

**LEGAL TECHNICALITIES AND THE DETERMINATION OF ELECTORAL
DISPUTES IN KENYA: A REVIEW OF THE LEGAL FRAMEWORK AND THE
EMERGING JURISPRUDENCE**

RESEARCH PAPER

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DECLARATION

I, the undersigned, declare that this is my original work and has not been submitted to any other college, institution or university other than the University of Nairobi.



MURIUKI MURIUNGI
(Candidate)

This dissertation has been submitted for examination with my approval as the student supervisor



MUTHOMI THIANKOLU
(Supervisor & Lecturer, Department of Public Law)

DEDICATION

To the Justices of the Supreme Court of Kenya:

Substance is permanent but form is evanescent
The law our servant and needn't be subservient
May you lay down the law and avoid the mumble
The fumble befuddle 'cause we need no muddle

To Mama, who took me to School:

Even when I thought myself a fool
Gave me a head start that's now a tool
That I now employ to fill my barn in full

To Papa, who always taught me courage:

One of the many things I took for my age
Always inspiring encouraging and never giving up
May your cup overflow as one receiving from a tap

To Anna, my grannie and my muse:

She that calls me her husband of use
Never mind that she knows not how to read
But says a prayer when I'm in her hut of reed

To all that made this journey worthwhile:

You made it look better than I imagined all the while,
I'll do you but this one favour of letting you be,
For I have known that humility is a part of thee

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“Every good gift and every perfect gift is from above, and cometh down from the Father of lights, with whom is no variableness, neither shadow of turning.” (James 1:17 NKJV). I thank the Lord God Almighty for His sustaining grace. You are the source of my strength, my salvation.

I acknowledge my supervisor Mr. Muthomi Thiankolu for his impeccable mastery of the subject and a knack for thoroughness. You made me believe what someone once said, *“A good teacher is like a candle - it consumes itself to light the way for others.”*

Many thanks to comrade and friend, Odhiambo Lubeto, for his ardent willingness to review and proofread the manuscript. I cannot forget my buddy Alvin Kosgei who always keeps watch.

Gracias! To one whose awesomeness appears limitless, Mukami Esther. What an ester!

My appreciation also goes to my siblings who make my life all the perkier as does my nephew Collins. And did I say my cup of coffee?

Finally, I must admit that all errors and foibles are wholly attributable to me. I am only human.

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Abdikham Osman Mohamed & Another v Independent Electoral and Boundaries Commission & Others [2013] eKLR.

Anami Lisamula v Independent Electoral and Boundaries Commission & 2 Others, Petition No. 9 of 2014.

Aramat v Lempaka & Others, Petition No. 5 of 2014.

Baker v Carr 369 U.S. 186 (1962).

Benjamin Munywoki Musau v Daniel Mutua Muoki & 2 Others [2013] eKLR.

Burundi Nabwera v Joshua Angatia, Election Petition No 4 of 1983.

Bush v Gore 531 U.S. 98 (2000).

Center for Rights Education and Awareness (CREAW) & Another v John Harun Mwau & 6 Others [2012] eKLR.

Chelaite v Njuki & 2 Others (No. 3) [2008] 2 KLR (EP) 209.

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[2013] eKLR.

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Luka Angaiya Lubwayo & Another v Hon. Gerald Otieno Kajwang & Another [2013] eKLR.

M'Mithiaru v Maore & 2 Others [2008] 2 KLR (EP) 547.

Maitha v Said & Another [2008] 2 KLR (EP) 337.

Mary Wambui Munene v Peter Gichuki King'ara & 2 Others [2014] eKLR.

Matter of the Kenya National Human Rights Commission [2014] eKLR.

Michael Wachira Nderitu & 3 Others v Mary Wambui Munene [2013] eKLR.

Mohamed v Bakari & 2 Others [2008] 3 KLR (EP) 54.

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CHAPTER 1: RESEARCH PROPOSAL

1.1 Introduction

Alexander Hamilton famously stated that the judiciary is the least dangerous of the three branches of the government.¹ How wrong he was! The Kenyan judiciary, in particular the Supreme Court, has upset the constitutional architecture that holds our functioning democracy.² This paper examines the issue of insisting on legal and procedural technicalities when deciding matters, at the expense of substantive justice.

Kenya enacted a new constitution on 4th August 2010, heralding a fundamental change in the social, cultural, economic and political spheres.³ It introduced a robust Bill of Rights which encompasses (*inter alia*) political rights and a high threshold for conducting elections.⁴ The 2010 constitution also provides that the voting method must be simple, accurate, verifiable, accountable and transparent. Elections must be conducted in an

¹ Hamilton, A. The Federalist, No. 78. The Judiciary Department. Independent Journal Saturday, June 14, 1788. Available at: <http://www.constitution.org/fed/federa78.htm> (Accessed on 17th March 2015). He wrote that, “(The Judiciary) will always be the least dangerous to the political rights of the constitution, because it will be least in a capacity to annoy or injure them.” See this view also shared by Montesquei, B. (2002) *Spirit of Laws*. Prometheus Books, New York at p. 156, “Of the three powers above mentioned, the judiciary is next to nothing.”

² In *Evans Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* [2014] eKLR, the Supreme Court stated “The learned Judges perhaps failed to recognize that the overall integrity of the democratic system of governance is sealed on a platform of orderly process, of which the Judiciary is the chief steward...” It is the author’s view that the decision was a clear demonstration of emasculation of the principles of democracy contrary to the assertions of the court.

³ Musila, G. M et al., Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence (December 5, 2013). Available at: <http://www.judiciary.go.ke/portal/assets/files/JWCEP%20UPDATES/Handbook%20on%20Election%20Disputes%20in%20Kenya%20-1.pdf> (Accessed on 3rd November 2014). In particular, Musila argues that the 2010 Constitution introduced a paradigmatic shift in terms of the legal framework governing election disputes as well as a robust Bill of Rights that safeguards the rights of the electorate.

⁴ Article 81 and 86 of the 2010 Constitution.

efficient, accountable, neutral and accurate manner.⁵ This is the constitutional threshold required in the conduct of elections.

Further, article 87 (1) of the 2010 constitution empowers Parliament to enact legislation to establish mechanisms of timely resolution of election disputes. More fundamentally, Article 159 (2) (d) provides that the courts shall administer justice without having undue regard to legal technicalities.⁶ An examination of the Supreme Court decision in *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*⁷ reveals that the courts have failed to seize on the jurisprudential moment availed by the constitution to ensure that they dispense substantive justice to litigants.⁸

1.2 Statement of the Problem

The Supreme Court has dismissed all election petitions without examining their merits on grounds of legal and procedural technicalities such as filing out of the statutory timelines.⁹ While there is need to follow the laid down procedures and timelines to facilitate the timely disposal of matters,¹⁰ strict compliance cannot be insisted upon to the

⁵ *ibid.*

⁶ Legal technicalities refer to procedural rules that facilitate in the dispensation of substantive justice. In particular, there has been a tendency by Kenyan courts to insist on technicalities. For instance, in *Mwai Kibaki v Daniel Toroitich Arap Moi & 2 Others* [1999] eKLR, the court stated that only personal service by the petitioner was sufficient to the respondent, the then President of Kenya, quite an arduous task.

⁷ [2014] eKLR.

⁸ In this case, the Supreme Court threw out a petition filed by the appellants 72 days after the judgment of the High Court for being incompetent, holding that the statutory timelines laid out in the law were mandatory and could not be derogated from. This was so despite the fact that the appellant was not responsible for the delay, which had been caused by the failure by the High Court registry to avail typed proceedings of the judgment in good time.

⁹ *supra*, note. 6. Also see the case of *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 Others* [2014] eKLR.

¹⁰ In particular, the Supreme Court has in a number of cases held that section 76 (1) (a) of the Elections Act is born of Article 86 (2) of the Constitution that requires the presentation of a petition to court not later than 28 days after the declaration of election results. Of interest

extent of sacrificing substantive justice.¹¹ This is in line with Article 159 (2) (d) of the constitution which provides that courts shall administer justice without having undue regard to technicalities.¹² It is contended that the law is not achieving its intended purposes if applied in the manner that the Supreme Court has been applying it.

1.3 Research Questions

Are Supreme Court decisions in election matters emasculating the provisions of article 159(2) (d) of the constitution, and if so, is this sound electoral jurisprudence? Is the High Court alongside the Supreme Court engaged in supremacy battles with the Court of Appeal, or is it merely a case of divergence of jurisprudential thought? Has fidelity to legal technicalities obscured the more important issue of whether the elections are conducted in a free, fair, transparent, accurate, and verifiable manner? Have the Kenyan Courts lost any institutional legitimacy ensuing from their decisions, and what is the legal-political impact of their decisions?

1.4 Objectives

The proposed study seeks *inter alia*: to provide a thorough and academic discourse and critique on the Supreme Court's mechanical insistence on procedures and technicalities in resolving election disputes in the post-2010 constitution period. To examine and

however, is the fact that the Supreme Court has been overturning the decisions of the Court of Appeal on this ground, despite the fact that the Court of Appeal has been dispensing the matters within the prescribed time. The author is of the view that the Court is obligated to invoke its inherent power while interpreting both the Constitution as well as legislation so as to preserve the values and principles of the Constitution.

¹¹ This in no way suggests that technical procedures are of no use in the pursuit of substantive justice. However, whatever is required is a healthy symbiosis to ensure the orderly dispensation of justice that is just and fair to all parties.

¹² Indubitably, this provision must be read to be applying to all disputes that come to the courts whether civil or criminal in nature. Election disputes are sometimes characterized as special as election in character, and the same are not exempt.

demonstrate the legal, and political implications of Supreme Court judgments in election disputes, on the standard and integrity of elections in the future, as well as good governance. To analyse, critique, and demonstrate the variant persuasions and schools of thought among the Kenyan judges, in particular the Court of Appeal *vis-a-vis* the High Court and the Supreme Court, with respect to the question of insisting on legal technicalities or procedural justice. To examine and analyse whether the decisions from the courts have affected the institutional legitimacy of the courts among the public and scholars. To provide an informed prognosis on the future trends in electoral dispute resolution in Kenya.

1.5 Hypothesis

The Supreme Court has failed to deliver substantive justice by insisting on technicalities in resolution of election disputes thus subverting Article 81 and 86 of the 2010 constitution. The decisions emanating from the High Court and the Supreme Court as contrasted with those from the Court of Appeal are bad law, and are an indicator of a possible supremacy contest. The decisions of the Supreme Court have cast a dent on its institutional legitimacy.

1.7 Methodology

The research for this study will mainly be desk-based. Most of the materials are sourced from the internet, and include online newspapers and books published on the subject of electoral law. Key primary sources of the paper include a number of election petition judgments decided by the Supreme Court, which illuminate on the issue of legal and procedural technicalities.

1.8 Theoretical Framework

This paper adopts a sociological jurisprudential theory in analyzing the legal conundrum that faces our election courts in Kenya whilst analyzing the recent decisions of election petitions under the 2010 constitution.

Roscoe Pound, the foremost jurist on sociological jurisprudence had this to say about 'mechanical jurisprudence,' a term which he coined.¹³ Pound described mechanical jurisprudence as the unsavory practice by courts to inanimately apply precedents or the law to particular facts without having due regard to the social consequences.¹⁴ In contrast, Pound argued that judges owed the society a duty to take into account the practical results of their decisions while deciding cases. The practical effect of this mechanical approach in deciding election petitions is that litigants are denied access to justice by dint of insisting on technical rules. The social consequence of this is that the public lose confidence in courts and this also encourages irregularities in the conduct of elections. Since law cannot exist outside the society, he made the case that courts ought to endeavor to facilitate, rather than encumber societal growth.¹⁵

Adherents of mechanical jurisprudence and legal technicalities believe that the law is scientific and particular deductions can be made from particular conceptions.¹⁶ As such,

¹³ Pound, R. 'Mechanical Jurisprudence' (1908) 8 Columbia Law Review 605.

¹⁴ Pound, R. (1979) The Pound Conference: Perspectives on Justice in the Future. St. Paul: West Publishing Co., Minnesota. In his famous address titled, "*The Causes of Popular Dissatisfaction with the Administration of Justice*," delivered at the American Bar Association's Annual Conference –Roscoe Pound decried the rigidity and mechanical application of procedural rules and called for a change.

¹⁵ Pound, R. 'Sociology of Law and Sociological Jurisprudence' (1943) 5 University of Toronto Law Journal 1.

¹⁶ *supra* note 13 at 608.

they believe, it is possible to apply the law to particular facts and get a particular result.¹⁷ The sociological school argues for the treatment of logic as what it merely is, an instrument, and for pragmatism in the law. The principles, doctrines, applications of the law by the courts and their decisions must adapt to the human conditions and place the human being at the centre. If anything, the law is meant to serve human beings and not the converse. Such a view, without doubt, would certainly lead to a dispensation of justice and avoid the proclivity to give undue weight to technicalities in line with article 159 of the constitution of Kenya 2010.

Consider a plaintiff who sues in court for one million Kenya Shillings from a defendant but Nine Hundred and Fifty Thousand Kenya Shillings is proved as due to him in the courts. Then suppose that the court has to make an absolute decision both way, and the court finds for the defendant. One could argue that such a court that acquits the defendant of the money owing, does not find that the defendant owes the plaintiff nothing, but that he does not owe one million Kenya Shillings. One could gasp with indignation at reaching such a patently absurd result occasioning injustice to the plaintiff. Yet, this is not a far-fetched illustration as this is prevalent especially in our election courts whenever they apply the law mechanically by insisting on technicalities. Of much worry is when owing to legislative lethargy resulting in arbitrary laws, the courts as arbiters and vanguards of justice are unable to offer a remedy to litigants.

¹⁷ But see the views of those opposed to the argument that the law is organic. In particular, Viscount Simmonds, apparently aiming a jibe at Lord Denning, stated in *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446, at p. 467-468, "...heresy, is not the more attractive because it is dignified by the name of reform. ...The law is developed by the application of old principles to new circumstances. Therein lies its genius."

1.9 Conceptual Framework

Technicalities within the legal context denote the technical aspect of the law characterized by a strict adherence to the letter of the law thus subverting the spirit of the law.¹⁸ Fidelity to technicalities, also known as procedural justice, concerns itself with the processes and means of acquisition of decisions, including decisions emanating from judicial and quasi-judicial tribunals.¹⁹ Proponents of procedural justice have theorized that insistence on fair procedure is bound to lead to equitable and just outcomes even where corrective justice is not served.²⁰ To this end, it is argued that procedural justice is comparable to substantive justice in as far as it has an element of fairness in the distribution of the rights.

On the other hand, substantive justice refers to the merits or entitlements that accrue to a party or a person that he/she may be seeking to enforce through a judicial tribunal.²¹ Of concern are the actual rights sought to be achieved. It may be stated that whereas procedural justice is the means, substantive justice is the end.²² Substantive justice mainly emanates from substantive law while procedural justice is mainly a product of procedural or adjectival law. As learned authors Re Coles and Raven Shears wrote:

¹⁸ Martin, E. A. (2001) *Oxford Dictionary of Law*. Oxford University Press, London at p. 275.

¹⁹ Kibaaya, I. L. 'Access to Civil Justice in Kenya: An Appraisal of the Legal and Policy Frameworks' PhD Dissertation, University of Nairobi 2012 at p. 18. Available at: <http://erepository.uonbi.ac.ke/bitstream/handle/11295/15704/Fulltext2.pdf?sequence=4> (Accessed on 11th February 2015).

²⁰ Maiese, M. 'Procedural Justice,' in Burgess, G. and Burgess, H. (2004) *Beyond Intractability* (Conflict Research Consortium, University of Colorado, Boulder. Available at: <http://www.beyondintractability.org/essay/procedural-justice> (Accessed on 11th February 2015).

²¹ Saha, T. K. (2011) *Textbook on Legal Methods, Legal Systems & Research* ; 2010 edition, Universal Law Publishing, New Delhi, India at p. 197.

²² *ibid.*, at p. 198.

Substantive law creates rights and obligations and determines the end of justice embodied in the law, whereas procedural law is an adjunct or an accessory to substantive law.²³

Procedural justice, which is given effect through compliance with the procedural and legal technicalities, demands the consistent adherence and impartial application of the rules of procedure. It is predicated upon the supposition that it is only when there are fair procedures which are followed, that there can be acceptable and just outcomes. To a proceduralist,²⁴ the adjudication of matters while giving regard to fair procedures is the hall mark of justice.²⁵

Put differently, whereas substantive justice gives an indication of the rights and duties obtaining to a particular party, procedural justice provides the means and rules by which such rights and duties are achieved.²⁶ Whenever a court or a tribunal metes out substantive justice, it clearly delineates and pronounces the rights and obligations of parties in a dispute according to the relevant legal regime within which such parties are bound.²⁷ On the other hand, whenever a court serves procedural justice, it is usually engaged in the use of the particular legal machinery in order to give enforcement and meaning to the rights and duties in contest.²⁸

²³ Halsbury's Laws of England (2009) 5th Edition.

²⁴ By 'Proceduralist' we mean, a rigid adherent to procedures.

²⁵ Nelson, W. 'The Very Idea of Pure Procedural Justice,' Ethics, Vol. 90, No. 4 (July 1980). Available at: <http://www.jstor.org/stable/2380450>. (Accessed on 12th February 2015).

²⁶ Horn, J; Fraser, P and Griffin, S. (2011) Conduct of Civil Litigation in British Columbia LexisNexis, Toronto at p. 2. The authors aver that, "*Procedure exists only to give effect to substantive law, that it is the handmaiden of justice.*"

²⁷ *supra* note 21 at 197.

²⁸ *supra* note 21 at 198.

While it may seem easy to draw a line between what is substantive justice on the one hand and procedural justice on the other, the line is often blurred.²⁹ Arnold Thurman wrote:

...no one has ever been able to formulate any test which will distinguish between procedure and substantive law in any particular case. Substantive law remains the law which we enforce, procedure the practical rules by which we enforce it...The difference between procedure and *substantive law* is a movable dividing line which may be placed wherever an objective examination of our judicial institutions indicates is necessary...³⁰

Indeed, at times, substantive law can have technicalities such as where timelines are included in the substantive part of the law like the constitution as opposed to the rules and regulations to govern the interpretation of the law. For instance, the 2010 constitution of Kenya provides for the manner and mode of service of election petitions and the timelines within which to file an election petition.³¹ This feature in the context of the legal framework governing elections in Kenya is particularly canvassed in detail in chapter 2 of this study.³²

²⁹ *Wing Construction Ltd & Others v Sagkeeng First Nation* (2003) MBCA 115, Justice Scott of the Manitoba Court of Appeal stated, "*While the distinction between substance and procedure is not always easy to draw, it is well recognized nonetheless...*"

³⁰ Thurman, A. 'Role of Substantive Law and Procedure in the Legal Process' (1932) 45 Harvard Law Review 617. Available at:

http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5252&context=fss_papers (Accessed on 12th February 2015).

³¹ See articles 87 (2) and 87 (3) of the constitution of Kenya.

³² For instance, rules as to mode and manner of service of election petitions, traditionally considered a procedural matter, are contained in the constitution of Kenya 2010, as part of substantive law.

1.10 Literature Review

Godfrey Musila *et al*³³ argue that the 2010 constitution is a transformative legal framework that has major promises for the Kenyan people. In particular, Chapter 4 of the constitution on the Bill of Rights that provides for political rights as well as creating institutions, general conduct of elections, and the resolution of election disputes. He further argues that the 2010 constitution was a result of a clamor for good governance and introduced wide-reaching institutional and legal frameworks. He further avers that the nature and character of the 2010 constitution has implications on the resolution of election disputes but the Kenyan courts have failed to realize the promise in their handling of election disputes. Chapter 3 of the Handbook traces the historical evolution of election dispute resolution in the courts in Kenya highlighting the keen insistence by the courts on legal and procedural technicalities. Chapter 2 adopts a human rights and rule of law perspective in arguing that the Supreme Court erred in failing to have due regard to substantive justice in the presidential election petition. Much as the Handbook generates much light on the various electoral issues and electoral legal regime, it fails to adequately canvass the decisions made by courts in this pedantic manner. Further, the handbook does not give an analysis of the impact of such precedents on institutional legitimacy of the courts, the credibility of elections, and good governance. Nonetheless, this is understandable given the limited scope of the chapters authored, as well as space limitations of the document.

³³ Musila, G. M et al., Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence (December 5, 2013). Available at:

<http://www.judiciary.go.ke/portal/assets/files/JWCEP%20UPDATES/Handbook%20on%20Election%20Disputes%20in%20Kenya%20-1.pdf> (Accessed on 3rd November 2014).

Drawing from American Electoral law jurisprudence, Hansen³⁴ offers insights on the role of courts in resolution of election disputes. In particular, he highlights how the courts as institutions now play a major role in elections, traditionally considered a political process, as exemplified in the case of *Bush v Al Gore*³⁵ and *Baker v Carr*.³⁶ Though Hansen admits that the courts have a role to play in safeguarding a number of principles such as equality in political contests, he argues that courts need not meddle into contests that are within the province of political processes. Using this argument, Hansen makes the case that several election law cases in the United States such as the *Bush v Gore*³⁷ and *Baker v Carr*³⁸ are *per incuriam*. While the findings of Hansen are not entirely untrue, it is difficult to agree with the suggestion that courts should shy away from contests that are political in nature whenever public rights are involved. This study seeks to fill this gap by arguing that courts indeed should, and can, adjudicate election disputes and that this is sure to inspire confidence and contribute to good governance and the rule of law.

Abuya³⁹ argues that an independent judiciary is a key ingredient of free and fair elections as it comes in handy, if and whenever election results are contested. Possibly influenced by the post-election violence that characterized the announcement of the 2007 Presidential elections when petitioners refused to move to court, Abuya exhorts the role

³⁴ Hansen, R. L. (2003) The Supreme Court and election law: judging equality from *Baker v Carr* to *Bush v Gore*. NYU Press, New York. Available at: <http://muse.jhu.edu/books/9780814744536> (Accessed on 3rd November 2014).

³⁵ 531 U.S. 98 (2000).

³⁶ 369 U.S. 186 (1962).

³⁷ *supra* note 35.

³⁸ *supra* note 36.

³⁹ Abuya, O. E. '*The Role of the Judiciary in promotion of free and fair elections.*' Available at: <http://www.juridicas.unam.mx/wccl/ponencias/1/1.pdf> (Accessed on 14th November 2014).

of the court in resolution of election disputes. That notwithstanding, Abuya is not naïve to imagine that the legal remedies afforded by election courts is all that is needed to ensure free and fair elections. He cautions against the culture of electoral lawlessness that contributes to election malpractices that instigate election disputes.

Goodwin-Gill⁴⁰ lays bare the concept of free and fair elections and also offers a global perspective and developments necessary in obtaining international best practices. Goodwin-Gill examines the various political rights of people such as the right to vote, participation of women, accountability, and verifiability as well as equality. In particular, he proffers the argument that the will of the people as expressed through the ballot is the sole basis for the authority of government. As such, he argues that this will of the people must be exercised in free and fair elections that are conducted on the basis of universal suffrage and paying due regard to equality. As Gill observes in the book, political systems are usually subject to political, cultural, religious, and historical factors and as such, a nation's jurisprudence is usually unique from other countries. Nonetheless, there are basic principles of free and fair elections that must be adhered to, in a functioning democracy.

While Goodwin-Gill lays bare the concept of the rule of law and free and fair elections capturing international best practices and having regard to principles of equality and transparency, he fails to adequately address how this is to be achieved. Almost invariably, it finally falls to the courts to resolve disputes in legal contests. The manner in which the courts resolve these disputes determines whether future elections will be conducted in

⁴⁰ Goodwin-Gill, G. S. (2006) Free and fair elections: international law and practice. Inter-Parliamentary Union, Geneva. Available at: <http://www.ipu.org/pdf/publications/free&fair06-e.pdf> (Accessed on 3rd November 2014).

accordance with best practices as enumerated in the book. This study argues for a jurisprudence that does not unduly insist on legal and procedural technicalities thus subverting substantive justice.

1.11 Chapter Breakdown

Chapter 1 of the paper is the research proposal.

Chapter 2 examines the question whether fidelity to legal and procedural technicalities by the Supreme Court has obscured the more important issue of whether elections are conducted in a free, fair, transparent, accurate, and verifiable manner.

Chapter 3 analyses the impact of article 159 (2) (d) of the constitution and the new electoral laws and the divergent jurisprudential opinion on this subject amongst the superior courts, to wit, the High Court and the Supreme Court *vis-a-vis* the Court of Appeal.

Chapter 4 analyses the possible legal-political impact of the jurisprudential trajectory taken by the Supreme Court on the conduct of elections, and makes recommendations and conclusions.

CHAPTER 2: TECHNICALITIES AND THE DETERMINATION OF ELECTION PETITIONS

2.1 Introduction

This Chapter examines the question whether the insistence of the Supreme Court on legal and procedural technicalities through rigid and strict construction of election laws has obscured the weightier question of serving substantive justice. Generally, the role of courts is to serve both procedural and substantive justice.⁴¹ However, where procedural justice or insistence on legal and procedural technicalities would unduly prejudice the dispensation of substantive justice, the courts would do well to refrain from insisting on technicalities.

The Oxygen Principles⁴² set out in section 1A and 1B of the Civil Procedure Act, section 3A and 3B of the Appellate Jurisdiction Act and section 14 (6) of the Supreme Court Act emphasize the need to give preference to substantive justice. If such principles were evolved to be applicable to civil disputes, it follows *afortiori*, that these principles must find favour in election petitions. This position is fortified by section 80 (1) (d) of the Elections Act and the views of the Nigerian Court of Appeal in *Dr. Chris Nwebueze Ngige v Peter Obi and 436 others*.⁴³

⁴¹ Arenella, P. 'Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' *Competing Ideologies* (1984) 72 Georgetown Law Journal 185. Albeit in the context of criminal proceedings, the author argues that the purpose of procedural law is to vindicate substantive law by legitimizing resolution of disputes in a manner that earns respect for the courts among the public. Available at: http://heinonline.org/HOL/Page?handle=hein.journals/glj72&div=14&g_sent=1&collection=journals (Accessed on 11th February 2015).

⁴² Oxygen Principles (O₂) derive from the words 'overriding objectives' and are captured in both the Civil Procedure Act and the Appellate Jurisdiction Act which provide, "The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."

⁴³ [2006] Vol. 18 WRN 33.

Election petitions are by their nature peculiar from the point of view of public policy. It is, therefore, the duty of the court to endeavour to hear them without allowing technicalities to unduly fetter their jurisdiction.

2.2 Retroactivity and Time for Filing Election Petitions

The Supreme Court of Kenya has severally dismissed appeals against election petitions filed outside the 28 day period provided for by article 87 (1) of the constitution and reinforced by the Elections Act. While this is in giving effect to the attribute of timeliness and accuracy as decreed by the constitution, this jurisprudence has been applied mechanically to all cases without considering the injustice ensuing therefrom. The effect of this has been to dismiss election disputes without an examination of their merits.

In *Mary Wambui Munene v Independent Electoral and Boundaries Commission & 2 Others*,⁴⁴ the appellant, dissatisfied with the decision of the Court of Appeal that had nullified her election, moved the Supreme Court to dismiss the appeal arguing that the election petition at the High Court had been filed out of time and was thus incompetent. She further argued that the issue of timelines went to the heart of the jurisdiction of the Court and that the Supreme Court as well as the lower courts were bereft of the requisite jurisdiction. The appellant had been declared the winner and issued with a Certificate in Form 38 on 5th March 2013. Under section 76 (1) of the Elections Act and article 87 (1) of the constitution, the respondent ought to have filed an election petition challenging the election of the appellant 28 days upon the declaration of results. The 28 day period lapsed on the 2nd April 2013 while the respondent lodged his petition on 8th April 2013, which translated to 6 days outside the time provided by law. The appellant relied on the decision

⁴⁴ [2014] eKLR.

in the *Joho Case*,⁴⁵ in which the Supreme Court had declared section 76 (1) of the Elections Act as unconstitutional and held that the date of declaration of results is the date of the issuance of a Certificate of Results in Form 38 to the presumptive winner by the Returning Officer and not the date of publication of the results in the Gazette.⁴⁶

It was also in issue that the matter of late filing was being raised at the Supreme Court for the first time, having not been raised in the lower courts and thus robbing the lower courts of the advantage of proffering their view on the same. Further, and since the decision in *Joho* was given while the case was still within the court's system, the respondent took issue with the retroactive application of the decision which had found Section 76 (1) (a) unconstitutional. However, the Supreme Court merely lamented the unfortunate drafting of the relevant provisions of the Elections Act which had led the respondent all the way to believe that his petition had been filed on time, but nonetheless held the petition to be defective.

A close reading of the Supreme Court ruling reveals that the court predicated its decision on the need for predictability and uniformity noting that its holding in the *Joho case* had been applied by the lower courts including the Court of Appeal.⁴⁷ Owing to this, so the Court argued, there was need to find a similar holding even in the peculiar circumstances obtaining herein, so as to ensure predictability, consistency, and uniformity as had previously been stated by the Court in *Jasbir Singh Rai & 3 Others v The Estate of*

⁴⁵ “*The Appeal is allowed, with the holding that Section 76(1)(a) of the Elections Act, 2011 is inconsistent with article 87(2) of the constitution of Kenya, 2010 and, to that extent, a nullity*” at para 103.

⁴⁶ *ibid.*, at para 100.

⁴⁷ The Court of Appeal had applied the principle in a number of cases such as *Paul Posh Aborwa v Independent Electoral and Boundaries Commission & 2 Others* [2014] eKLR and *Suleiman Said Shahbal v The Independent Electoral and Boundaries Commission & 3 Others* [2014] eKLR, while dismissing the two appeals for having been filed out of time.

*Tarlochan Singh Rai & 4 Others.*⁴⁸ The result of this was to find the appeal filed at the Supreme Court as defective for want of competence and thus inadmissible at the Court. The Supreme Court proceeded to dismiss the matter at this preliminary stage without considering the matter on its merits. We argue that this mechanical application of the law, under the guise of ensuring predictability and uniformity occasioning injustice, is unwarranted.

In this particular case, the respondent had filed the petition at the High Court while relying on section 76 (1) (a) of the Elections Act, which until then had not been declared unconstitutional, believing that he was still within the timelines. Section 76 (1) (a) of the Elections Act, which had been enacted after and in line with the 2010 constitution, provided that a petition must be filed within 28 days following the publication of the results in the Gazette. It is this provision that the respondent had relied in filing his petition, and applying this particular provision to the matter at hand, he was well within the timelines. The question in issue then was since the relevant section had since been declared unconstitutional, who was to bear the brunt of the blunt drafting of the legislature. In this scheme of things, and in its quest to ensure predictability in the law, the Supreme Court chose to visit the injustice on the respondent.⁴⁹ This it did by holding that the unconstitutionality of section 76 (1) (a) of the Elections Act was void since the promulgation of the constitution 2010. Put differently, the Supreme Court held that this provision of the Elections Act was a nullity from the beginning and could not have been

⁴⁸ [2013] eKLR. At para 42, “*The immediate pragmatic purpose of such an orientation of the judicial process is to ensure predictability, certainty, uniformity and stability in the application of law...*”

⁴⁹ In dismissing the appeal, the Supreme Court stated thus, at para 89, “*...we are convinced that for the benefit of certainty and consistency, the declaration of invalidity must apply from the date of commencement of the Elections Act, i.e. 2nd December 2011.*”

relied upon, at least for the matters that were still to come to a close. While holding thus, the Supreme Court seems to have been clouded and persuaded by the reasoning of the Court of Appeal in this respect in *Suleiman Said Shahbal v The Independent Electoral and Boundaries Commission & 3 Others*⁵⁰ where the appellate Court had remarked:

We are alive to the fact that when Section 76(1) (a) of the Elections Act, 2011 was enacted, article 87(2) of the constitution was already in operation. Giving that statutory provision legal effect from the date of its enactment, would, in a sense be tantamount to holding that from the date it came into operation until it was declared unconstitutional on 4th February, 2014, that provision of the statute overrode the clear provisions of article 87(2) of the constitution. We are not convinced.⁵¹

The Supreme Court would have been proper in holding that the appeal was competent given that the respondent, while filing a petition at the trial court, had relied on a clear statutory enactment. Indeed, no prejudice would have been suffered by any of the litigants in holding thus. Further, this would have served not only justice to the respondent but also to the larger public, since elections are disputes in *rem*, wherein there is public interest. As conceded by the Supreme Court itself in its ruling, the Court would have refused to apply the principle retrospectively given the special circumstances in this case. While considering the issue whether to apply this principle of retroactivity to this case, the Supreme Court at para 84 averred:

In *Joho*, this Court had been silent on the effect of its declaration of invalidity of a statute... in appropriate cases, this Court may exercise its jurisdiction to give its constitutional interpretations retrospective or prospective effect.

The Court went on to remark thus, at para 87:

However, while we have pronounced ourselves on the issue of invalidity of Section 76(1) (a) of the Elections Act, in line with the constitution, this Court is

⁵⁰ [2014] eKLR.

⁵¹ *ibid.*, at p. 9.

not precluded from considering the application of the principles of retroactivity or proactivity on a case-by-case basis.

One fails to find the predictability, uniformity, and the stability of the law as emphasized by the Supreme Court, in light of its holding that it is not precluded from considering the application of the principle of retroactivity on a case by case basis.

Applying the same approach adopted by the Supreme Court of endorsing retroactivity, suppose a person who is declared as winner by the electoral body and has served for some time is unseated by a court through an election petition. Were the same approach to be adopted, it would mean that such person was in office for the particular period of time illegally. This is so if it is to be argued, as the Supreme Court did, that allowing only prospective application would be to say that an illegality was proper and valid until it is declared void by court. Such a person would then be civilly liable to both the electorate and the due winner. However, where his declaration as winner was due to the fault of the electoral body, it would cause complexities. This problematisation clearly shows the absurdity that is likely to ensue if the approach taken by the Supreme Court is to be adopted in all cases.

Moreover, such a concession by the Supreme Court leaves readers with no doubts as to the powers of the court to give the interpretation of unconstitutionality of the Elections Act either a retrospective or a prospective effect. It would have done well to have given a prospective effect to this principle with regard to this particular case and proceeded to examine the matter on its merits instead of mechanically applying the legal principle to the case at hand.⁵² The approach by the Supreme Court in this respect was

⁵² Such caution in applying the principle of absolute retroactivity was expressed by the United States Supreme Court in *Chicot County Drainage District v Baxter State Bank*, 308 U.S. 371 (1940) where Hughes CJ remarked, "... *The actual existence of a statute, prior to such a*

unconventional.⁵³ The conventional approach is that the declaration of invalidity of legislation only operates prospectively and not retrospectively.⁵⁴

It is also curious that whereas the Supreme Court has consistently found actions to be incompetent for being filed late, the Supreme Court itself does not seem to be bothered with whether it can admit matters that are filed late. The Supreme Court had dismissed a preliminary objection to the main appeal despite having been filed late, holding that the determination of the matter was in the public interest. The troubling aspect of this reasoning is why the lower courts cannot be allowed to hear such matters, since they are still in the public interest. It would seem that while other courts are bound by the timelines and the restricted jurisdiction, the same is not the case for the Supreme Court.

determination, is an operative fact, and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration...it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.”

⁵³ Retrospective application of the law is not novel. Its history can be traced to the arguments by jurist William Blackstone that the duty of a court is not only to pronounce new law but also to maintain and expound on the old one. See, Blackstone, W. (1769) Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–69. Chicago University Press, Chicago. The Supreme Court of Kenya must have found favour with this position of the law to the effect that its mandate extended to finding the law as it existed when the dispute emerged and declaring the law as it so was. While this position is to be applied in suitable circumstances, the same should not be applied in an absolutist manner in all cases.

⁵⁴ Lon Fuller argued against the retrospective application of the law in Fuller, L. L. (1969) The Morality of Law Revised ed, Yale University Press, New Haven at p. 33–38. Even within the context of criminal law, there is the principle of legality, (*Nullum crimen, nulla poena sine praevia lege poenali*) that provides that all law must be clear and non-retrospective. This principle of legality is captured in article 50 (2) n of the 2010 Constitution of Kenya. This has also been the common law position with regard to non-criminal statutes which is to the effect that all statutes other than those that are merely declaratory or which relate only to procedural or evidential matters are prima facie prospective, and retrospective effect is not to be given to them, unless it is so provided either expressly or impliedly. See Halsbury’s Laws of England, (1995) 4th Edition Vol. 44. Butterworths, London, at p. 570.

Indeed, this view has been articulated severally by particular judges of the Supreme Court.⁵⁵

It is difficult to state why the Supreme Court did not seize the occasion in this matter to determine the case on its merits, in tandem with its rhetoric in a number of cases, instead of throwing out the matter on technicalities. To hold as the Court did, that the unconstitutionality of section 76 (1) (a) of the Elections Act was retrospective as to apply in the *Wambui case*, was to unduly take away a fundamental right that the country was made to believe existed all along.⁵⁶ Yet, this is in conflict with the holding of the Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others*⁵⁷ where it had stated:

Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately accrued before the commencement of the constitution.⁵⁸

Similarly, in *Anami Lisamula v IEBC & 2 Others*⁵⁹, the Supreme Court while relying on its holding in the *Joho* and *Wambui* cases, held the appeal to be incompetent since the initial petition at the High Court had been filed 35 days after the declaration of results as

⁵⁵ In *Anami Lisamula v IEBC & 2 Others*, Petition No. 9 of 2014, Justice J. B Ojwang rendered himself thus at paras 147-150, "...the inherently enlarged competence of the Supreme Court is at once apparent – an element not shared with any of the lower Courts... It is my perception that this Supreme Court has a larger profile than that which had been attributed to Courts of the past, by the Court of Appeal's decision in "*Lillian S*". Also see Otieno-Odek, J. 'Transmutation of Kenya Superior Court jurisdiction: from pyramidal to hour-glass jurisdictional system' (2014), paper presented at the Annual LSK Conference at Leisure Lodge, Mombasa, on August, 15, 2014. Available at: www.innovativelawyering.com/attachments/article/19/Hon%20Justice%20Prof%20Odek%20%20%20Transmutation%20of%20Kenya%20Superior%20Court%20Jurisdiction.pdf (Accessed on 8th March 2015).

⁵⁶ As a matter of general rule, statutory enactments are given a prospective effect by dint of section 9 of the Interpretation and General Provisions Act (Cap. 2, Laws of Kenya).

⁵⁷ [2012] eKLR.

⁵⁸ *ibid.*, at p. 50.

⁵⁹ Petition No. 9 of 2014.

opposed to the 28 days decreed by law. The results had been declared by the Returning Officer on 5th March 2013 and the petition impugning the election was filed on 9th April 2013. In dismissing the appeal, the Supreme Court pushed a number of substantive issues such as burden of proof, allegations of bias, allegations of unfair trial, and order as to costs, among others, to the periphery.

2.3 Time for Filing and Determining Appeals in Election Disputes

The timelines governing the filing of appeals contesting the decision of a trial court in election petitions is governed by section 85 A of the Elections Act. The relevant section provides that appeals against the decision of the High Court shall only be limited to matters of law and must be filed within 30 days following the decision of the trial court. It is further provided that the appeal must be determined within six months of lodging of the appeal. Appeals against the decisions of the Court of Appeal have consistently found their way into the Supreme Court, though not expressly provided for under the law, through a clever couching of the disputes as involving the interpretation or application of the constitution.⁶⁰ Following a similar trajectory, the Supreme Court has held as incompetent, appeals that had been filed out of the statutory timelines at the Court of Appeal, notwithstanding the extenuating circumstances of the particular cases. The apex court has consistently remarked that timeliness is an essential and non-negotiable

⁶⁰ The first in the long line of cases to make it to the Supreme Court through the framing of the appeal as concerning a matter of interpretation and application of the constitution was *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Application No. 5 of 2014 where the court dismissed a preliminary objection contesting its jurisdiction to entertain the matter. See, para 69.

attribute of the new legal framework governing resolution of election disputes as decreed by article 87 (2) of the constitution.⁶¹

In *Evans Odhiambo Kidero & Others v Ferdinand Ndungu Waititu & Others*,⁶² the Supreme Court held that the appeal at the Court of Appeal having been filed outside the 30 day limit set by section 85A of the Elections Act⁶³ was incompetent and thus a nullity and reinstated the decision of the High Court. Finding that it had no jurisdiction, it dismissed the matter in its entirety without examining it on its merits, but with Justice Njoki Ndung'u dissenting on that particular issue of competency of the appeal.⁶⁴ The judgment of the High Court was delivered on 10th September 2013 and the appeal at the Court of Appeal was filed on 22nd November 2013 which translated to 72 days after the delivery of the judgment of the High Court. This was in breach of section 85A of the Elections Act that provides that appeals must be filed within 30 days of the delivery of judgment of the High Court.

While recognizing the essence and primacy of timeliness of resolving electoral disputes and as a consequence ensuring that litigants adhere to laid down timelines, it is critical that courts examine each case on its peculiar facts. While countering the allegation that its appeal was filed out of time, the respondent alluded to the fact that the trial court was to blame for failing to avail typed proceedings of the judgment in good time, a

⁶¹ For more insights on the issue of timeliness by the Supreme Court, see *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* [2014] eKLR (at para 75); *Mary Wambui Munene v Peter Gichuki King'ara & 2 Others* [2014] eKLR (at paras 87 and 88); *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Application No. 5 of 2014 (at para 77)

⁶² [2014] eKLR.

⁶³ It provides that an appeal must be filed within thirty days of the decision of the High Court and heard and determined within six months of the filing of the appeal.

⁶⁴ *supra* note 62 at para 199.

prerequisite for filing an appeal. In this particular case, upon delivery of judgment by the High Court, the respondent's lawyer wrote to the High Court's Deputy Registrar the following day enquiring about the typed judgment to enable him file an appeal. The Deputy Registrar wrote to the lawyer the following day intimating that the certified copy of the judgment would be availed upon payment of the requisite fee followed with the typed proceedings at the High Court. The respondent collected the typed proceedings on the 30th October 2013 and filed the appeal on the 22nd November 2013. However, according to the back page of the typed proceedings, it was indicated that the typed proceedings had been ready for collection on the 9th October 2013. With the 30 day period ending on the 10th October 2013, the respondent would have been able to file the appeal on time, if indeed he were really keen, but under extraneous circumstances. It is indeed this line of thought that the majority judges in the Supreme Court found attractive and deprecated the respondent for lethargy, ineptitude and dilatory proceeding in blatant violation of the election laws.

We argue that even if the respondent had been diligent enough to collect the typed proceedings on the 9th October 2013 when they had become available, it would have been practically impossible to file an appeal the following day. Such alacrity in proceeding would undoubtedly affect the quality of the appeal he would have filed, and proceeds on the assumption that the respondent did not need to adequately peruse the typed proceedings in issue as per Kiage JA at the Court of Appeal.⁶⁵ It also infringes on the right to fair trial and having adequate time to prepare for court proceedings and thereby

⁶⁵ The 30 day period laid down is hardly sufficient to lodge an appropriate appeal given the demands of a Record of Appeal. It would even be more onerous where the issuance of typed proceedings is delayed. This constitutes a half-hearted attempt of a right of appeal.

curtails the right of access to justice as enshrined in article 48 of the constitution. Moreover, the respondent had no means of knowing whether the proceedings had become ready by the 9th of October 2013 since the same was not communicated, unless if he had continuously checked with the registry.

At the Court of Appeal, in a 2-1 majority decision, the court had found the appeal as competent holding that the Court had the power to exclude the time taken in preparation of the typed proceedings in computation of the time required to file an appeal. This was informed by the Certificate of Delay that had been issued by the High Court indicating that there had been a delay in availing the typed proceedings. The Supreme Court held that the Court of Appeal had no power to extend time where the same was not provided for in statute and that the Court of Appeal Rules that provided for extension were inapplicable to election petitions. This is despite an express provision that the Court of Appeal Rules that allow for extension of time by appellate judges are applicable to election petitions.⁶⁶ However, it is submitted that as held by Kiage JA in the Court of Appeal, the Court was not merely engaged in extending time in violation of statutory law, but simply omitted the time spent in preparation of proceedings in computation of time.

As articulated by Kiage JA, the 30 day period for filing an appeal was predicated on a supposition that an intending appellant would have all the tools necessary for lodging an appeal, including the typed proceedings and other constituting documents.⁶⁷ That this was not so in this case, sufficed to find the appeal as competent. Nothing else could have been the intention of the framers of the constitution and Parliament while enacting the

⁶⁶ Rule 35 of the Petition Rules applies the Court of Appeal Rules to election petition appeals.

⁶⁷ At p. 98.

Elections Act. In this context, it is important that courts have due regard for the purpose for which particular legislation was enacted, if indeed, they are to serve justice. It is critical that courts examine the mischief that the lawmakers sought to cure while enacting a particular statute rather than applying the law mechanically to particular cases and facts. The application of this principle to the cases before the courts would obviate the recurrent throwing out of election petitions for want of competence. While it is true that the Elections Act and in particular section 85A is born of article 87(1) of the constitution that demands the enactment of laws to enable the timely resolution of election disputes, it must be borne in mind that blind and mechanical construction and interpretation of the same would lead to absurdity and unfairness.⁶⁸ An appreciation of this historical background and the circumstances and context within which the laws were enacted would greatly assist in the interpretation of the particular laws.

Proceeding from that postulate, it is axiomatic that Parliament intended to enable the timely resolution of the disputes as demanded by the constitution. This was done by limiting the period within which an appeal must be filed, to wit, 30 days and the time within which such an appeal must be determined by the court, in this case within six months. It would therefore seem that the devil was in the inordinate delays in determination of election disputes caused by incessant litigants and at times, the court. It is this very mischief that the law sought to cure, and not to place unreasonable barriers on

⁶⁸ This position was well stated by the Supreme Court in the leading case of *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR where it remarked, "It may be argued that the Supreme Court ought to apply the principle of substantial justice, rather than technicalities...However, each case must be considered within the context of its peculiar circumstances..." We argue that this is an acknowledgment of the fact that despite the peremptory nature of observing the stipulated timelines, the same is not cast in stone as not to be derogated from, in extraneous circumstances. This particular case afforded such a moment for the application of the principle given that the opposing party did not stand to suffer any prejudice by a relaxation of the stringent application of the law.

the right of access to justice. This being the case, it is safe to state that so long as a Court has made a determination of the matter within the laid down timeline, such a matter should not be held to be incompetent even though filed a few days later than the stated timeline, especially where such delay is not deliberate.

Undoubtedly, such an interpretation and construction of statutes gives effect to the intention of the legislature, ensures justice and avoids absurdity.⁶⁹ However, the Supreme Court rejected this argument and held that the lack of jurisdiction in the matter disposed of it and did not venture to examine the merits of the case.⁷⁰ In doing this, the Supreme Court pushed to the periphery, crucial substantive issues such as the scope of cross-examination, allegations of a denial of a fair trial at the trial court, among others.⁷¹ Indeed, the Supreme Court has mischievously cited this issue of timeliness as enshrined in article 87 (1) of the constitution in virtually all decisions that have come before it, even where no question of timeliness has been in issue.

⁶⁹ Even within the context of administrative law, it is not infrequent that a consideration of the scope and purpose of an enactment is given preeminence while construing legislation. In De Smith, S. A. and Evans, J. M. (1980) De Smith's Judicial Review of Administrative Action, 4th Edition, Sweet & Maxwell, London at p. 142, the learned author states, "*The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act*". The application of this principle would obligate the court to inquire into the purpose of the Elections Act, whether it intended to shut the door on prospective litigants or to ensure efficiency in determination of cases.

⁷⁰ This finding was similar to the election petition of *Maitha v Said & Another* [2008] 2 KLR (EP) 337 thereby denying the appellants a right of appeal finding that it had since expired. Given that this case was decided in the pre-2010 constitution period, it is contended that such an anachronistic view and preoccupation with technicalities should be avoided by the courts.

⁷¹ These issues were considered by Justice Njoki Ndung'u substantively after the learned judge found that the appeal was competent. Interestingly, she found the respondent to have been denied a fair trial. Curiously, this jurisprudential thought is strikingly absent in all other similar matters that have been decided by the Supreme Court.

The same mechanical approach was adopted with regards to the period for determining appeals in *Aramat v Lempaka & Others*⁷² where an appeal filed 32 days after the determination of the High Court was found to be incompetent as it was in breach of the 30 day statutory period availed by law. More fundamentally, the Supreme Court held that the Court of Appeal had disregarded the constitutionally-set six month timelines for determining an election petition by attempting to confer upon the High Court extended jurisdiction for carrying out a vote recount. Though the examination of merits of the case may not necessarily have returned a different verdict than was reached, it is submitted that the narrow interpretation of the Supreme Court with regard to this issue is troubling. It may indeed appear that the position taken by the Supreme Court to the effect that the Court of Appeal gave an extended jurisdiction beyond the confines of the law to the High Court of conducting a vote recount. However, a keen reading of the relevant law reveals the contrary. It must be noted that by dint of the Elections Act that confers jurisdiction of hearing appeals to the Court of Appeal, the appellate court is required to consider matters of law only and no more. Given that a vote recount and scrutiny is a matter of fact, it follows that the appellate court would not have made an order for a recount by remitting the matter to itself, as the same would be defective for want of jurisdiction. As a result, it made an order directing the High Court, which was the trial court with the jurisdiction to deal with matters of fact, to conduct a vote recount so as to determine who won in the elections. While that would be without contest at most times, the matter in issue here was that the six month period that the High Court has to dispose an election petition had lapsed. Consequently, the appellant contested that the High Court had become *functus*

⁷² Petition No. 5 of 2014.

officio and could not thus be permitted to conduct a vote recount. While appreciating such an argument, it is imperative to consider that almost invariably, by the time that matters come on appeal, the six-month period for determination of an electoral dispute by the trial court will have lapsed. To adopt the stance taken by the Supreme Court, which at the moment is the law, would mean that an appellate court that finds that an order for a vote recount by the trial court had been unjustifiably denied would be helpless before a litigant. Without doubt, such could not have been the intention of the legislature nor does such portend any notions of justice and fairness.⁷³

The only reasonable position is that the six-month period set by article 105 (2) of the constitution relates to the period preceding the judgment as opposed to post-judgment proceedings that arise upon the issuance of orders by an appellate court.⁷⁴ Such a holding would ensure that justice is served even where a trial court has unduly prejudiced the rights of an appellant by unreasonably refusing an order for vote recount or scrutiny.⁷⁵

73 It is even more troubling that the Supreme Court has showed a proclivity towards that end when it remarked in *Evans Odhiambo Kidero & Others v Ferdinand Ndungu Waititu & Others* [2014] eKLR at para 180, “*It is clear to us that the Court of Appeal’s majority position, even if founded upon notions of “justice and fairness”, had overlooked clear imperatives of the law that are overriding...They had not taken into account the fact that ideals of justice are by no means the preserve of the intending appellant, and that they must enure to the electorate as a whole...*” The Supreme Court went on to reprimand the Court of Appeal for not following its earlier decision (*Patrick Ngeta Kimanzi v Marcus Mutua Muluvi and 2 Others* [2014] eKLR) which the majority appellate judges expressed doubts as to its correctness, holding that it had not been distinguished. It is further difficult to explain what ideals of justice can enure to the electorate where it is unclear as to who won the elections.

⁷⁴ Indeed, this argument was canvassed by counsel for the respondent. The mischief behind the six-month period of determination of disputes was to ensure efficient and timely disposal of disputes. It would be difficult to show how an order for recount by a trial court ordered by an appellate court while still within the statutory period set for the appellate court, would militate against the timely resolution of election disputes.

⁷⁵ It is the author’s view that an alternative view as taken by the Supreme Court would only mean that the right of appeal as afforded by the law is to a great extent, illusory.

2.4 Scrutiny and Recount of Votes

Scrutiny and recount of votes in an election petition is one of the remedies that may be given by the Court to a litigant either at the preliminary stage or during hearing and may have the effect of disposing of the petition without going to the main trial.⁷⁶ Though closely interrelated, the two processes are different, in view of their resultant outcomes. Whereas a recount is made where there is erroneous counting or tallying such that the results returned inaccurate figures, scrutiny is more concerned with the validity of the votes cast and whether the votes were flawed.⁷⁷ Simply put, it may be said that a recount is quantitative in nature while scrutiny is qualitative in nature.⁷⁸

The law that governs the making of an order for recount and scrutiny of votes in election petitions is Section 82 of the Elections Act as read together with Rule 33 of the Elections (Parliamentary and County Petition) Rules 2013. The importance of recount and scrutiny of votes was explained by the Supreme Court in *Raila Odinga v Uhuru Kenyatta & 3 Others*⁷⁹ where it stated:

⁷⁶ If upon scrutiny or recount it is found that another candidate other than the one declared winner won in the elections, the Court is now empowered to declare such person as winner forthwith under section 80 (4) of the Elections Act, 2011 which empowers a Court to order the issuance of a certificate to a candidate who is the apparent winner in a recount and who has not committed any election offence.

⁷⁷ *Justus Gesito M'ugali M'mbaya v Independent Electoral & Boundaries Commission & 2 Others* [2013] eKLR per Justice Erick Ogolla at para 25: "... it is discernible that there is a distinction between recount of votes and scrutiny of votes. The difference lies in the outcome from conducting the processes. A recount, in my view, determines the number of votes a candidate received in an election...Scrutiny of votes, on the other hand determines the validity of the votes cast in an election..."

⁷⁸ *ibid.*

⁷⁹ Petition No.5 of 2013.

The purpose of the scrutiny was to understand the vital details of the electoral process, and to gain impressions on the integrity thereof.⁸⁰

It therefore follows that the essence of a recount and scrutiny of votes in an election petition is to assist the court to determine the validity and the integrity of the electoral process. It also assists the court in ascertaining the validity or otherwise of the alleged irregularities in the petition thereby helping it in disposing of the petition while serving justice. Consequently, recount and scrutiny of votes should not be unjustifiably denied as it may be the only way of ascertaining the winner of an impugned election.

In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*⁸¹ (*Munya case*), the Supreme Court overturned the decision of the Court of Appeal and held that the appellate court had erred in holding that the trial judge ought to have allowed a scrutiny of votes in all polling stations in four constituencies. At the trial court, the petitioner had prayed for scrutiny of votes in four constituencies, prayers which were refused by the trial judge on the basis that the Rules only allowed for scrutiny confined to polling stations. Consequently, the judge allowed for scrutiny in only seven of the polling stations which returned various irregularities. The petitioner appealed against this finding *inter alia* other grounds at the Court of Appeal which reversed the finding of the trial court thus:

If the trial court had adopted a purposive interpretation of Rule 33(4), it would be apparent that if a petitioner seeks scrutiny and recount of votes in a constituency, the purposive approach is that he is seeking scrutiny and recount of votes in all the polling stations in the constituency...⁸²

This kind of purposive interpretation of the law is to be preferred so as to give effect to substantive justice as opposed to an insistence on the technical application of the law. In giving effect to section 82 of the Elections Act, there was promulgated Election Rules

⁸⁰ *ibid.*, at para 169.

⁸¹ Petition No. 2b of 2014.

⁸² Civil Appeal No. 38 of 2013 at para 148, p.43

and in particular, Rule 33 of the Elections (Parliamentary and County Petition) Rules 2013. Sub-rule 4 states that scrutiny shall be confined to the polling stations in which the results are disputed. It is this particular provision that the Supreme Court, with profound respect, construed restrictively as to deny justice to the respondent. It would appear from a glance that the Rule seems to limit the scrutiny of votes to the polling stations where election results are impugned. The reasons behind this formulation of the law are manifold. First, scrutiny is usually a laborious and time-consuming process that would militate against the stringent timelines of resolving election disputes.⁸³ Secondly, the limitation as to scope of scrutiny is meant to ensure judicial economy since scrutiny takes much of the court's time and costs.⁸⁴ Thirdly, scrutiny is limited to particular polling stations as prayed by the petitioner to avoid instances of fishing expeditions by a litigant who desires to obtain evidence to advance their case.⁸⁵

Borrowing from the jurisprudence in a number of High Court decisions, the Supreme Court seemed to give more weight to the stringent application of Rule 33 (4), arguing that a prayer for scrutiny in all polling stations in a constituency lacked in specificity and must be refused.

⁸³ *Ledama ole Kina v Samuel Kuntai Tunai & 10 Others* [2013] eKLR, Justice Wendoh, while refusing an order for scrutiny delivered herself thus, "...The applicant needed to be specific on which polling stations he wanted a scrutiny done...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."

⁸⁴ *ibid.*

⁸⁵ In *Gideon Mwangangi Wambua & Another v IEBC & 2 Others* [2013] eKLR, Justice Odunga stated thus at para 26, "The aim of conducting scrutiny and recount is not to enable the Court unearth new evidence on the basis of which the petition could be sustained... Where a party does not sufficiently plead his facts with the necessary particulars... 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."

It is similarly curious that the Supreme Court found it untenable that a relaxed and purposive interpretation could be given to Rule 33 (4), especially in light of section 82 of the Elections Act. The latter section provides that an election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for scrutiny of votes to be carried out in such a manner as the election court may determine. The statutory provision does not have such a limitation clause in its wording as to limit the scrutiny to polling stations as the Rules would seem to indicate. Given that the Rules are born of the Elections Act, it follows that the statute law must have precedence. We argue that there is no conflict between the Rules and the Elections Act as the Rules give more flesh to the statute by specifying the conduct of scrutiny. A harmonious construction that builds rather than destroys the Elections Act can be given to the Rules through the adoption of a purposive approach. It would again appear that the Supreme Court chose to dwell more on semantics in adopting a pedantic construction of the Rules to the effect that the Rules only allow for scrutiny confined to polling stations and no more. Polling stations are only but small units in a constituency. To deny a petitioner a prayer for scrutiny in polling stations in a constituency simply because they prayed for scrutiny in a constituency, is ridiculous at best. For the avoidance of doubt, the petitioner in the *Munya* case had identified the relevant polling stations that he sought an order for scrutiny against, stations which happened to be most of the polling stations in the four constituencies.

It is instructive that the Court of Appeal in its judgment considered scrutiny as provided for in Rule 33 (4), as constituting scrutiny of votes rather than scrutiny of polling stations.

However, in its approach of splitting hairs, the Supreme Court expressed doubts as to the judgment of the Court of Appeal.

Undoubtedly, scrutiny is conducted upon the votes cast to ascertain their validity. The polling station is only a unit where initial tallying takes place. As a result, it is conventional that the Rules provide for polling stations as the units upon which scrutiny may be conducted since they constitute areas where irregularities may have occurred. Nonetheless, this must not be taken to mean that a constituency as an administrative area as much as a polling station may be for purposes of elections, cannot properly be invoked in application for scrutiny.

Besides, the Supreme Court would have done well to have taken into account the vote margin between the appellant and the respondent while deciding whether the refusal of scrutiny in the various polling stations as prayed was proper and served justice. There was a vote margin of 3,436 votes between the winner and the runner up according to the results declared by the election body, which translated to about 0.819 percent of the total votes cast. Further, results from the scrutiny in the seven polling stations that were scrutinized revealed almost systematic discrepancies in the results as announced. Given that the choice of the polling stations that were scrutinized was random, it is difficult to argue that the other polling stations had no irregularities as would have fundamentally altered the results, if scrutiny would have been allowed in respect of all the polling stations as prayed. While election disputes can neither be won through speculation nor can the scrutinized polling stations be taken as representative samples of the whole constituencies, where vote margins are small, courts ought to be slow in rejecting

applications for scrutiny.⁸⁶ This position finds judicial support in *Joho v Nyange & Another*⁸⁷ where Maraga J stated:

... where the margin is very narrow justice will be done and be seen to be done if a scrutiny should be ordered without laying a foundation simply to expeditiously dispose of petitions and save the time which would otherwise have been spent on full hearing.⁸⁸

The moment a petitioner demonstrates a basis or sufficient cause for scrutiny even in the whole constituency, then the trial judge must not fetter his discretion by refusing to order such scrutiny. The tenor of the judgment of the Supreme Court in the *Munya* case seems to indicate that the respondent herein had not laid a basis for scrutiny, at the trial court.

The Supreme Court judges posed thus:⁸⁹

What “purposive interpretation” can be applied to Rule 33(4) to dictate that scrutiny means scrutiny at the constituency level or in all polling stations in a constituency, even where there is no basis for such scrutiny?...⁹⁰

However, this is not the case from the record of the proceedings of the trial court. In making an application for scrutiny in all polling stations in the four constituencies at the trial court, the respondent had made reference to the fact that Returning officers duplicated and/or omitted results for seven (7) polling stations, the total valid votes cast in each of the identified nine (9) polling stations exceeded the total number of the registered voters for each of the respective polling stations, the results of 48 polling stations in the four constituencies were not signed or authenticated by any candidate or agent, and that the returning officer had not written the reasons for the agent's or

⁸⁶Scrutiny was allowed in *Burundi Nabwera v Joshua Angatia* Election Petition No 4 of 1983 and *Said v Maitha & another* [2008] 2 KLR (EP) 380 where the vote margins were 521 and 534 respectively.

⁸⁷ [2008] 3 KLR (EP).

⁸⁸ *ibid.*, at p.188.

⁸⁹ Petition No. 2b of 2014.

⁹⁰ *ibid.*, at p. 36.

candidates' failure to sign or authenticate the results, among other grounds. Interestingly, it is likely that the trial judge did not consider these grounds as a basis for scrutiny as he deemed it to be an introduction of additional evidence. More so, these grounds were contained in an affidavit supporting the petition which the trial judge ruled that it could not properly be said to amount to pleadings. In an interesting twist, the Supreme Court overruled the trial judge on this point and stated that the annexures to the affidavit would properly count as pleadings.⁹¹ One would therefore glean from these proceedings that the respondent was a victim of judicial gymnastics.

2.5 Review of the Legal Framework

Various provisions of the constitution concern themselves with elections and election dispute resolution. However, before highlighting the specific provisions that touch on the subject of electoral disputes resolution, it is worth noting that virtually all constitutional provisions are relevant to dispute resolution based on the doctrine of interpreting the constitution as an integrated whole.⁹² This is to say that a particular provision of the constitution say relating to the Bill of Rights or the Judiciary cannot be ignored since it does not directly bear on the question of electoral dispute resolution. This is born out of

⁹¹ The Supreme Court in the *Munya* case at para 173 and 174 remarked thus: "... the learned trial Judge made a wrong statement of law relating to pleadings to the effect that "annexures to any affidavit cannot be said to be pleadings..."

⁹² Barak, A. (2006) *The Judge in a Democracy*. Princeton University Press, Princeton at p. 308. This doctrine of interpreting the constitution as a whole has been reaffirmed in a number of Kenyan cases such as *Kituo cha Sheria v John Ndirangu Kariuki & Another* [2013] eKLR by the Court of Appeal in *Center for Rights Education & Awareness (CREAW) & Another v John Harun Mwau & 6 Others* [2012] eKLR, and by the Supreme Court in the *Matter of the Kenya National Human Rights Commission* [2014] eKLR at para 26, and *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Application No. 2 of 2012 at para 83.

the understanding that every part of the constitution represents the will of the people, who are its chief promulgator.

Article 38 of the constitution 2010 provides that every citizen has the right to form and participate in a political party and the activities thereof, campaign for such a party, be registered as a voter, and cast his vote. Further, article 38 provides that every citizen has the right to a free and fair election based on universal suffrage and a free expression of the will of the voter.⁹³

Articles 22 and 23 of the constitution provide a prospective litigant with the option of enforcing his right as embodied in article 38 by approaching the courts for a determination of the dispute.⁹⁴

Article 87 of the constitution is three-pronged and is an essential provision with regard to electoral dispute resolution in so far as it seeks to provide for the procedural filing of an election petition. Article 87 (1) provides for the enactment of legislation by Parliament to enable the timely resolution of electoral disputes.⁹⁵

Article 87 (2) prescribes the timeline within which an election petition has to be filed if it is to be found as competent for determination. The constitution provides that an election

⁹³ It is argued that it is this very right that a voter seeks to exercise whenever he contests election results citing irregularities in the impugned elections.

⁹⁴ It is also useful to note that other quasi-judicial tribunals such as the Independent Electoral and Boundaries Commission charged with determination of nomination disputes under article 105 (2) of the constitution may lay claim to article 38 of the constitution when enforcing a right of a litigant. This is discernible from article 2(1) of the constitution that provides that all State organs are bound by the constitution.

⁹⁵ It follows that whatever legislation to be enacted must take into consideration this key imperative-that of timeliness. In this respect, Parliament enacted the Elections Act. The fact that this was provided for in the constitution is a further testimony of the disenchantment of the Kenyan people with the historical nature of delays by courts in deciding electoral disputes.

petition (save for presidential elections)⁹⁶ must be filed within 28 days following the declaration of results. Controversy surrounding the issue of what constitutes the declaration of results for purposes of filing an election petition was settled in the case of *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others*⁹⁷ where the Supreme Court held that declaration of results occurs the moment the Returning Officer declares a winner and issues him/her with the Certificate of Results.⁹⁸ With respect, the holding by the Supreme Court is not necessarily a correct reading of the law when one considers the practical implications of the decision. For instance, where a Returning Officer announces a winner erroneously and later changes his mind or goes underground, greater absurdities and inconveniences may arise. Indeed, this happened in the case of *George Mike Wanjohi v Steven Kariuki & 2 Others*⁹⁹ where, the Supreme Court relying on the decision in *Joho* as regards the declaration of results and article 88 (4) (e) of the constitution held that the Returning Officer could not, after issuing the Certificate of Results in favour of the first respondent, cancel it. The Returning Officer had cancelled the Certificate issued to the announced winner upon noticing an error and issued a fresh Form 38 to the applicant. The Supreme Court held that the cancellation of the Certificate and the subsequent issuance of Form 38 to another candidate was a nullity since the Returning Officer had become *functus officio*, on grounds that it would affect the very sanctity of the election process and encroach on the powers of the election court. Such a finding complicates the

⁹⁶ A petition contesting the election of President must be filed within 7 days of declaration of results in accordance with article 140 of the constitution. This again, is a demonstration of the preeminence given by the supreme law to timeliness.

⁹⁷ [2014] eKLR.

⁹⁸ The Supreme Court rejected the contentions that declaration of results takes place upon gazettelement of the results stating that is merely an affirmation of results. It follows that time starts running immediately upon the announcement of the winner by the Returning Officer.

⁹⁹ [2014] eKLR at paras 139, 140 and 142.

situation by demanding that a candidate aggrieved by the announcement of a winner by the Returning Officer, even where such announcement is plainly erroneous, may only seek redress in court.

Article 87 (3) concerns itself with the service of election petitions and provides that service may either be direct, and where not possible, through a newspaper with nationwide circulation. This is a purely procedural matter¹⁰⁰ that appears to have been provided for in the constitution given the peculiar history of election petitions in this country.¹⁰¹

Article 88 of the constitution provides for the establishment of the Independent Electoral and Boundaries Commission (hereinafter, the IEBC) as the body charged with the management of elections. Given that it is charged with the supervision and conduct of elections, it follows that the body is invariably involved in resolution of election disputes

¹⁰⁰ It is a procedural issue in so far as it seeks to provide for the mode of instituting and serving an election petition. Rather than being provided for in statute or the regulations thereunder, it was expressly provided for in the constitution.

¹⁰¹ Historically, election petitions have been dismissed on legal and procedural technicalities with regard to timelines as well as the issue of service of election petitions. It is therefore not difficult to understand why the framers of the constitution chose to expressly provide for the manner, time, and mode of filing and serving an election petition. For instance, in *Moi v Matiba & 2 Others* (2008) 1 KLR (EP) 622, a petition was struck out as it had not been signed by the respondent, but had instead been signed by his wife who had been given a power of attorney by the respondent, since he was paralyzed and unable to sign. That notwithstanding, the court held that this was in violation of Rule 4 of the then National Assembly Elections (election petition) Rules 1993 that provided that the petition must be signed by all petitioners. Such a stringent approach was similarly followed in *Kibaki v Moi & 2 Others* (No 3) (2008) 2 KLR (EP) 351, where a petition was struck out for want of proper service since personal service had not been effected by the petitioner as against the respondent, notwithstanding the fact that he was the President. Of course, one would go through insurmountable security challenges trying to effect personal service to a serving president in view of the heavy security detail. Also see *Mohamed v Bakari & 2 Others* [2008] 3 KLR (EP) 54 at p. 58, 62 and 63, *M'Mithiaru v Maore & 2 Others* [2008] 2 KLR (EP) 547. Courts have held election petitions to be incompetent as against all respondents for failure to file and serve the respondent within the required period as was the case in *Murathe v Macharia* [2008] 2 KLR (EP) 244; *Onalo v Ludeki & 2 Others* [2008] 2 KLR 508, *Chelaite v Njuki & 2 Others* (No. 3) [2008] 2 KLR (EP) 209; *Munyao v Munuve & 2 Others* [2008] 2 KLR (EP) 20 and *Libasia v Wekesa & 2 Others* [2008] 2 KLR (EP) 195.

as it its conduct of elections that is usually impugned in election petitions. As a result, almost invariably, the body is usually a respondent in an election dispute. The IEBC has a duty mandated by the constitution to conduct elections that are free, fair, accountable, accurate, and verifiable and which align with other principles enumerated by the constitution.¹⁰² Article 88 (4) (e) delineates the settlement of pre-election disputes as one of the core functions of the Commission.¹⁰³ As such, and as enunciated by the Supreme Court in the *Joho* case, there can be no jurisdictional overlap between the IEBC and the High Court with respect to this issue of resolving disputes, given that the courts will always give primacy to themselves if the dispute arises after the declaration of results.¹⁰⁴ Where such a dispute is before declaration of results, the courts will always require the litigant to have exhausted the other available avenues such as the dispute resolution mechanism set up by the IEBC.¹⁰⁵

With respect to service of election petitions, the constitution demands that it should be direct, or through a newspaper of national circulation.¹⁰⁶ It must never be assumed that ‘direct service’, is a phrase capable of only one precise meaning as illustrated by the decisions of the courts. Whereas the constitution speaks of direct service, the Elections

¹⁰² Other principles are set out in article 81 and 86 of the constitution.

¹⁰³ Most of these disputes will include nomination disputes within the political parties or qualification to run for office. The role of the IEBC in settling electoral disputes under article 88 (4) (e) of the constitution has been asserted in a litany of cases such as *Benjamin Munywoki Musau v Daniel Mutua Muoki & 2 Others* [2013] eKLR, *Luka Angaiya Lubwayo & Another v Hon. Gerald Otieno Kajwang & Another* [2013] eKLR, *International Centre for Policy and Conflict & 4 Others v The Hon. Uhuru Kenyatta & Others* [2013] eKLR.

¹⁰⁴ This function of resolving pre-election disputes by the IEBC is also vested in the body vide section 4 of the Independent Electoral and Boundaries Act 2011.

¹⁰⁵ In *Michael Wachira Nderitu & 3 Others v Mary Wambui Munene* [2013] eKLR, the High Court adumbrated: “...where the constitution and or statute establish a dispute resolution procedure, then that procedure must be used...”

¹⁰⁶ Article 87 (3) of the constitution.

Act 2011 speaks of personal service. It becomes helpful to consider judicial commentary on the same to ascertain whether there is a difference between the two phrases. Seised of this very issue, Justice Mutuku in *Abdikham Osman Mohamed and Another v Independent Electoral and Boundaries Commission & Others*¹⁰⁷ remarked:

Is it personal or direct service? The constitution refers to direct service; the Act refers to personal service while the Rules refer to direct service. ... I think I am not wrong to state that personal service and direct service refer to the same mode of service which connotes the physical presence of the person being served.

A similar holding was made in other decisions,¹⁰⁸ marking the rigid construction of the law by the courts. The import of this finding is that a service that in every way reaches a respondent in an election petition cannot suffice as proper service within the meaning of the law. Clearly, this is not a correct interpretation of the law. It is discomfiting to note that the learned judges made no reference to the regulation thereunder to seek to ascertain the meaning intended by the constitution. Section 2 of the Elections (Parliamentary and County Elections) Petition Rules 2013, which is typically the interpretative section in a statute, provides that direct service includes personal service on a respondent or his duly authorized agent. The court's interpretation of 'direct service' as 'personal service' is plainly erroneous as the two are clearly distinct. To equate the two would be to unduly restrict the broad meaning afforded to service of election petitions by the constitution, and militate against access to justice by encouraging would-be respondents to go underground so as to escape personal service. As stated herein before, judges must always bear in mind the mischief sought to be cured and the intention of the law while

¹⁰⁷ [2013] eKLR.

¹⁰⁸ *Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 Others* [2014] eKLR. See also the views of Justice Kimondo in *Steven Kariuki v George Mike Wanjohi & Others*, (Nairobi) EP No. 2 of 2013 where he opined: "on the face of it, the two terms may seem different but on closer scrutiny direct or personal service is mere tautology: it simply means service personally on the respondent."

construing constitutional and statutory provisions rather than mechanically applying the law. A plain reading of section 2 of the Regulations suggests that personal service is just but one of the various modes of direct service demanded by the constitution. Would the will of the people, as expressed by the constitution have been to provide for more than one means of effecting service, if only it is direct, given the contentious issue of service of election petitions in this country? Without doubt, the mischief sought to be caught by demanding direct service, as is the case in all other civil proceedings, is to enable the respondent to know the case he meets and prepare accordingly.¹⁰⁹ In a country where respondents keen on evading service go underground, and given the high costs involved in placing advertisements in newspapers with national circulation,¹¹⁰ it is arguable that the constitution indeed envisaged more modes of service of election petition other than personal service by couching the same as “direct service”.¹¹¹ Indeed, this appears to be the case given that the Supreme Court through its Regulations to govern service of presidential election petitions contemplates an electronic means of service.¹¹² Moreover in this technological era, the use of electronic means and other modes of service is not only efficient and timely, but also non-burdensome.

¹⁰⁹ This facilitates a fair trial in accordance with article 50 of the constitution. As such, it is submitted, the mode of service should not be onerous or merely punitive for the sake of it as long as the purpose of service is met.

¹¹⁰ Further, given the high levels of poverty and the costs involved with filing a petition, this would be a violation of article 48 on access to justice.

¹¹¹ We argue that it is such a finding and interpretation that should be accorded by the courts in a transformative constitution like the Kenyan constitution 2010.

¹¹² See Rule 7 (1) of The Supreme Court (Presidential Election Petition) Rules 2013 which stipulate that within two hours of filing a petition, the petitioner shall serve the respondent through electronic means. We argue that this Regulation is constitutional and in line with article 87 (3) of the constitution and constitutes direct service. Such a relaxed and liberal construction should be given to the constitution.

CHAPTER 3: APPROPRIATE APPROACH TO THE RESOLUTION OF ELECTORAL DISPUTES

3.1 Introduction

Article 159 (2) (d) of the constitution obligates courts to dispense substantive justice without giving undue regard to procedural technicalities. It is instructive that the constitution speaks of ‘undue’ regard to technicalities. This *per se*, is an indication that due regard may be had to technicalities and procedure, as they are essential in enabling the administration of justice and the dispensation of substantive justice.¹¹³ This provision must guide the interpretation of any constitutional provision, no less than it should, those touching on electoral dispute resolution. Taking this provision into consideration would without doubt give an expansive and liberal construction to the law to aid in justice, as opposed to applying an absolutist, strict, and mechanical approach to the law.

More importantly, it is worth noting that Article 159 (2) (d) of the constitution is contained in Chapter 10 of the constitution that is entirely devoted to the Judiciary. In the main, Article 159 of the constitution provides that all judiciary authority exercised by the courts derives from, and vests in the people. To our minds therefore, all authority exercised by courts and tribunals must be guided by the will of the people as expressed by the constitution given that the Courts are exercising delegated authority. The constitution proceeds to enunciate a number of principles to guide the courts and tribunals in interpreting the constitution, key among which is administering justice

¹¹³ Indeed, in *James Mangeli Musoo v Ezeetec Limited* [2014] eKLR, Justice D.K Njagi Marete considered article 159 (2) (d) of the constitution and delivered himself thus, “...*Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had...*”

without undue regard to technicalities as enshrined under Article 159 (2) (d). In addition, it provides that the purpose and principles of the constitution must be promoted during interpretation of the constitution.¹¹⁴ This obligates the courts to ensure that they seek to find the purpose of the various constitutional provisions as and when they turn on a matter and then seek to give effect to those purposes. Doubtless, this is an exhortation by the constitution itself to courts to adopt a purposive approach while interpreting the supreme law. It is impossible to promote the purpose of the constitution or indeed any other legislation, if one does not endeavor to find the purpose of such legislation and then give it a purposive construction.

3.2 Purposive Interpretation/Approach

As argued above, a purposive approach to the interpretation of the constitution is to be preferred and adopted, given the clear exhortation by the very constitution.¹¹⁵ The issue of constitutional interpretation was amply elaborated in the celebrated case *Njoya & Others v Attorney General & Others*¹¹⁶ where Justice Ringera (as he then was) stated thus with respect to the constitution:

It is the supreme law of the land... must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles.

In this case, Justice Ringera quoted with approval the dictum of the court in *Crispus Karanja Njogu v Attorney General*¹¹⁷ as regards constitutional interpretation to the effect that:

¹¹⁴ So does article 259 (1) (a) of the Constitution.

¹¹⁵ Article 159 (2) (e) and 259 (1) (a) of the 2010 Constitution of Kenya.

¹¹⁶ [2004] LLR 4788.

¹¹⁷ HCCC Application No. 39 of 2000.

... constitutional provisions ought to be interpreted broadly or liberally, and not in a pedantic way, that is restrictive way.

The Tanzanian Court of Appeal in *Ndyanabo v Attorney General*¹¹⁸ best captured this concept of purposive approach to constitutional interpretation in an opinion rendered by Samatta CJ:

We propose to allude to general provisions governing constitutional interpretation...Courts must, therefore, endeavor to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it.

A purposive approach basically involves both a subjective and an objective element in the sense that it encompasses the intention of the drafter as well as the intent of a reasonable drafter and the fundamental values of a particular legal system.¹¹⁹ Consequently, when applying this approach to a case at hand, a judge must bring to bear his subjective mind as to the intention of the author as discernible from the language of the constitution. Equally true is that a judge must also seek the intention of a reasonable author or drafter of such a law if at all the meaning discernible from the language occasions absurdity. In ascertaining this purpose or intention of the law or of the reasonable drafter of the law, the judge will do well to be guided by the fundamental values of the particular legal system. We argue that if such a purposive approach is adopted in the determination of disputes and especially election disputes, it will obviate the proclivity by courts towards procedural and legal technicalities as has been demonstrated in chapter 2 of this paper. Further, this would be in conformity with Article 159 (2) (d) and (e) of the constitution. It cannot possibly be that these constitutional provisions were mere lofty provisions. Rather, they were purposely designed to be given

¹¹⁸ [1969] EA 357.

¹¹⁹ Barak, A. (2005) *Purposive Interpretation in Law*. Princeton University Press, New Jersey at p. 88.

effect. Indeed, this is more the case when one takes into account the fact that the purposive approach evolved as a replacement of the mischief rule of interpretation, which sought to cure the absurdities that arose through the literal and strict interpretation of the law.¹²⁰

It has been argued that the purposive approach blurs the concept of separation of powers between the legislature and the judiciary, with the latter attempting to usurp the function of lawmaking from the former.¹²¹ Critics of this purposive approach have thus called for an abandonment of this mode of interpretation in as far as it gives judges considerable power to go beyond the words contained in the law so as to ascertain the intention and purpose of the very law.¹²² While this criticism may be meritorious to some extent, it must not be preferred as its adoption portends even greater trouble for the greater majority of people who seek to access justice. It has the effect of turning a judge into a robot who eschews substantive justice and lays down mechanical jurisprudence so as to be within the strict confines of the letter of the law. Lord Denning in an appeal decision in *Nothman v London Borough of Barnet*¹²³ appositely captured the situation thus:

It is the voice of the strict constructionist. It is the voice of those who adopt the strict literal and grammatical construction of the words, heedless of the consequences. Faced with glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this court. The literal method is now completely out-of-date. It has been replaced by the approach which Lord Diplock described as the 'purposive approach'.

¹²⁰ Driedger, E. A. (1983) *Construction of Statutes*. Butterworth & Co. (Canada) Ltd., Toronto at p. 87.

¹²¹ For an in-depth criticism as far as this is concerned, see Fahey, A. E. 'United States v O'Hagan: The Supreme Court Abandons Textualism to Adopt the Misappropriation Theory' (1998) 25 *Fordham Urban Law Journal* 507.

¹²² *ibid.*

¹²³ (1977) All E.R. 1243.

We argue that a failure by courts to seize the moment and apply a purposive approach to the constitution runs the risk of eroding the gains presented by the constitution 2010. A constitution is usually a reflection of past experiences and provides a trajectory going into the future by seeking to cure the ills of the past.¹²⁴ Where a body charged with the implementation or interpretation of a constitution fails to breathe life into the document by interpreting it according to its purposes, such an emergent constitution is rendered impotent.¹²⁵ A constitution must be owned by the people and the courts if it is to fulfill its desired effect, since constitution making does not end with its drafting.¹²⁶

3.3 Article 159 (2) (d) of the constitution

As demonstrated above, a purposive approach is one of the ways of giving effect to article 159 (2) (d) which provides that justice shall be administered without undue regard to procedural technicalities. This provision has been the subject of litigation in a number of cases since the promulgation of the 2010 constitution as litigants sought to seek justice through it. A keen reading of the cases reveals that some of the judges have ably appreciated the import of the provision by properly finding the purpose behind the constitutionalisation of the provision. However, some of the judges have simply deprecated a litigant who has sought to seek shelter in the provision holding that the

¹²⁴ Okoth-Ogendo, H.W.O (1991) Constitutions without Constitutionalism: Reflections on an African Political Paradox in Shivji, G. I. (ed) *State and Constitutionalism: An African Debate on Democracy*. Southern African Political Economy Series Trust, Harare at p. 3 – 25 where he compares the making of a constitution to a power map which in its making, draws from past experiences and future aspirations of the people.

¹²⁵ *ibid.*

¹²⁶ Even within the context of political or executive authority as opposed to the exercise of judicial authority, Prof. Yash Pal Ghai argues that though a number of regimes have found the rule of law as invaluable as a principle of organization and ideology, few of those political regimes in Africa have acted upon them beyond rhetoric. See Ghai, Y, P 'The Rule of Law, Legitimacy and Governance' (1986)14 International Journal of the Sociology of Law 179.

provision cannot be used as a cure for all procedural deficiencies by litigants. We argue that as ably captured by some judges, article 159 (2) (d) will only aid a litigant who has not willingly failed to live to the procedural and legal formalities laid down. Such a position indeed gives effect to the purposive approach and serves to dispense substantive justice. Axiomatically, this approach further demands that each case be examined on its own peculiar circumstances to determine whether the circumstances attending a particular matter are excusable as to relax the rule regarding the procedural and technical formalities required.

The tenor and thrust of the various pronouncements by the courts as regards article 159 (2) (d) is that the new constitutional dispensation attempts to avoid the prior preoccupation with legal and procedural technicalities in civil matters, and no less in election petitions. It obligates courts to apply a progressive jurisprudence that adopts a purposive interpretation of the law while deciding cases. This constitutional provision impels the courts to abandon strict reliance on similar decisions made in the pre-2010 constitution era under the doctrine of *stare decisis*, given the shift in terms of the law. Even where similar cases that turn on the issue of procedural and legal technicalities decided before the promulgation of the 2010 constitution are cited, they must only be so cited for purposes of distinguishing them.¹²⁷

¹²⁷ Malleon, K. and Moules, R. The Legal System. Fourth Edition. Oxford University Press, London, (2010). At p. 69, the authors define the distinguishing of a case by a court as holding that a particular established legal reasoning will not apply to a case at hand through the doctrine of *stare decisis*, due to a markedly different set of facts between the two cases. This change in facts may be a change of the law as happened with the advent of the 2010 Kenyan constitution.

3.4 Access to Justice

An appropriate approach to resolution of election disputes is one that facilitates access to justice. The concept of access to justice is so important that it is articulated under article 48 of the 2010 constitution as one of the key fundamental rights of the people.¹²⁸ The whole legal system is dependent on people being able to afford and access it. If there be impediments to litigants wishing to pursue justice in the available legally instituted forums, the right of access to justice cannot be said to be safeguarded. Within the context of resolution of election disputes, a lack of actualization of the right of access to justice militates against the achievement of democracy as it serves the purpose of denying people their rightful and preferred leader especially where elections have been marred by irregularities.¹²⁹ To this extent, a violation of the right of access to justice also makes a mockery of article 38 which provides for political rights of citizens and the right to vote.¹³⁰

The 2010 constitution seeks to enhance access to justice for the Kenyan people in a number of ways. Besides providing a substantive provision in the form of article 48 mandating the state to ensure access to justice, it provides for an avenue for a person seeking to enforce his fundamental rights and freedoms where they are either infringed or threatened.¹³¹ Article 159 of the constitution that stipulates the guiding principles in the

¹²⁸ Article 48 of the constitution provides that the state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

¹²⁹ For instance, where a rightful winner has been denied victory due to fraud at the ballot and he is unable to access justice owing to a number of factors such as lack of finances, the electorates lose out on their chosen leader.

¹³⁰ Article 38 (3) (b) of the constitution provides that every adult citizen has the right, without unreasonable restrictions, to vote by secret ballot in any election or referendum.

¹³¹ This is provided under article 22 which provides that any person has the right to institute court proceedings either on his behalf or on behalf of others claiming that a fundamental freedom or

interpretation of the constitution also seeks to give effect to the right of access to justice. Article 159 (2) (a) provides that justice shall be done to all irrespective of status. To this end, the constitution seeks to ensure that there is no discrimination that will ensue in the dispensation of justice based on one's social, economic, or ethnic class. Article 159 (2) (b) provides that justice shall not be delayed. This is in recognition of the fact that delay of justice may in particular circumstances, be tantamount to a denial of justice especially where time is of the essence. Article 159 (2) (c) provides that alternative forms of dispute resolution mechanisms such as reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms shall be promoted. This provision, in effect, institutionalizes alternative dispute resolution mechanisms so as to facilitate access to justice for persons who are unable to afford the litigation processes which can be overly expensive, complex, and time consuming.

Article 159 (2) (d) also, to a great extent, seeks to promote the right of access to justice by providing that justice shall be administered without undue regard to procedural technicalities. Doubtless, constitutions are made out of long drawn negotiations and compromises and seek to transform the past going into the future. We argue that the inclusion of this particular provision in the constitution was deliberate, and was specifically intended to enhance access to justice by doing away with an insistence on procedural technicalities by courts. Indeed, access to justice is broader in meaning in that

right has been infringed or is threatened. Also, article 258 of the Constitution empowers any person to move to court claiming that the constitution has either been contravened or is threatened with contravention.

it encompasses accessibility of the courts, information availability, and absence of inhibitive and complex procedures and technicalities.¹³²

Admittedly, access to justice in Kenya has been hampered by a number of challenges which include high court filing fees, understaffing in courts, high lawyer's fees, backlog of cases, absence of effective legal remedies, lack of independence in the judiciary and complex procedures and rules, among others.¹³³ Given that complex rules, procedures, and technicalities are some of the impediments on the right of citizens in accessing justice,¹³⁴ article 159 (2) (d) must have been informed by these realities.

The courts ought to be guided by the principles enumerated under article 159 of the constitution while interpreting the law so as to enhance access to justice. It is only through fidelity to the principles enshrined therein, that this right of access to justice will be achieved. The right of access to justice, properly understood, is not fulfilled through mere accessibility to courts. Rather, it is fulfilled when a litigant is able to obtain substantive justice in a case, without being unduly hindered by procedural and legal technicalities.

¹³² Kenya Civil Society Strengthening Program, 'Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution', A Report prepared in 2011.

¹³³ Ojwang, J.B, '*The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development*' (2007) 1 *Kenya Law Review Journal* 19 at p. 29.

¹³⁴ ICJ Kenya, *Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002. Available at: http://pdf.usaid.gov/pdf_docs/pnacw006.pdf (Accessed on 15th March 2015).

CHAPTER 4: LEGAL-POLITICAL IMPACT OF MECHANICAL JURISPRUDENCE

4.1 Introduction

Insistence on strict and absolutist construction of the law and more so procedural law has huge ramifications in not only the legal sense, but also in a political sense. Firstly, such an approach has the effect of stunting the evolution of a democracy by emasculating democratic ideals. This is because it allows for irregularities conducted in elections and resulting into injustice to go unchecked in the pursuit of ensuring that technical and procedural imperatives are met. Secondly, it has the impact of promoting a lack of accountability and transparency in a manner that violates the constitution and betrays the principles and purposes of the constitution. Thirdly and closely intertwined with the promotion of a lack of accountability, it encourages laxity on the part of the institutional agencies charged with the conduct of elections, in this case, the Independent Electoral and Boundaries Commission that is mandated with the management of elections. This further leads to an erosion of democratic ideals. Fourthly, such decisions emanating from the courts whereby litigants feel that injustice has been served have the unfortunate effect of undermining public trust in the whole institutional framework including courts and other bodies charged with electoral dispute resolution. This could also result in the loss of institutional legitimacy in these bodies and the courts, and could have the effect of making litigants and the citizenry at large, shun these bodies in a bid to resolve their disputes.¹³⁵ Fifthly, the undermining of the institutional framework has a damaging effect

¹³⁵ This has happened before such as in the events leading to the 2007/20087 post-poll violence where prospective litigants refused to contest the dispute in the court as they felt that they would not serve justice. The effect of this was demonstrations that led to untold suffering and loss of lives and property.

on the rule of law and good governance as people choose to live and be guided by other mechanisms other than the law.

4.3 Conclusion

Respectfully, and as argued elsewhere in this paper, where a breach of the requirements of a statutory provision occur in special circumstances especially those beyond the control of a litigant, and where no prejudice is occasioned to the opposing party, no useful purpose is served by finding an action incompetent. Regard must be given to any prejudice that may be occasioned to the other party since justice flows both ways. To allow an opposing party to succeed in advancing such a technical argument confounds the very values, principles, and aspirations of the constitution.¹³⁶ It must be reiterated that the purpose of the enactments stipulating the stringent timelines is to ensure the effectiveness of the institutionalized dispute resolution mechanisms. Failure to observe timeliness, and dilatoriness on the part of litigants and respondents so as to make the outcome of electoral disputes mere academic exercises, conceivably, must have informed the lawmakers. However, in light of the purpose of these enactments and the mischief sought to be curbed, there is no good enough reason to suppose or advance the argument that Parliament and the will of the people of Kenya, as expressed through the constitution, intended to shut the door on prospective litigants.

¹³⁶ “Statutory interpretation calls for reference not only to the context, scope and purpose of the statute but also to antecedent history and policy as well as community values”: See Mason, A. ‘Changing the Law in a Changing Society’ (1993) 67 Australian Law Journal 568 at 569.

4.2 Recommendations

This study argues that a relaxed alternative approach that gives effect to substantive justice needs to be applied not only in cases occasioned by administrative inefficiency but also in others where the ends of justice so demand.

The 2010 Kenyan constitution which borrows heavily from the South African one is a progressive and a transformative constitution¹³⁷ that demands a robust interpretation that gives effect to its principles and values.¹³⁸ This is more so the case, when considered in light of the peculiar and unique history of electoral dispute resolution that was fraught with insistence on technicalities. We argue that this kind of jurisprudence from the apex court which has to be adhered to by the lower courts under the doctrine of *stare decisis*, is unfortunate.¹³⁹ While comparative jurisprudence from other jurisdictions is definitely useful for a fairly new court such as the Supreme Court of Kenya, a mechanical adoption of the same is unwarranted.¹⁴⁰ An autochthonous jurisprudence peculiar to the Kenyan situation is required while at the same time keeping pace with important developments

¹³⁷ See Chapter 1 of Musila, G. M et al., Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence (December 5, 2013).

¹³⁸ The principles and values of the Constitution are set out in Article 10 and 259 of the Constitution of Kenya 2010.

¹³⁹ This common law principle of *stare decisis*, now codified in Article 164 (3) of the Kenyan Constitution demands that decisions of a higher court are followed by the lower courts when seised of matters with similar facts.

¹⁴⁰ Mutunga, W. 'Elements of Progressive Jurisprudence in Kenya: A Reflection,' speech delivered to judges in Kenya. Available at: <http://www.judiciary.go.ke/portal/assets/downloads/speeches/Elements%20of%20Progressive%20Jurisprudence%20in%20Kenya-%20A%20Reflection.pdf> (Accessed on 21st January 2015).

and jurisprudence from other countries.¹⁴¹ Indeed, the Kenyan Supreme Court has conceded to this sentiment in the *Aramat Case* (supra)¹⁴² where it opined:

...this Court should not rely on cases from the Nigerian Supreme Court, because of variations in constitutional profile between the two countries, we affirm that any reference to foreign case law is merely for persuasive effect, in respect of broad lines of reasoning – and certainly not for a binding mode of resolution to the case before this Court, which must rest on its unique facts and circumstances.

Despite this recognition, the Supreme Court went ahead and applied this line of reasoning to the case at hand.

A transformative constitution obligates courts to adopt a liberal and purposive interpretation. This view is not only restricted to the interpretation of constitutional provisions but also to statutes that emanate from the constitution and which must imbue this very spirit of the constitution. Transformative constitutions the world over arise after a dark epochal period, and as the word suggests, they usually seek a paradigmatic shift or transformation from the status quo.¹⁴³ The apex court, and indeed any other court, cannot afford to abnegate from this responsibility.

It is thereby recommended that the Supreme Court, as the leading court, adopts a broad and purposive interpretation of the constitution and statutes, taking account of social justice and the social conditions attendant to the enactment of the particular laws. Such an

¹⁴¹ Mutunga, W. ‘The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions,’ speech delivered at the University of Fort Hare, 2014. Available at: http://www.haldane.org/storage/pdfs/SL65_pp20-23_kenya.pdf (Accessed on 21st January 2015).

“My concern, when I emphasize “indigenous” is simply that we should grow our jurisprudence out of our own needs, without unthinking deference to that of other jurisdictions and courts, however, distinguished.”

¹⁴² At para 141.

¹⁴³ Leading Constitutional Law Scholar Yash Pal Ghai speaking at the International Conference on Interpretation and Shaping of Transformative Constitutions held on 9-10th June, 2014 at the Sarova Panafric Hotel, Nairobi, Kenya said that constitutions in modern day are not mere special statutes that seek to order the state but rather, they capture the values and principles of a nation and endeavor to transform it from its dark past.

approach is the only justifiable one, if one takes into account the fact that the enactment of laws is preceded by particular conditions and is usually within a particular context and social condition. Further, it is nearly impossible for Parliament while enacting laws, to be mindful of the various facts that may arise. Lord Denning in *Seaford Court Estates Ltd. v Asher* stated:¹⁴⁴

It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity...when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy...

Applying this reasoning to section 85A of the Elections Act, it would be beyond the absurd, to claim that Parliament intended to provide a forum in court to an intending litigant in a half-hearted manner, as the decisions of the Courts discussed in the earlier chapters would seem to indicate. It is banal that Parliament contemplated that all requisite instruments would be in place for the stipulated timelines to be applicable, unless if delays are caused in a deliberate manner by the litigant himself. To hold that an appeal is incompetent merely because it was delayed owing to administrative lethargy and so as to meet the constitutional injunction of timeliness, and to insist on an unyielding requirement for personal service in election petitions, borders on the absurd.

While seeking to promote efficacy, efficiency, and timeliness in resolving disputes since the same is in the public interest, it is recommended that this is done with due regard being paid to other extenuating circumstances in each case. One chief way of ensuring this is by ensuring that courts give effect to the intention of Parliament by curing the mischief that the lawmakers sought to preclude so as to ensure justice is served. The

¹⁴⁴ [1949] 2 ALL ER 155.

jurisprudence emanating from the Australian High Court in this respect, and as enunciated in the case of *Project Blue Sky v Australian Broadcasting Authority*¹⁴⁵ is particularly apt:

A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid...

We argue that this principle that has found favour in Australia and New South Wales should be similarly applied by Kenyan courts within the context of electoral dispute resolution.

¹⁴⁵ (1998) 194 CLR 355 at para 93.

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