections (General) Regulations, 2012 defines 'rejected ballot paper' as a ballot paper rejected in accordance with Regulations 77 and 78. (See paragraph 272 of Supreme Court Raila Judgment).

A spoilt ballot never finds its way into the ballot box. A spoilt ballot is one that a voter has inadvertently spoilt by marking it incorrectly; it is handed back to the voting station officers in exchange for a new blank ballot paper. The new one is carefully marked by the voter and placed in the ballot box. A spoilt ballot may also be one that is improperly printed, torn or soiled. These are taken away from the voters and new ones are given. A spoilt ballot is never placed in the ballot box. The Supreme Court in Raila Case expressed at paragraph 275 that:

> [275] The law, thus, is clear: the "spoilt ballot paper" will not find its way into a ballot box – and so, it does not count as a vote.

Every ballot that finds its way into the ballot box is a cast ballot. A cast ballot can either be valid, invalid, rejected or a stray ballot.

A rejected ballot is one that finds its way into the ballot box but has been rejected at the count because it was improperly marked or is not marked at all even though

a mark is required. A cast vote is rejected when, during counting, a ballot is found to have a mark for more than one candidate or political party when only one was supposed to be chosen. According to electoral law, any unofficial or unusual mark on a ballot paper that does not clearly reflect the choice of the voter is rejected. It follows that a rejected ballot is a ballot that has failed to meet the requirement that a voter must vote for only one candidate among other candidates on the ballot paper at a polling centre.In many cases, rejected ballots result out of inadvertently leaving an ink mark in two or more boxes on the ballot paper for each candidate.

The Court of Appeal in **IEBC -v- Maina Kiai & 5 Others, Civil Appeal No. 105 of 2017 at** page 72 of its judgmentillumined the legal consequence of "rejected ballot." The Court observed that during counting, all the ballot papers that do not bear the security features determined by IEBC or on which anything is written or so marked as to be uncertain for whom the vote has been cast is marked with the word "rejected" and not counted. If an objection is raised to the rejection, the presiding officer shall add the words "rejection objected to".

Regulation 78 of the Elections Act provides for yet another category of votes, known as the "disputed vote". It is thus provided [Reg. 78(2)]:

> "The presiding officer shall mark every ballot paper counted but whose validity has been disputed or questioned by a candidate or an agent with the word 'disputed' but such ballot paper shall be treated as valid for the purpose of the declaration of election results at the polling station."

Intentional or unintentional marking or ticking or thumb-printing of two boxes for two candidates, respectively, on the ballot paper renders the ballot invalid.A ballot paper that does not carry the stamp or a required identification symbol of the Electoral Commission is not valid. Mistakenly touching a ballot paper with an inked finger while folding the ballot paper or putting it into the ballot box – makes the ballot invalid.

The Supreme Court in**Raila Odinga -v- IEBC & Others SC Petition No. 5 Of 2013** Case Expressed:

> **“[282] Since, in principle, the compliant ballot paper, or the vote, counts in favour of the intended candidate, this is the valid vote; but the non-compliant ballot paper, or vote, will not count in the tally of any candidate; it is not only rejected, but is invalid, and confers no electoral advantage upon any candidate.”**

A stray ballot is a cast vote that is placed in the wrong ballot box. For example, it is expected that only presidential votes cast should be in the presidential ballot box. If during counting, a cast vote for a gubernatorial candidate is found in the presidential ballot box, such a gubernatorial vote is a stray vote because it has strayed and found its way into a wrong ballot box. The legal issue is what is to be done with a stray vote? Should it be taken and counted with the votes cast in the correct ballot box?

The Supreme Court in **Raila Odinga -v- IEBC & OthersSC Petition No. 5 of 2013)** expressed that a ballot paper which had been cast and did not satisfy the requirements under the law cannot be added in determining the results of the election. It was held that the phrase votes casts in **Article 138 (4)** of the Constitution referred only to valid votes cast, and did not include ballot papers, or votes cast but were later rejected for non-compliance with the terms of the governing law.It was held that rejected ballot papers are invalid and cannot be included while tallying results for candidates.

In reaching their decision, the judges asked what are “all the votes cast” and whether they include even the “rejected votes”, which, of course, were cast? The court noted that neither the Constitution nor the Election Regulations make provision for “rejected votes”, though they provide for “rejected ballot papers”, “spoilt ballot papers”, and “disputed votes”. (See paragraph 271).

The Court correctly stated that “spoilt ballot papers” are those that are not placed in the ballot box, but are cancelled and replaced where necessary by the presiding officer at the polling station.” It was observed that “rejected ballot papers”, which although placed in the ballot-box, are subsequently declared invalid, on account of certain factors specified in the election regulations – such as fraud, duplicity of marking and related shortfalls.

In this context, the Kenya Supreme Court concluded that a valid vote is counted in favour of the intended candidate while rejected vote will not count in the tally of any candidate. It is not only rejected, but is invalid, and confers no electoral advantage upon any candidate. In that sense, the rejected vote is void. (See paragraph 282 of the Judgment).

On a comparative basis, **Article 77 of the Federal Constitution of Brazil** provides that a candidate wins an election with a majority of valid votes. In this context, blank or invalid votes are not counted. Blank votes are those in which voters do not express preference for any of the running candidates. Void votes consist of spoiled votes that result from a voter's intention to spoil his/her vote. Void votes are registered only for statistical purposes but are not counted as valid votes; they are not transferred to any candidate. In Brazilian legislation, only valid votes are to be counted when assessing the results of an election. Valid votes are those directly cast to a given candidate. Void votes are not to be deemed to be valid; blank votes are not deemed to be valid. (See **Brazil Electoral Code Law N.4, 737/1965 and Elections Act Law N. 9,504/1997).**

The rationale for excluding rejected or void votes from determining the results of the electionstem from the notion that an election is basically a process in which popular will is checked. Voters are the true holders of democratic power which is to be placed upon a preferred candidate. If an eligible citizen does not appear to vote or spoils his vote, he/she does not express his/her preference for any candidate. Due to absence of any preferred candidate, constitutional rules attribute no weight to this type of vote and it is simply not counted for election result purposes.

The Seychelles Constitutional Court in 2016 had occasion to consider whether rejected votes are to be considered in determining the results of the election. In **Ramkalawan -v- Electoral Commission and Others (Valid Votes) (CP 07/2015) [2016] SCCC 10 (31 May 2016)**; the Constitutional Court held that votes casts mean valid votes. The Court continued and expressed as follows in selected excerpts from various paragraphs of its judgment:

> *67. Comparative studies in terms of electoral laws…show that terminology in electoral laws is not consistent across jurisdictions. For example, the term spoilt vote has different meanings. In Seychelles, a spoilt vote is a*

ballot paper that never enters a ballot box. In Canada, a spoiled vote is the equivalent of what in Seychelles is termed a rejected vote, that is, a ballot paper in the ballot box that is rejected for different reasons. However, although different terminology is used in different countries, generally those ballots considered spoilt, spoiled, void, null, informal or stray are invalid and thus not included in the vote count. Spoiled ballots, rejected and unused ballots are counted only to create a complete audit trail.

70. In Australia, the terminology formal vote is sued to indicate those votes that are counted to elect a candidate and informal votes those that are not. Section 123 of the Electoral Act of Queensland for example, in the relevant part provides as follows:

> *If a ballot paper has effect to indicate a vote, it is a formal ballot paper.*
>
> *If a ballot paper does not have effect to indicate a vote, it is an informal ballot paper.*

71. Similarly, in New Zealand, sections 178-179 of the Electoral Act 1993 makes a distinction between a vote and an informal vote. Informal votes are rejected and not included in the count of the votes for the candidate.

72. In the United Kingdom, a vote is included in deciding the election of a candidate only where a clear preference for that candidate is indicated. (See sections 47-50 of the Representation of the People Act, 1983).

76. In South Africa, section 47 (3) of the Electoral Act 1993 provides for the procedure for the rejection of votes and Regulation 25 of the Election Regulations 2004 clarifies the procedure for counting the votes, clearly indicating that rejected ballots are not counted as part of the vote.

78. We have not been able to find a single jurisdiction where all votes cast are counted for the purpose of electing a candidate in an election. It would also appear that even in those jurisdictions where the phrase votes cast is used, only valid votes are counted for the election of a candidate.

91….We are satisfied that the expression votes or votes casts…mean valid votes cast.

Analysis of Kenyan and comparative jurisprudence reveals that rejected, stray and spoilt votes are not to be included in computing and determining the results of an election. It is noteworthy that the Seychelles Constitutional Court had occasion to review the Kenya Supreme Court decision in**Raila Odinga -v- IEBC & Others SC Petition No. 5 of 2013)** on the effect of rejected votes in tallying and determining the results of an election. The Seychelles Court did not depart from the dicta of the Kenyan case.

JURISPRUDENCE ON CREDIBILITY OF ELECTION PETITION WITNESSES

Just as in any court proceedings, the credibility of witnesses is critical in election petitions. Caution should be taken against lining up several witnesses as such a number could create inconsistencies in the accounts of witnesses that can be fatal to the petition. In court, the quality or credibility of a witness is more important than the quantity of witnesses. Corroboration is not generally required but is often times advisable to have corroborating material or witnesses. It does not matter that you have only one witness; if you have a witness who is credible, it is better than two or three pathological liars who will be affected by lack of credibility and will create inconsistency that is fatal to the petition. The veracity and cogency of the petition depends on the credibility of the witnesses and consistency of their testimony.

Credibility of a witness is a matter for the trial court which saw and watched the mannerisms, habits and idiosyncrasies of the witness unlike the appellate court which has only the printed record of the evidence to decide. Subject to very limited exceptions, it is not for the appellate court to resolve conflict on issue of credibility of witnesses.

A party cannot be allowed to introduce, through cross examination contests which were previously not specifically raised in the pleadings. The reason for this is simple. The Election Petitions are limited in time and scope. The Petitioner must present his Petition within 28 days and he/she cannot be allowed to amend same

thereafter. The Respondents are given time to respond to the Petition and in their response the law states clearly that they too cannot introduce any issues or contests outside those raised by the Petitioner in his pleadings.

In **Ndungu Kimanyi -v- Republic1976-1980 KLR 1444,** the Court of Appeal said:

> **"We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise a suspicion about his trustworthiness or do or say something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence."**

In **Sambu -v- Genga & Another(2008) 1 KLR (EP) a396 at 412**, in relation to the allegation of bribery, the court expressed as follows:

> **"…All the petitioner's witnesses, apart from being shaky in the delivery of their evidence, were accomplices whose evidence though admissible, is wholly unreliable without corroboration."**

Excerpts from the Indian case of **Sri Raj Raj Deb -v- Sri Gangadhar Mohapatraand Ors. AIR 1964 Ori 1, 1964 CriLJ 57** sheds some light on issues of credibility of witnesses in an election petition. The Court expressed:

> **"With regard to the second category of corrupt practices…. the aforesaid witnesses have spoken about them. In addition, P. Ws. 2, 6, 8, 9, 19, 24, 25, 27, 34 and 37 have also spoken about the same. Of these P. Ws. 2, 6, 8, 9, 24 and 27 had worked as election agents on behalf of the appellant, but at the time of giving evidence they went over to the other side. Though they may not be said to be accomplices in the strict sense, nevertheless, the conduct of persons who desert one candidate and go over to the rival side and say, on oath, that on behalf of the former candidate they had**

themselves committed corrupt practices cannot but be characterized as infamous.

In this connection, the following observations of the Punjab High Court in 19 Ele. LR 417 (Punj) are worth quoting:

"This apparently wholesale desertion of the respondent by her devoted supporters and active workers during the election campaign and their appearance en masse as witnesses for the rival candidate who is now seeking to unseat her, is sufficient in itself to arouse the strongest suspicions as to the bona fides of the witnesses."

While refuting the argument that these witnesses were merely coming forward to speak the truth in the interests of purity of election, the learned Judge further *observed:*

"I am very doubtful indeed whether the worship for truth flourishes to such an extent in the town of Jagraon that so many active workers and supporters on behalf of the respondent could overnight have turned into persons anxious to bring about her downfall merely for the sake of telling the truth at all costs."

Here also it cannot be said that these witnesses who according to their deposition were accomplices of the appellant in the omission of crimes or corrupt practices, which are in any case highly improper, should have become suddenly repented and become votaries of truth especially when they were summoned by the petitioner to depose on his behalf.

The remaining witnesses are also not very impressive. Thus P. W. 19 gave up a lucrative job in Rourkela on his own evidence and returned home. He has deposed as a prosecution witness in a murder case which however ended in acquittal. Though he has denied the suggestion that he was compelled to resign his job at Rourkeia as there was threat of departmental proceeding against

him for defalcation of Govt. money nevertheless the circumstances under which he left his job appear somewhat suspicious. P. W. 25 though not himself a Congressman admitted that his son-in-law was a propagandist for the Congress. P. W. 37 is a partner in a business with Gadadhar P. W. 2 who is a notorious litigant involved in 40 cases Civil and Criminal. Thus we are left with only one witness namely P. W. 34 against whom nothing had been brought out in cross-examination.

13a. But the petitioner's allegations in this respect suffer from an initial doubt which has not been properly displaced. The allegations about corrupt practices saw the light of day for the first time only in the election petition of the petitioner dated 27-7-61 nearly two months after the commission of the same. The obvious question that arises is why he kept quiet for such a long time.

Vigorous canvassing and campaigning on both sides were going on in the latter part of May 1961 and according to the petitioner, not clandestinely but openly in a brazen faced manner. In the entire constituency public meetings were held and people were exhorted to vote for the appellant on pain of committing sin against Lord Jagannath if they did not do so. Though the petitioner did not have personal knowledge of the commission of the aforesaid corrupt practices he must have come to know about them from his workers sometime before the date of polling because he stated that he worked and moved to the constituency for 13 days before election. Nevertheless, he did not report the matter to the authorities concerned. It is true that the delay from the date of polling till the date of filing of the election petition was undeterminable, because once the polling was over the defeated candidate may as well wait to incorporate all these allegations in the election petition.

But the inaction of the petitioner till the date of polling has not been satisfactorily explained. From his ripe experience in conducting criminal cases, it can be safely inferred that he was fully aware of

the fact that any undue delay in reporting to the authorities about the commission of corrupt practice by the appellant unless satisfactorily explained would itself be sufficient to throw doubt on the truth of the allegations. He also knew that his case would gain additional strength if a contemporaneous document of unimpeachable genuineness was available to show that such allegations were immediately brought to the notice of the authorities. As soon as his agents informed him about the corrupt practices said to have been committed by the appellant he knew fully well that some of them may amount to offences under Sections 171F read with Section 171C and 508 I. P. C. and yet he remained silent. The obvious question is -- why he did not at once bring these facts to the notice of the Magistrate?

ELECTION PETITIONS MUST BE CONCLUDED WITHIN TIME LIMITS

Constitutional and statutory requirements relating to election law have to be strictly adhered to because election disputes are statutory proceedings unknown to the common law and thus the doctrines of equity do not apply to such disputes. (See **Arikala Narasa Reddy – V- Venkata Ram Reddy Reddygari, Air 2014 SC 1290; JT 2014 (2) SC 549).**

In tandem with constitutional and statutory principles, election petitions are time bound. The Kenya Supreme Court in **Hon. Lemanken Aramat -v- HaraunMeitameiLempaka & 2 Others, Petition No. 5 OF 2014**at paragraph 69 of its judgment expressed that the electoral process, and the electoral dispute resolution mechanism in Kenya, are marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by the Constitution and the electoral law. The jurisdiction of the Court to hear and determine electoral disputes is inherently tied to the issue of time, and a breach of this strict scheme of time removes the dispute from the jurisdiction of the Court.

In **Hassan Ali Joho And Another -v- Suleiman Said Shahbal And Others, Sup. Ct. Petition No. 10 of 2013** the Supreme Court held that proceedings emanating from petitions and matters that were filed out of time were a nullity ab initio. The

Court of Appeal in**Paul Posh Aborwa -v- Independent Electoral And Boundaries Commission And 2 Others, Civil Appeal No. 52 OF*2013,*** in a judgement dated 2nd May 2013 held that it had no jurisdiction to hear and determine an election petition appeal emanating from proceedings that are a nullity by reason of the petition having been instituted outside of the time limit set out under **Article 87(2)** of the Constitution of Kenya, 2010.

The issue for discourse in this paper is what about proceedings conducted out of time limit set for hearing and determination of an election petition? Are such proceedings and any ensuing judgment a nullity?

Article 105(1) and **(2)** of the Constitution enjoins the High Court to hear and determine an election petition within six months of the lodging of the petition. The Elections Act likewise enjoins the Court of Appeal to hear and determine election petition appeals within six months of lodgment of the appeal. The legal issue is what is the consequence of failure by an election court to hear and determine a petition within the stipulated six months? The Supreme Court in **Hon.Lemanken Aramat -v- Haraun Meitamei Lempaka & 2Others, Petition No. 5 OF 2014**expressed at paragraph 83 that by the terms of the Constitution, the High Court's special jurisdiction in resolving electoral disputes is time-bound. The Court's jurisdiction has practical meaning only in the context of the prescribed timelines. In this context, the Supreme Court held at paragraph 144 that the Court of Appeal had disregarded the constitutionally-set, six-month timeline for determining a parliamentary membership electoral dispute; and it had attempted to confer upon the High Court extended jurisdiction for carrying out a vote-recount.

The Supreme Court in **Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others(Petition No 2B of 2014)**held (at paragraph 62) that:

> **"Article 87 (1) grants Parliament the latitude to enact legislation to provide for timely resolution of electoral disputes. This provision 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. The Constitutional**

sensitivity about timelines and timeliness was intended to redress this aberration in the democratic process. The country's electoral cycle is five years. <u>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</u>. (Emphasis mine).

In **<u>Mary Wambui Munene -v- Peter Kingara & Others</u>**, the Supreme Court in its judgment at paragraph 78 expressed:

"[78] In line with the time-limits set by the Constitution, this Court, in **<u>RAILA ODINGA & OTHERS V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION &OTHERS</u>**, **S.C. Petition No. 5 of 2013**, and the ***Joho*** case, emphasized the need for adherence to the time-limits provided by the Constitution. In a Ruling dated 3rd April, 2013 expunging a new affidavit from the record before the Court, in the ***Raila Odinga case***, the Court held (at page 9):

"However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and Rules relating to the Constitution, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity. The Rules and time-lines established are made with special and unique considerations."

... "The background to the setting of the strict time-lines must be known to most Kenyans. There was a purpose to this and the intention of the People of Kenya and of Parliament must be respected."

... "The parties have a duty to ensure they comply with their respective time-lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of

> ***omissions, or inadvertences which were foreseeable or could have been avoided."***

In the Nigerian case of Senator**John Akpanudoedehe & Others -v- GodswillObot Akpabio & OthersS.C of Nigeria Appeal No. 154 of 2014**, the Supreme Court of Nigeria held:

> **"Once 180 days elapsed the hearing of the matter fades away along with any right of fair hearing. There is no longer a live petition left. There is nothing to be tried even if a retrial order is given. It remains extinguished forever…If this Court extends time provided in Section 285 (6) for the hearing of election petitions it would amount to judicial legislation and that would be wrong. The National assembly is to make law and that includes amending existing laws and the Constitution."**

In **Chief Doctor Felix Amadi &Anor -v- Independent National Electoral Commission (INEC) & Others S.C. of Nigeria Appeal No. 476 of 2011,** the Nigerian Supreme Court held:

> **"There is no room for the exercise of any discretion in relation to the allotted time. Everything needed to deliver the judgment must be done and the judgment delivered within sixty (60) days of the date of delivery of judgment on appeal. The appeal in question has lapsed by one day as at 7th December 2011 when the same was listed for hearing. That means that as at that date the appeal had ceased to exist in law and could therefore not have been heard–it was dead in the eyes of the law and the Constitution."**

In the case of **Peoples Democratic Party (Pdp) -v- Congress For Progressive Change (Cpc) & 42 Others**and in the case of**Dr.Goodluck Jonathan & Another -v- Congress ForProgressive Change (CPC) & 41 Others, 17 NWLR 485,**the Nigerian Supreme Court struck out the appeals due to violation of time limits set for the hearing and determination of the appeals. The two appeals both filed within the stipulated time limits were consolidated but by the time they were fixed for hearing on 27th October 2011, the period of 60 days for the hearing and disposal of

appeals from an election Tribunal or Court of Appeal had elapsed. In determining whether the appeals were competent, the Nigerian Supreme Court struck out both appeals as incompetent, they being statute barred by that time of judgment and not by the time of filing. Justice Peter Odili JSC observed that it is not the function of a court of law to sympathize with a party in the interpretation of constitutional provision merely because the appellants acted timeously and due to no fault of theirs there is an effluxion of time allotted for hearing and final determination of the appeal. (See also Judgment from Ghana Court of Appeal by Justice Tanko Amadu JA**In The Matter Of Petition By Hon. Richard Akuoko Adiyia V Akwasi Adusei & Electoral Commission, Appeal No. HI/46/2014** at paragraphs 49 to 54.

CERTIFICATE OF DELAY AND APPEALS IN ELECTION PETITIONS

A party who is dissatisfied and aggrieved by the decision of a trial court may have a right to appeal to a higher court. In most cases, the appeal should be filed within stipulated timelines. One of the primary documents required to institute an appeal is the record of appeal. The record contains typed proceedings of the trial court. Ordinarily, it is the trial court that types the proceedings and issues the same to the parties. A delay in typing proceedings automatically delays the filing and lodging of the record of appeal. In most jurisdictions, whenever there is delay on the part of the court in providing the typed proceedings, a certificate of delay is issued by the Registrar. The legal effect of the certificate is that time stops running and computation of the time within which to file the record of appeal starts from when the typed proceedings were ready for collection. This date is indicated in the Certificate of Delay.**Article 259 (5) of the Constitution** provides that in calculating time between two events, the day on which the first event occurs shall be excluded and the day by which the last event may occur shall be included.

In **Basil Criticos -v- Independent Electoral and boundaries Commission &2 Others [2014] eKLR**, the words of Okwengu JA are illuminating in this regard (paragraph 12):

> ***"…the right to a hearing in regard to an appeal from an election petition is tied to the <u>timelines provided in that Act</u>. In this way the right to a hearing is appropriately balanced with the public interest of expeditious disposal of electoral disputes. This is as it should be, for one party may have brought an appeal, but the outcome affects the interest of the public whose right to representation is in limbo during the pendency of the appeal."***

In relation to election petition appeals, the legal issue is whether a Certificate of Delay can extend the stipulated time for filing or lodging an appeal. The Supreme Court in **<u>Evans Odhiambo Kidero & 4 others -v- Fedinard Ndungu Waititu & 4 Others</u>, Petition No. 20 of 2014**) expressed that *a certificate of delay has no place in election petitions.* In arriving at its decision after reviewing the facts and case law, the Supreme Court reasoned and stated:

> "[160] The Judgment of the High Court was delivered on 10th September, 2013. (See page 132 Vol. B1). The 1st respondent filed at the Court of Appeal a Notice of Appeal against the Judgment and orders of Mwongo J on 12th September, 2013.
>
> [161] Under Section 85A(a), the 1st respondent ought to have filed an appeal within 30 days from the date of Judgment in the High Court, that is on 10th of October, 2013. This was however not to be, as the subsequent events now show. On 11th September, a day after the High Court's Judgment, the 1st respondent's advocates wrote to the Deputy Registrar of the High Court of Kenya requesting typed proceedings in the matter. The Deputy Registrar responded the following day, informing the 1st respondent's advocates that they would be notified to collect the proceedings once typing of the same was completed. On 9th October, 2013, certified proceedings were ready for collection (see pages 28-30 vol. B1).
>
> [162] The 1st respondent has met the claim of belated appeal on his part by invoking a "certificate of delay" which was in his possession. The content of the said certificate of delay runs as follows:
>
> > "1. An application for proceedings was lodged in Court on 11/9/2013;

"2. Certified copies of proceedings were not ready until 9/10/2013;

"3. Certified copies of the proceedings and ruling were ready on 9/10/2013;

"4. The certificate of delay was prepared and ready for collection on 30/10/2013;

"5. Number of days taken: 49 days."

[163] Armed with a certificate of delay, the 1st respondent then lodged his memorandum of appeal at the Court of Appeal registry on 22nd November, 2013 being 23 days from the date of issue of the certificate of delay.

[164] Section 85A of the Elections Act, under which the 1st respondent's appeal to the Court of Appeal was to be admitted, provides as follows:

"An appeal from the High Court in an election petition concerning membership of the National Assembly, Senator or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be:

(a) filed within thirty days of the decision of the High Court; and

(b) heard and determined within six months of the filing of the appeal to the Court of Appeal."

[165]It was the appellants' argument that the appeal was filed after a record 72 days from the date of the Judgment of the High Court. According to the appellants, the mandatory provision of Section 85A (a) of the Elections Act was not adhered to, in contravention of the underpinning constitutional principle of timely resolution of electoral disputes, embodied in Article 87(1). The Appeal was, therefore, incompetent in law. It was urged that the Court of Appeal acted without jurisdiction, by determining an incompetent appeal, the same having been filed outside the mandatory statutory timeline. In canvassing this contention, learned Senior Counsel, Prof. Ojienda

submitted that this Court has held that Courts do not have discretion to extend mandatory timelines set out in the Elections Act.

[166]Counsel cited a number of authorities including the Joho case, in which this Court affirmed the Court of Appeal's pronouncement in **Ferdinand Waititu -v- Independent Electoral and Boundaries Commission & 8 Others Civil Appeal No. 137 of 2013** that the timelines set by the Constitution and the Elections Act are neither negotiable nor extendable by any Court; **Mary Wambui Munene -v- Peter Gichuki Kingara & 2 OthersS.C Petition No. 7 of 2014**in which this Court was categorical as to the imperatives of timelines demanded by the Constitution, in the settlement of electoral disputes; and Munya 2 in which this Court declared the constitutional basis of Section 85A of the Elections Act, stating that it was "neither a legislative accident nor, a routine legal prescription". Counsel invited this Court to consider and affirm the pronouncements by Warsame J.A in his dissenting Judgment at the Court of Appeal.

[168] There are two critical questions to be answered at this stage, namely:

> (a) What is the legal effect of the provisions of Article 85A (a) of the Elections Act on election-petition appeals?
>
> (b) To what extent, if at all, are the Court of Appeal Rules in general and Rule 82(1) in particular, applicable to electoral disputes before the Court?

[169] In answer to question (a), it is an eminently relevant point that, long before this Court had pronounced itself on the question of timelines in election petitions other than in a Presidential-election petition, the Court of Appeal had already considered the question, and delivered authoritative decisions of merit. Two of these cases are outstanding. In an illuminating declaration of legal principle (which found favour in this Court), the Court of Appeal in **Ferdinand Waititu -v- Independent Electoral andBoundaries Commission, (IEBC) & Others, Civil Appeal No. 137 of 2013** (Mwera, Musinga and Kiage JJA), stated as follows:

> **"…These timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any Court for whatever reason. It is indeed the tyranny of time, if we may call it so. That means a trial Court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously. It was therefore imperative that the Elections Petition Rules be amended to bring about mechanisms of expediting trials…"**

[170] In**Patrick Ngeta Kimanzi -v- Marcus Mutua Muluvi &2 Others, Nairobi C.A No.191 of 2013 [2014] eKLR**;the Court of Appeal(Kariuki, Kiage and M'Inoti JJA) was again categorical, that the provisions of Section 85Aof the Elections Act, setting out timelines for the filing and determination of election petitions, were peremptory and non-negotiable.

The learned Judges of Appeal had the following to say:

> **"The ruling and order appealed from in Machakos Election Petition No. 8 of 2013 was delivered on 17.6.2013. The appellant filed the appeal on 12.08.2013. The period for lodging appeal expired in July 2013 and clearly the appeal was filed out of time. In Maitha vs. Said and Another, (1999) 2 E.A 181, this Court held that s.23 (4) A of the National Assembly and Presidential Elections Act, which like s.85 A of the Elections Act stipulated the period within which an appeal from the decision of the election court should be filed, was mandatory and that upon the lapse of the stipulated time, the right of appeal automatically lapsed…"**

[171] Warsame J.A, in an extensively reasoned dissent in the matter at hand, revisited these cases, acknowledging their merits. The learned Judge thus remarked:

> **"Having so found, what is the time within which an appeal from the decision of the High Court is to be filed and determined? The answer to this question is to be found at Section 85A(a) which is worded in very clear terms, that an appeal from an election**

> **petition 'shall' be…filed within thirty days of the decision of the High Court…. "The word 'shall' used in Section 85A(a) of the Elections Act connotes an emphatic intention, an expression of strong assertion or command, a duty rather than a wish, required to perform a function in a discretionary manner. In my understanding, the use of words shall and filed within 30 days of the decision of the High Court confer a mandatory sense that the drafters typically intended, and that courts typically must uphold. It means the filing of an appeal from the decision of the High Court is to be done within 30 days. In other words, the filing is to be done within the period, not exceeding or beyond the 30 days from the date when the decision is rendered."**

[172] Such a position is entirely consistent with a number of precedents which have been laid by this Court. In **Hassan Ali Joho &Another v. Suleiman Said Shahbal &2 Others, S.C Petition No. 10 of 2013 [2014] eKLR,** this Court cited with approval the declaration of legal principle by the Court of Appeal in the Ferdinand Waititu case (quoted above). The Court stated that adherence to the imperatives of time, as decreed by the Constitution, is a vital element in the operation of a democratic system based upon electoral expression.

[173] In**Mary Wambui Munene -v- Peter Gichuki King'ara & 2 Others SC Petition No. 7 of 2014**, this Court while annulling the proceedings of the High Court and Court of Appeal in an election petition that had been filed outside the time-frame prescribed in Article 87(2) of the Constitution, stated as follows:

> **"…. Time as a principle, is comprehensively addressed through the attribute of accuracy, and emphasized by Article 87(1) of the Constitution, as well as other provisions of the law. Time in principle and applicability, is a vital element in the electoral process set by the Constitution. This Court's decision in Joho was guided by this consideration. For purposes of this case, we apply the precedent in Joho, taking into account that the issue in**

question involves imperatives of timelines demanded by the Constitution in settling electoral disputes which involve accuracy, efficiency and exactitude, limiting any other considerations, in the exercise of our discretion."

[174] In**Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others SC Petition No. 2B of 2014**, this Court clearly established the constitutional genealogy of Section 85A of the Elections Act, when it declared that the same was "neither a legislative accident nor a routine legal prescription." Section 85A, the Court affirmed, "Is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion."

[187] Indeed, judicially, the special status of the diverse elements of the electoral law had already been affirmed by the Court of Appeal in the **Ferdinand Waititu case (cited above),** as follows:

"The Elections Act and the Rules made thereunder constitute a complete code that governs the filing, prosecution and the determination of election petitions in Kenya. That being the case, any statutory provision or rule of procedure that contradicts or detracts from the expressed spirit of Article 87 (1) and 105(2) and (3) of the Constitution is null and void."

[188] This Court incorporated precisely such a perception in its recent Judgment in **Fredrick Otieno Outa -v- Jared Odoyo Okello & 4 Others S.C. No. 10 of 2014,** when it thus held (paragraph 77):

"On this account, it makes in our perception, eminent sense that the ordinary rules of procedure, in their full tenor and effect, tend to be ill-suited to the effectuation of substantive aspects of the Elections Act and the Rules made thereunder. It is clear to us, for instance, that Rule 35 of the Elections Petition Rules, in so far as it makes the Court of Appeal Rules applicable to appeals in election-dispute matters, is to be construed only as a supplement to and

not a substitute to- the provisions of the Elections Act. We would state, for the avoidance of doubt, that the importation of the Court of Appeal Rules into the conduct of electoral appeals via Rule 35 of the Election Petition Rules, cannot oust the clear provisions of Section 85A of the Elections Act."

[189] We would agree with the perception of Warsame JA, regarding the applicability or otherwise of Rule 82 of the Court of Appeal Rules, to electionpetition appeals. The learned Judge in his opinion thus stated (pp. 29-30 of the Judgment):

"Can Rule 82 of the Court of Appeal Rules, 2010 which provides for the certificate of delay, defeat the statutory provisions contained in section 85A of the Elections Act? The answer to this question must be in the negative…Section 85 is the legal foundation and all the rules must be interpreted in a manner that will not displace it…. Therefore, the Elections Act is the parent Act. It has all the and structures for the filing of the petition which is provided for in the Constitution…. The time for lodging and determination of appeals in election disputes is found at section 85A of the Constitution, and a party who (sic) does not comply cannot find refuge in the rules of this Court. It is not tenable to elevate the rules of procedure of the Court above a statutory provision…"

[190] The interplay between electoral dispute-settlement timelines, and other types of dispute-settlement procedures, is a jurisprudential issue that has been experienced in other jurisdictions as well. In **Ferdinand Frampton and Others -v- Ian Pinard and Others Claim Nos. DOMHCV 2005/0149**, the High Court in of the Commonwealth of Dominica held that a petitioner must do everything to lodge his or her petition within the stipulated time, and that an election Court has no power to extend the time prescribed by statute unless such power is expressly conferred upon it. The Court pronounced itself as follows:

"The rationale…is that provisions for the litigation of election petitions are a matter of substantive law, and, like the Statute of Limitation, cannot be dispensed with by the Court. The statutory time limits provide a rigid time table to ensure that everything that is necessary is done, in a timely manner, to bring these petitions to trial because of the public interest requires it…"

[191] In **Ezechiel Joseph -v- Alvina Reynolds HCVAP2012/0014** the Caribbean Court of Appeal at St. Lucia was faced with several questions, inter alia: whether the Civil Procedure Rules 2000 of 1967 applied in part, or as a whole, to proceedings under the Elections Act; and whether a petitioner, upon giving good reason, could rely on any provision of the Civil Procedure Rules, 2000 to move the Court for an extension of the time prescribed for doing specific acts. The learned Judge, Sir Hugh Rawlins stated as follows:

> **"In keeping with the strict approach, our Courts have generally insisted that the provisions in elections legislation must be strictly complied with because the paramount public interest is that election challenges should be determined as quickly as possible so that the assembly and the electors should know their rights at the earliest possible time…The election Court has no power to extend time or allow amendments filed out of time unless election legislation so provides" (emphasis supplied).**

[192] In the matter before us, it is for certain that the petition of appeal before the Court of Appeal was filed well outside the mandatory time prescribed by Section 85A of the Elections Act. It is also an established fact that the proceedings at the High Court were ready for collection on 9th of October 2013. A certificate of delay was issued on 30th October 2013 notwithstanding the fact that the proceedings had been ready for collection on 9th of October. The petition of appeal ought to have been filed on or before the close of day on 10th October 2013. Instead, the appeal was not filed until the 22nd of November 2013.

[193] The first respondent herein has been portrayed as an innocent man in this entire saga. The Court was invited to regard him as a victim of the High Court's lethargy or inefficiency; an intending appellant without fault, who

would otherwise have lodged his appeal within the timelines prescribed by Section 85A (a) of the Elections Act. Other than the letter written to the Deputy Registrar of the High Court by 1st respondent's counsel, inquiring about the proceedings, we were not informed of what else the respondent did to follow up on the same. The proceedings were ready on 9th October 2013. Yet the respondent collected the same on 30th of October 2013. Was the respondent conscious about the provisions of Section 85A of the Elections Act?

[194] Let us assume, for purposes of argument, that all along, the respondent was intent on beating the statutory deadline. Towards this end, he would have diligently collected the proceedings on the 9th of October 2013, and proceeded to prepare and lodge his appeal in the Court of Appeal, before close of day on 10th of October 2013. It was robustly submitted by Senior Counsel Mr. Muite, that the delay in the preparation of the proceedings ought to be taken into account in the computation of time. But even if the Court were to accede to such a request, the latest the respondent ought to have filed the appeal would have been the 10th of November 2013, being the thirtieth day as from the date the proceedings were available. What did the respondent do? He filed his appeal on the 22nd of November 2013. So all along, the respondent's conscience does not appear to have been pricked by the provisions of Section 85A of the Elections Act.

[195] Was it impossible for the first respondent herein, through counsel, to take all initiatives to lodge an appeal in the Court of Appeal before close of day on 10th October 2013? We don't think so, given the high stakes involved in the matter.

[196] Consequently, and in view of our appraisal of the law, we hold that the learned Judges of Appeal erred in law by admitting, and determining an incompetent appeal the same having been filed out of the time prescribed by the peremptory provisions of Section 85A (a) of the Elections Act as read with Article 87 (1) of the Constitution. In so doing, the Court of Appeal acted without jurisdiction. In the circumstances, the majority Judgment

annulling the election of the first appellant herein is a nullity for all purposes.

[197] This Court has noted the occurrence of delay in the preparation of proceedings at the High Court, and would restate the position it has taken in election cases. Courts of law should not be the ones to stand in the way of the expeditious disposal of electoral disputes, in a manner that gives fulfilment to the terms of the Constitution and the law. We hereby direct the Chief Registrar of the Judiciary to take appropriate action within her mandate under the Constitution, to ensure that inordinate delays do not occur.

APPEALS AND STAY OF CERTIFICATE OF THE ELECTION COURT

A judgment takes effect immediately on pronouncement unless the trial court states otherwise. In election petition, once an election court has pronounced its decision, if the petition is allowed, the results of the election stand nullified when the certificate is issued. **Section 85A (1)** of the **Elections Act** provides that "An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of a county governor shall lie to the Court of Appeal on matters of law only. The Election Act was amended in 2016 to insert **Section 85 A (2)** which provides that "An appeal under **sub-section (1)** shall act as a stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined.

The amendment introducing **Section 87A (2)** has the legal effect that a notice of appeal filed and lodged at the Court of Appeal operates as a stay. Consequently, in election petitions, there is no need to file an application for stay before the Court of Appeal.

What about appeals from the Court of Appeal to the Supreme Court? Does a notice of appeal operate as a stay? There is no express provision in the Elections Act on the issue. However, unless new jurisprudence originates from the Supreme Court, jurisprudence from the Court arising from the 2013 election petitionsinvites an inference that stay is granted upon application and is granted as a matter of course.

In **Gatirau Peter Munya -v- Dickson Githinji Mwenda, SC Application No. 5 of 2014,** the Supreme Court in its Ruling granting orders to stay Court of Appeal judgment nullifying election results posited the following questions:

iv. ***Would the Appeal be rendered nugatory if the orders of stay are not granted?***

[92] There are two possible scenarios that could emerge, if the orders sought by the applicant are not granted. The first is that the election machinery will be set in motion. The applicant will seek re-election by contesting, while at the same time pursuing his appeal before this Court. If, for purposes of argument, the appeal succeeds and the applicant is re-elected, then it could be said that the appeal would have been rendered nugatory. The main objective of the applicant is to forestall a situation where he is forced to go through the rigours of an election, when there is a possibility that his earlier election could be upheld by this Court.

[93] Secondly, the applicant could participate in the elections and *fail to be re-elected, while the appeal eventually succeeds.* The effect would be the same from the applicant's point of view. Thirdly, the applicant could participate in the election and fail to be re-elected while the appeal also fails, eventually. In this third scenario, it cannot be said that the appeal would have been rendered nugatory.

v. ***Is it in the Public Interest that the Orders of Stay should be granted?***

[94] The first and second scenarios would have a devastating impact upon the other contestants who would have participated in the fresh gubernatorial elections. Not only would they have participated in the elections in vain, they would also have expended considerable amounts of money in the campaigns. The electorate, likewise, would suffer grave disturbance, for having voted in an election that, for all intents and purposes, was meaningless. The 2nd respondent would have applied *public funds and other resources* in organizing an election in vain. In our view, these possibilities are inordinately extravagant, and are best avoided.

[95] The applicant's prayer in this case is, in its essence, a *conservatory order*: to the effect that during the pendency of the appeal, the current occupancy of the Governor's office be maintained; and the motion towards new elections be held in abeyance.

[96] Although learned counsel have urged their case partly on the basis that the applicant, by virtue of Article 38 of the Constitution, has the "right to hold office", we do not perceive this case as a *"private-interest matter";* for the *public interest* in fairly-conducted elections, and in legitimate office-holding, looms larger still.

[97] Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of *good governance,* that runs in tandem with the conscientious deployment of *thescarce resources drawn from the public.* Proper husbandry over public monetary and other resources, we take *judicial notice*, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources.

[98] These principles dictate that our conscientious sense of proportions stands *not* in favour of allowing the conduct of fresh elections for Meru County's gubernatorial office, during the pendency of an appeal. By our sense of responsibility, the Court's contribution to good governance in that context, takes the form of an expedited hearing for the appeal.

In the case of **Mary Wambui Munene -v- Peter Gichuki Kingara & 2 Others, SC APPLICATION NO. 12 OF 2014**on the issue of stay, the Supreme Court expressed as follows:

"[81]We are of the opinion that the matter before us involves public interest issues. This necessitates grant of orders that are for public good which will not only preserve public resources but also ensure fidelity to the Constitution. Safeguarding public funds and ensuring good governance is indeed a means of preserving public resources and it focuses on public good. We take note of the principle of good

governance enshrined in Article 10(2) (c) of the Constitution that this Court, being one of the State organs, is bound to abide by in the discharge of its Constitutional mandate. Article 10 states that:

> **"10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them: -**
>
> **(a) applies or interprets this Constitution;**
>
> **(b) enacts, applies or interprets any law; or**
>
> **(c) makes or implements public policy decisions.**
>
> **(2) The national values and principles of governance include: -**
>
> **(a) …;**
>
> **(b) …;**
>
> (c) **good governance, integrity, transparency and accountability; and**
>
> **(d) …."**

[82]We acknowledge the fact that if a vacancy occurs as envisaged in the Constitution, there has to be an election within 90 days. This case is peculiar because already there are contentions as to when the vacancy occurred. It would be appropriate in our view that this matter be determined in the Appeal since the answer thereof holds the key to the determination of when a By- election should be conducted. This demonstrates the urgency of the hearing of the Appeal, considering time is of the essence in terms of Article 101 of the Constitution.

[83]The Supreme Court Act, 2011 in Section 3 sets out the objectives of the Act in the following words:

“The object of this Act is to make further provision with respect to the operation of the Supreme Court as a Court of final judicial authority to, among other things— (a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya; (b) provide authoritative and impartial interpretation of the Constitution; develop rich jurisprudence that respects Kenya’s history and traditions and facilitates its social, economic and political growth; (c) enable important Constitutional and other legal matters, including matters relating to the transition from the former to the present Constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya; (d) improve access to justice; and (e) provide for the administration of the Supreme Court and related matters.”

[84]These objectives outlined in the Act are a clear indicator that the powers conferred on this Court are to secure the process of administration of and access to justice and at the same time developing rich jurisprudence respecting Kenya’s history and traditions as it facilitates social, economic and political growth. We are required to have regard to the kind of jurisprudence which will not only resolve the current conflict but will also be good law applicable in the future to meet ends of Justice.

[85] In light of the foregoing, this Court is inclined to exercise its discretionary powers in favour of the Applicant’s prayers. In doing so, it is noted that the voters of Othaya Constituency need to be represented in theNational Assembly. Further, the same voters needing to fully know what became of their exercise of political right carried out on 4th March, 2013, and also to be assured that there will be no confusion as to who is the proper representative after the By- election, if one is held. Consequently, we are convinced that conservatory orders would be imperative in this matter.

[86]The upshot is; we are of the view that conservatory orders should issue to stay the By-election being undertaken by the IEBC to pave way for the Appeal to be heard on merit.

POINTS OF LAW and JURISDICTION OF THE COURT OF APPEAL IN ELECTION PETITIONS

The jurisdiction of the Kenya Court of Appeal to hear and determine appeals arising from election petitions is governed by Section 85 A of the Elections Act.

Section 85 A of the Elections Act, 2011 provides that:

> **"An Appeal from the High Court in an election petitionconcerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only…"**

What is the meaning of the instructive words "an appeal shall lie to the Court of Appeal on matters of law only?" When is an appeal said to lie on matters of law only, as opposed to "matters of fact", or "matters of mixed law and fact?"**Section 85 A** of the Elections Act is directed at litigants who may be dissatisfied with the judgment of the High Court in an election petition. To those litigants, it says:"Limit your appeals to the Court of Appeal to matters of law only."

What, essentially, is an appeal on a question or a matter of law, as distinct from a question or a matter of fact? How ought the Court of Appeal to proceed, in considering appeals brought before it under Section 85A of the Elections Act?

The Supreme Court of Canada in **Canadian National Railways Company -v- The Bell Telephone Company of Canada and Montreal L. H & P. Cons (1939) SCR, 308** expressed that

> **"The phrase question of law which the Legislature has employed in this enactment is prima facie a technical phrase well understood by lawyers. So construed, "question of law" would include (without attempting anything like an exhaustive definition which would be impossible) questions touching the scope, effect or application of a rule of law which the courts apply in determining**

the rights of parties; and by long usage, the term "question of law" has come to be applied to questions which, when arising at a trial by a judge and jury, would fall exclusively to the judge for determination….."

The meaning of "a question of law" and "a question of fact" was further explicated in the English case, **Bracegirdle v. Oxley (2) [1947] 1 ALL E.R. 126[at p.130, per Lord Denning]:**

"The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts was not one that could reasonably be drawn from them."

In the Indian case of **Meenakshi Mills, Madurai -v- The Commissioner ofIncome Tax, Madras (1957) AIR 49, (1956) SCR 691**, the Supreme Court of India after reviewing many English and Indian precedents, came to a conclusion of principle that a question of law would arise in the following three instances only:

(a) the construction of a statute or document of title;

(b) the legal effect of the facts found where the point for determination is a mixed question of law and fact;

(c) a finding of fact unsupported by evidence, or that is unreasonableorperverse in nature.

In the South African decision,**Magmoed -v- Janse Van Rensbura and Others 1993 (1) SA 777 (A),** the Court considered what constitutes a question of fact oroflaw,on the following lines:

> "In jurisprudence, the term "question of law" is used in various ways. In the first place it means a question which a Court is bound to answer in accordance with a rule of law, a question which the law itself has authoritatively answered to the exclusion of the right of the Court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter. In a second and different signification, a question of law is a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter. A third sense in which the expression "question of law" is used arises from the division of judicial functions between a trier of law and a trier of fact. The general rule is that questions of law in both the aforegoing senses are for the judge, but that questions of fact (that is to say, all other questions) are for the trier of fact"

The Supreme Court of the Philippines has had occasion to distinguish between "a question of fact" and "a question of law" in the case of **Republic -v- Malabanan, G.R. No. 169067, October 632 SCRA 338, 345. Citing another case, Leoncio – v- De Vera, G.R. No. 176842, 546 SCRA 180, 184** the Court thus remarked:

> "A question of law arises when there is doubt as to what the law is on a certain state of facts, while there is a question of fact when the doubt arises as to the truth or falsity of the alleged facts. For a question to be one of law, the same must not involve an examination of the probative value of the evidence presented by the litigants or any of them. The resolution of the issue must rest solely on what the law provides on the given set of circumstances. Once it is clear that the issue invites a review of the evidence presented, the question posed is one of fact. Thus, the test of whether a question is one of law or of fact is not the appellation given to such question

by the party raising the same; rather, it is whether the appellate court can determine the issue raised without reviewing or evaluating the evidence, in which case, it is a question of law; otherwise it is a question of fact."

The same Philippines Court was even more emphatic regarding the meaning of "question of law" and "question of fact" in the case of **New Rural Bank of Guimba -v- Fermina S Abad and Rafael Susan; G.R No. 161818 (2008).** This was a petition for Certiorari filed under Rule 45 of the Rules of Civil Procedure, section 1 of which provides that: "The Petition shall raise only questions of law which must be distinctly set forth." Dismissing the petition, the Court ruled:

> "The Petitioner would have us delve into the veracity of the documentary evidence and truthfulness of the testimonial evidence presented during the trial of the case at bar…We reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of the witness, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation. This Court cannot adjudicate which party told the truth… by reviewing and revising the evidence adduced at the trial court. Neither verbal sophistry, nor artful misinterpretations of supposed facts can compel this Court to re-examine findings of fact which were made by the trial court…. absent any showing that there are significant issues involving questions of law."

The Court of Appeal in the case of **M'Iriungu -v- R [1983] KLR 455** had occasion to consider the meaning of the expression "question of law", as employed to prescribe the limits of appellate jurisdiction. At page 466, the Court stated:

> "In conclusion, we would agree with the views expressed in the English case of **Martin -v- Glyneed Distributors Ltd** that where a right of appeal is

confined to questions of law only, an appellate Court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law…unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law. We, here have resisted the temptation".

The Kenya Supreme Court in its judgment in **Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others(Petition No 2B of 2014)**at paragraphs 80 to 82 expressed as follows as to the meaning of matters of law.

"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.

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, theSenate,or theofficeofCounty 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 CountyGovernor;

(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.

It is for the appellate Court to determine whether the petition and memorandum of appeal lodged before it by the appellant conform to the foregoing principles, before admitting the same for hearing and determination.Flowing from these guiding principles, it follows that a petition which requires the appellate Court 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. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral dispute adjudication, on the other hand."

CERTIFICATION OF APPEALS FROM THE COURT OF APPEAL TO THE SUPREME COURT

Article 163 of the Constitution delineates the jurisdiction of the Supreme Court as follows:

"163. (4) Appeals shall lie from the Court of Appeal to the Supreme Court-

> **(a) as of right in any case involving the interpretation or application of the Constitution and**
>
> **(b) in any case in which the Supreme Court or the Court of Appeal, certifiesthat a matter of general public importance is involved…."**

The Supreme Court, in **Peter Oduor Ngoge -v- Francis Ole Kaparo & 5 Others**, **Supreme Court Petition No. 2 of 2012; [2012] eKLR**, observed at paragraph 26 that to invoke the jurisdiction of the Court as of right, the petitioner must rationalize the transmutation of the issue in contention from an ordinary subject of leave-to-appeal, to a meritorious theme involving the interpretation or application of the Constitution. In such a case, it must be demonstrated that the Court of Appeal's reasoning and conclusions which led to the determination of the issue can properly be said to have taken a trajectory of *constitutional interpretation or application.* In **Naomi Wangechi Gitonga & 3 Others -v- IEBC & 4 Others**, **Supreme Court Civil Application No. 2 of 2014; [2014] EKLR**it was expressed that (at paragraph 31) meritorious questions of constitutional import inviting interpretation or application fall within the jurisdiction of the Supreme Court. Dicta at paragraph 27 in**Lawrence Nduttu & 6000 Others -v- Kenya Breweries Ltd. & Another**, **Supreme Court Petition No. 3 of 2012; [2012] eKLR**,is to the effect that merely alleging that a question of constitutional interpretation or application is involved does not automatically, without more, bring an appeal within the ambit of **Article 163(4)(a)** of the Constitution.

The Supreme Court examined its appellate jurisdiction in relation to election petitions in the case of **Hon. Lemanken Aramat -v- Haraun Meitamei Lempaka & 2 Others, Petition No. 5 of 2014**and held as follows:

> **"[102] The Supreme Court's jurisdiction in relation to electoral disputes is, in our opinion, broader than that of the other superior Courts. We note in this regard that while the Court of Appeal's jurisdiction is based on Section 85A of the Elections Act, with its prescribed timelines, that of the Supreme Court is broader and is founded on the generic empowerment of Article 163 of the Constitution, which confers an unlimited competence for the**

> **interpretation and application of the Constitution; and this, read alongside the Supreme Court Act, 2011 (Act No. 7 of 2011) illuminates the greater charge that is reposed in the Supreme Court, for determining questions of constitutional character."**

Guided by the foregoing precedents, the Supreme Court heard appeals on several election petitions ensuing from the 2013 General Elections. A common thread in most of the cases is that the jurisdiction of the Supreme Court was invoked as of right under **Article 163 (4) (a)** on the premise that the appeals involved questions of the interpretation or application of the Constitution. The concept of constitutional normative derivatives and or constitutional trajectory was used to invoke a right of appeal to the Supreme Court. For instance, in**Gatirau Peter Munya -v- Dickson Mwanda Kithinji And Two Others, SUP. CT. Application No.5 of 2014**, the Supreme Court expressed at paragraph 77:

> **"While we agree with [learned counsel], 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 cannot disengage from the Constitution."**

Guided by the jurisprudence from the Supreme Court in its Rulings in the **GATIRAU MUNYA CASE AND MARY WAMBUI MUNENE APPLICATIONS (SUPRA)**an inference can be drawn that in relation to election petition matters, an appeal from the Court of Appeal lies as of right to the Supreme Court. Consequently, an aggrieved party does not require leave or a certificate from the Court of Appeal to the Supreme Court on election petition matters.However, there is contrary dictum from the Supreme Court in **Joseph Amisi Omukanda -v- Iebc & 2 Others, Civil Application No. 32 of 2014,** where the Court in its ruling declined to entertain an election petition appeal from the Court of Appeal on the ground that it was founded on **Article 163 (4) (b)** and not **Article 163 (4)** a of the Constitution. The dictum expressed in **Lawrence Nduttu &6000 Others -v-**

Kenya Breweries Ltd. & Another, **Supreme Court Petition No. 3 of 2012; [2012] eKLR** must be borne in mind.

The principles to invoke the appellate jurisdiction of the Supreme Court are summarized in the case of **Gatirau Peter Munya -v- Dickson Kithinji Mwenda (SC Petition No. 2B of 2014**) where it was stated:

> **"[244] In summary, the guiding principles that we have articulated under Article 163(4)(a) are:**
>
> **i. a Court's jurisdiction is regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent;**
>
> **ii. the chain of courts in the constitutional set-up have the professional competence to adjudicate upon disputes; and only cardinal issues of law or jurisprudential moment deserve the further input of the Supreme Court;**
>
> **iii. the lower Court's determination of an issue appealed against must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;**
>
> **iv. an appeal within the ambit of Article 163(4)(a) is one founded on cogent issues of constitutional controversy;**
>
> **i. with regard to election petitions, the Elections Act and the Regulations are normative derivatives of the Constitution and, in interpreting them, a Court of law cannot disengage from the Constitution."**
>
> **ii. with regard to election matters, not every 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. (See paragraph 130 in Evans Odhiambo Kidero & 4 others –v- Fedinard Ndungu Waititu & 4 others, Petition No. 20 of 2014).

In the exercise of its appellate jurisdiction, the procedure to be followed at the Supreme Court is as stipulated in the Constitution, the Supreme Court Act and any practice directions given by the Court. The Civil Procedure Act and Rules (Chapter 21 of the Laws of Kenya) does not apply to proceedings before the Supreme Court. Inthe case of **County Executive of Kisumu-v- County Government of Kisumu& 8 others, Civil Application No 3 of 2016**, the Supreme Court (Ibrahim & Wanjala JJSC) expressed as follows:

"The regime of law that governed proceedings before the Supreme Court was the Constitution, the Supreme Court Act, the Supreme Court Rules 2012, and any Practice Directions made by the Court or by the Chief Justice. The Civil Procedure Rules were not applicable. Consequently, the applicant could not rely on the provisions of the Civil Procedure Act…."

The pronouncement by the learned judges of the Supreme Court is in tandem with **Section 1 (1)** of the Civil Procedure Act which provides that the Act applies to proceedings in the High Court and, subject to the Magistrate's Courts Act (Cap. 10), to proceedings in subordinate courts. Court is defined in Section 2 of the Act to mean the High Court or a subordinate court, acting in the exercise of its civil jurisdiction.

The appellate jurisdiction of the Kenya Supreme Court in relation to election petitions should be contrasted with the jurisdiction of the Ghana Supreme Court. In **Re Parliamentary Election For Wulensi Constituency: Zakarai -v- NyimakanSupreme Court, Accra CM73/2003,** in a majority judgment, the Ghana Supreme Court held that it had no jurisdiction to hear election petition appeals from the Ghana Court of Appeal.**Article 131 (1)** of the Ghana Constitution provides:

"131 (1) An appeal shall lie from a judgment of the Court of Appeal to the Supreme Court:

(a) As of right in civil or criminal cause or matter in respect of which an appeal has been brought to the Court of Appeal from a judgment of the High Court or a Regional Tribunal in the exercise of its original jurisdiction."

Aggrieved by the decision of the Ghana Court of Appeal, the petitioner lodged a second appeal to the Supreme Court. In dismissing the appeal, the Supreme Court held there was no right of further appeal from the Court of Appeal to the Ghana Supreme Court in respect of an appeal from an election petition determined by the High Court because: (i) notwithstanding the general appellate jurisdiction of the Court of Appeal, the Constitution expressly provided that a person aggrieved by the determination of an election petition by the High Court might appeal to the Court of Appeal; that that provision had the effect of taking it, i.e. such an appeal out of **Article 131 (1)** jurisdiction of the Court of Appeal in respect of appeals to the Supreme Court; (ii) when a remedy has been given by the Constitution and a forum had also been given either by the Constitution itself or statute for ventilating a grievance, it was to that forum that a plaintiff might present his petition; that in the instant case, the Ghana Constitution had provided only two courts for dealing with election petitions namely the High Court and the Court of Appeal; (iii) that application of the maxim, general words do not derogate from special means that the special provision granting the right of appeal to the Court of Appeal from the determination of the High Court for an election petition should supersede the general appellate jurisdiction of the Supreme Court under **Article 131 (1) (a)**. Justice Twum JSC observed that whereas in a wider sense, it may be said that **Article 131 (1) (a)** should give a further right of appeal to the Supreme Court, a special remedy has been created and in that remedy the appeal process ends at the Court of Appeal. Justice Sophia Akuffo JSC in her dissenting opinion observed that there was no express constitutional provision limiting the right of appeal to the Court of Appeal alone; that an election petition is nothing more than a civil proceeding and as such, an appeal should lie from the Court of Appeal to the Supreme Court in the normal course of civil appeals.

NOTICE APPEAL TO THE SUPREME COURT

Rule 31 of the Supreme Court Rules (2012) provides that 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 judgment or ruling of the Court of Appeal. Rules 31 and 32 provide:

> 31. (1) A person who intends to appeal to the Court shall file a notice of appeal within fourteen days from the date of judgment or ruling, in Form B set out in the First Schedule, with the Registrar of the court or with the tribunal, it is desired to appeal from.
>
> 32. (1) An appellant shall, within seven days of lodging a notice of appeal, serve copies of the notice of appeal on all persons directly affected by the appeal

The time for counting the 14 days commences on the date of the judgment or decision of the Court of Appeal. Where the Court of Appeal pronounces its decision but reserves the reason for decision, time begins to run from the date of decision and not from the date the reasons are given.(See **Richard NyagakaTongi -v- Chris Bichage & 2 Others, Supreme Court Petition No. 17 of 2014).**

Rule 33 of the Supreme Court Rules, 2012 provides that appeals to the Court must be filed within 30 days of the filing of the Notice of Appeal. It is provided that:

> 33. (1) An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal—
>
> (a) a petition of appeal;
>
> (b) a record of appeal; and
>
> (c) the prescribed fee.
>
> (2) A petition for purposes of appeal shall be in Form D set out in the First Schedule and shall contain—

(a) the grounds of objection to the decision appealed against, under concise and distinct heads, without argument or narrative;

(b) points which are alleged to have been wrongly decided;

(c) the nature of the order which it is proposed to request the court to grant.

DOCTRINE OF MOOTNESS AND ACADEMIC EXERCISE

A party lodging an appeal to an appellate court must take into account the doctrine of mootness. In the Ugandan case of an**Application for Judicial Review BetweenJulius Maganda v. National Resistance Movement (HCMA NO. 154 OF 2010) (HCMA NO. 154 OF 2010) [2011] UGHC 4 (11 January 2011)**as adopted by the Supreme Court of Kenya in**RichardNyagaka Tongi -v- Chris Bichage & 2 Others, Supreme Court Petition No. 17 of 2014 at paragraphs 57-60;** it was expressed:

> **"Courts of law do not decide cases where no live disputes between parties are in existence. Courts do not decide cases or issue orders for academic purposes only. Court orders must have practical effects. They cannot issue orders where the issues in dispute have been removed or merely no longer exist."**

Further, in the South African case of **National Coalition for Gay and Lesbian Equality and Others -v- Minister of Home Affairs and Others 2000 (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1**, Ackermann J. at the Constitutional Court, observed that a case is 'moot' and, therefore not justiciable, if it no longer presents a live controversy. 'Live controversy' was also aptly defined by Hughes, CJ in **Aetna Life Ins. Co. -v- Haworth, 300 U.S. 227 (1937),** where he distinguished it "from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot". He observed that a live controversy must be "definite and concrete, touching the legal relations of parties having adverse legal interests". A live controversy he posited:

> *"… must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."*

In **Ashwander -v- Tennessee Valley Authority [1936] 297 U.S 288**, the US Supreme Court stated that courts should only decide cases which invite "a real earnest and vital controversy".

The Kenya High Court in **John Harun Mwau & 3 Others -v- AG & 2 Others HCCP No. 65 of 2011 (unreported)**stated as follows:

> **"We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy."**

JUDICIAL INDISCIPLINE, DOCTRINE OF PRECEDENT AND ORBITER DICTA

The Supreme Court is the apex court in Kenya and its decisions are final. A decision of the Supreme Court is final not because the decision isfundamentallyand jurisprudentially right but because the Court is final. The decision is final because it is final.The Court is not final because it is right; it is right because it is final; theCourt is not final because it is supreme, it is supreme because it is final.The Supreme Court is supreme because it is final; it is final because it is supreme.However, decisions of the Supreme Court can be changed by Parliament or reviewed by the Court itself. Justice Robert H. Jackson (1892-1954) of the U.S. Supreme Court wrote in the concurring opinion in **Brown -v- Allen(1953)**

> **"There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also**

be reversed. We are not final because we are infallible, but we are infallible only because we are final."

Article 163 (7) of the Constitution stipulates that all courts, other than the Supreme Court are bound by the decisions of the Supreme Court. In**Gatirau Peter Munya -v- Dickson Kithinji Mwenda(SC Petition No. 2B of 2014)**the Supreme Court expressed:

> **"[196] Article** 163 (7) of the Constitution is the embodiment of the time-hallowed common law doctrine of s*tare decisis*. It holds that the precedents set by this Court are binding on all other Courts in the land. The application, utility and purpose of this constitutional imperative are matters already considered in several decisions of this Court: **Jasbir Singh Rai – v-.Tarlochan Singh Rai & Others,**and quite recently, in **George Mike Wanjohi -v- Steven Kariuki & OthersPetition No. 2A of 2014.**
>
> **[197]** In addition to the benchmark decisions to which this Court adverted in **Wanjohi -v- Kariuki,** regarding the importance of the doctrine of *stare decisis, we* would echo the dictum in **Housen -v- Nikoaisen(2002) 2 SCR:**
>
> > **"It is fundamental to the administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence, the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced … should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationships between the courts."**

Recalling the concept of hierarchy of courts, the Kenya Supreme Court in **Hon. Lemanken Aramat-v- Haraun Meitamei Lempaka & 2 Others, Petition No. 5 OF 2014**quoting from a Canadian case adopted the position that obiter dicta from the Supreme Court should be given deference. It was stated:

> **"[120] Such an enhanced standing of Supreme Court determinations is, similarly, signalled in a decision of Canada's Provincial Court of ALBERTA, R V. MACLEOD,** ***2001 ABPC7 (paragraph 41):***
>
> **In my view, the law is that any obiter dicta comments of the Supreme Court should be accorded deference unless there are any compelling reasons not to do so…. The practical reasons for preferring the remarks of the Supreme court are self-evident: (1) the Supreme Court is the highest Court in Canada; (2) the Supreme Court always gives great deference to judgments from their own court."**

In**Evans Odhiambo Kidero& 4 others -v- Fedinard Ndungu Waititu& 4Others, Petition No. 20 of 2014**, the Supreme Court observed that it is an abuse of the process of court to nonchalantly request the Court to depart from well-**established principles of law. The Court expressed:**

> **[179] …. What this Court has affirmed as being a settled statement of the law, can neither be broad principle, nor orbiter, before other superior Courts.**
>
> **[131] We have considered Mr. Abdullahi's submissions, and have formed certain distinct impressions. We find no basis of merit upon which learned counsel suggested we should depart from our decisions in the Munya case. To ask this Court, so nonchalantly in the course of submissions, to depart from a statement of principle formally taken in a judicial setting, amounts, with respect, to an abuse of the process of Court.**

The following excerpts from the India Supreme Court case of **Markio Tado -v- Takam Sorang CivilAppeal No. 8260 OF 2012** resonate with the binding nature of Supreme Court judgments. At paragraph 22 *et seq* it was observed:

> **"The judge clearly ignored that the law declared by this Court is binding on all courts within the territory of India under Article 141 of the Constitution of India, and judicial discipline required**

him to follow the mandate of the Constitution. He entered into an impermissible exercise, and deleted the votes received by the appellant which he considered to be tainted votes. It is quite shocking to see that the learned judge has proceeded to delete the votes of the appellant from 8 polling stations, although the grievance was only about Ruhi and Roing polling stations. By making these deductions, he came to the conclusion that the respondent No. 1 had received 826 votes more. As can be seen from paragraph 28 of the judgment, rendered in Civil Appeal No. 1539 of 2012, that at best the case of the first respondent was that there were double entries of voters in 1304 names. The allegation was only with respect to twopolling stations. In those polling stations, the appellant had received 1873 votes. Even if these 1304 votes were to be deleted, it would not affect the result materially since the appellant had won with a margin of 2713 votes. The learned judge, therefore, ignored that even if the ground of improper reception of votes under section 100(1)(d)(iii) was to be taken, the respondent no.1 had failed to establish that the result of the election of the appellant had been materially affected by such improper reception of votes. The decision of the learned judge was therefore clearly flawed and untenable. Thus, the learned judge went into the counterfoils of the vote's inspite of the fact that this court had already ruled in the judgment in C.A. 1539 of 2010, that in the facts of the present case, no case was made out for calling of the counterfoils. Thereafter, however he proceeded to act exactly contrary to the direction emanating from the dismissal of M.C. (EP) No. 5 (AP) of 2010, which amounts to nothing but judicial indiscipline and disregard to the mandate of Article 141 of the Constitution of India. This is shocking, to say the least, and most unbecoming of a judge holding a high position such as that of a High Court Judge. We fail to see as to what made the judge act in such a manner, though we refrain from going into that aspect. It is unfortunate that such acts of judicial impropriety are repeated inspite of clear judgments of this court on the

significance of Article 141 of the Constitution. Thus, in a judgment by a bench of three judges in Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. and Anr., reported in (1997) 6 SCC 450, this court observed, "32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Court to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops." We may as well refer to Para 28 of the State of West Bengal & Ors. v. Shivanand Pathak and Ors., reported in (1998) 5 SCC 513, wherein this court observed:

> **"If a judgment is overruled by the higher court, the judicial discipline requires that the judge whose judgment is overruled must submit to the judgment. He cannot, in the same proceedings or in collateral proceedings between the same parties, rewrite the overruled judgment…"**

JUDGEMENT MUST BE WRITTEN IN SIMPLE LANGUAGE

A good judgment enhances the image and perception associated with the justice delivery process and increases public confidence in the judiciary. A respectable judgment is one that is written in plain simple English language. The judgment must communicate to the parties and all readers in society. Litigants are consumers of justice and the judgment must speak to them.Legal and non-legal minds should be able to interpret the content of the judgment. A defeated litigant should be able to know from reading the judgment why he lost the case. A judgment should not be wordy, rambling or verbose. A lengthy judgment is not *sine qua non* to a good

judgment. However, at the same time, a judge should remember that brevity cannot be to the extent of obscurity.

The supreme requirement of a good judgment is reason. Judgment is of value on the strength of its reasons. The weight of a judgment, its binding character or its persuasive character depends on the presentation and articulation of reasons. Reason, is the soul and spirit of a good judgment.

The Indian Supreme Court had occasion to reverse a poorly written judgment that was difficult to decipher. Excerpts from the trial court judgment that was reversed read as follows:

> **"In sequel thereto finality besides conclusivity stands imputed to the findings recorded by the learned first Appellate Court qua the relevant factum probandum of the defendants' not warranting vis-à-vis them any rendition of any decree of mandatory injunction arising from theirs during the pendency of the suit before the learned trial Court or during the pendency of the suit before the learned First Appellate Court raising obstructions on the path by stacking material thereupon whereby the user of path by the plaintiffs depicted in the decree of permanent prohibitory injunction besides embodied in tatima Ex.PW-1/A stood fully forestalled besides thwarted."**

Eventually, Justice Sureshwar Thakur of the Himachal Pradesh High Court concludes:

> ***"For facilitating its consummation, though the learned executing Court stood enjoined to pronounce an appropriate order, contrarily it by relegating the impact of the aforesaid germane factum probandum comprised in the enforceable executable conclusive decree, has inaptly dismissed the execution petition." (See Mind Your Language, Judge Sahab, a Badly Written Judgment Can Now Be Overturned; see https://thewire.in/126542/poor-english-himachal-high-court/).***