REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIOS COURT AT BUNGOMA

ELRC MISCELLANEOUS APPL. NO. E006 OF 2023

MAURICE WABWILE MARANGO.....1ST APPLICANT

ABIDAN KIMKERICK KAPCHANGA.....2ND APPLICANT

ARUPUT ISAAC JUMA.....3RD APPLICANT

CHRISTOPHER NYONGESA SIMIYU.....4TH APPLICANT

ISAAC MUKENYA WELIKHE.....5TH APPLICANT

VERSUS

COUNTY PUBLIC SERVICE BOARD-BUNGOMA COUNTY.....1ST RESPONDENT

COUNTY ASSEMBLY OF BUNGOMA.....2ND RESPONDENT

ACTING COUNTY SECRETARY, BUNGOMA COUNTY.....3RD RESPONDENT

H.E KENNETH MAKELO LUSAKA.....4TH RESPONDENT

APPLICANTS' WRITTEN SUBMISSIONS ON THE PRELIMINARY OBJECTION DATED 4TH MAY 2023

May it please your Lordship.

It is humbly submitted for the Applicants thus:-

FACTUAL BACKGROUND

The 1st – 4th Applicants have been serving as chief officers in Bungoma County Government whilst the 5th Applicant has been serving as the Deputy County Secretary. The 2nd Respondent issued interdiction letters to the Applicants which letters were not specific on the duration of interdiction. During the pendency of the interdiction and before the disciplinary process, the Respondents proceeded to advertise vacancies and interview applicants for the positions that were still being held by the Applicants. In pursuit of their rights under the law, the Applicants went on to challenge their interdiction in the Employment and Labour Relations Courts, Bungoma and an interlocutory ruling was made in **Bungoma ELRC Petition No. E006 of 2023** directing the Applicants to lodge their complaint with the Public Service Commission as the first port of call under the doctrine of exhaustion since the Petition was premature. The Applicants have since lodged the said appeal before the Public Service Commission in compliance with the ruling of the Court.

In defiance of court orders and during the pendency of the appeal at the Commission, the governor of Bungoma County announced the nominated persons to take up the jobs held by the Applicants. The Applicants sought for conservatory orders to be issued by the Commission vide an Application filed on

14th April 2023 before the Commission but they were duly advised that the Commission does not issue interim orders that are injunctive in order. This has compelled the Applicants to now move this Honourable Court vide a Notice of Motion application dated 20th April 2023 seeking the conservatory orders so as to avoid miscarriage of justice and especially avoid rendering the entire Appeal proceedings at the Commission nugatory and an academic exercise.

The 1st, 3rd and 4th Respondents have since sought to have the Applicants' application dated 20th April 2023 dismissed by raising a Preliminary Objection dated 4th May 2023. The Preliminary Objection is premised on the ground that this Court purportedly lacks the requisite jurisdiction to hear and determine the Applicants' application on account of the provisions of the Public Service Commission Act, 2017 and Public Service Commission (County Appeals Procedures) Regulations, 2022.

The success or failure of the Respondents' Preliminary Objection dated 4th May 2023 herein depends entirely on the determination of the following question arising from the facts and circumstances of the case and the related law on the subject matter.

WHETHER THE COURT HAS THE JURISDICTION TO HEAR AND DETERMINE THE APPLICATION DATED 20TH APRIL 2023?

The Respondents have based their Preliminary Objection on some 8 grounds. In the discussion of whether the court has jurisdiction, it is imperative to analyze each ground separately;

1. **Section 88(4) of the Public Service Commission Act, 2017**

Section 88 (4) of the Act provides, **"(4) Despite the right of appeal or the right to apply for review in accordance with this Part, the implementation of the decision shall not be deferred or suspended pending the determination of the appeal or the application for review."**

It is on this premise, among others, that the Respondents contend that the Court lacks jurisdiction to hear and determine the Applicants' application. However, it is apparent that the Respondents' advocates have either wholly misapprehended the facts of the case or they have willingly decided to mislead this Honourable Court. The Applicants have not sought to evade, defer or suspend the proceedings before the Public Service Commission. In fact, the Applicants were directed vide the ruling in **Bungoma ELRC Petition No. E006 of 2023** to commence the Appeal before the Commission which they have done and are eager for the same to proceed to conclusion.

However, the Respondents have unfairly sought to replace the Applicants from their employment

positions without any disciplinary proceedings or lawful terminations. The Respondents have gone ahead to announce nominated persons to take up the jobs held by the Applicants notwithstanding the fact that the appeal is still pending before the Public Service Commission. This is not only prejudicial to the Applicants but also blatant contempt of court on the part of the Respondents.

The first port of call for the Applicants, in a bid to protect their rights under Employment laws, was the Public Service Commission. As such, the fact that the Applicants have moved this Honourable through their Notice of Motion Application does not override the role of the Commission neither is this Honourable Court barred from issuing conservatory orders.

Your Lordship, the Public Service Commission does not sit as a court of law. It cannot issue conservatory orders. It is only this court that can issue conservatory orders of the nature the Applicants seek. In the event that one files and appeals before the Public Service Commission, then one is then at liberty to approach the court for conservatory orders to preserve the subject of contention, in this case the Applicants' positions in the Bungoma County Government.

This position is further buttressed in the decision of the court in **Bungoma ELRC Petition No. E009 of 2021 Catherine Gathoni Otenyo -vs Governor, County Government of Kakamega & 3 others** where this Honourable Court issued conservatory orders against recruitment of Petitioner's replacement as Secretary and CEO of Kakamega County Public Service Board pending hearing and determination of the Petitioner's appeal to the Public Service Commission for the purported termination of her appointment. The cited case is similar and corresponds to the facts of the instant suit.

The principles in regard to the granting of interim or conservatory orders were outlined by the Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, Supreme Court Application NO. 5 of 2014 (2014) eKLR**, where the Court held that:-

> ""Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest:.. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes." (Emphasis added).

Further, **Article 23 of the Constitution of Kenya** as read with the provisions of **Article 165 and Rule 23 of the Constitution of Kenya (Protection of rights and Fundamental Freedom) Practice and Procedure Rules,**

2013, (otherwise referred to as "the Mutunga Rules") clearly grants this Honourable Court powers to hear and determine an application for conservatory order or interim orders in order to secure the subject matter in dispute. **Rule 23 of the Mutunga Rules** provides: -

> **"1) Despite any provision to the contrary, a Judge shall hear and determine an application for conservatory or interim order.**
> **2) Service of the application in sub rule (1) may be dispensed with, with leave of the Court.**
> **3) The orders issued in sub rule (1) shall be personally served on the respondent or the advocate on record with leave of the Court, by substituted service within such time as may be limited by the Court."**

Your Lordship, it is therefore evident that this Honourable possesses the requisite jurisdiction to hear and determine the Application dated 20th April 2023 and grant the conservatory orders sought. Section 88(4) of the PSC Act seeks to bar any deferment or suspension of the implementation of the decision by the Commission. The Applicants have not done either of these actions – deferment or suspension. The Applicants have sought conservatory orders on the basis that the Commission lacks the power to grant orders whereas this Honourable Court is empowered to grant the same.

2. <u>Regulation 13 of the Public Service Commission (County Appeals Procedures) Regulations, 2022</u>

Regulation 13 of the Public Service Commission (County Appeals Procedures) Regulations, 2022 provides that:

> **"13. (1) A party to an appeal may, at any time after the filing of an appeal with the Commission but before the final hearing and determination of the appeal, apply in writing to the Commission for directions or orders before the appeal is heard and determined by the Commission."**

The Respondents under Ground 2 of their Preliminary Objection contend that the above provision divests/dispossesses this Honourable Court from entertaining interim application pending the hearing and determination before the Public Service Commission.

Firstly, nowhere in the said provisions has this Honourable Court been precluded from hearing and determining the interim application such as the one by the Applicants. Secondly, the Application dated 20th April 2023 by the Applicants was first filed before the Commission. The applicants have averred in their application that upon filing their appeal. They were sought for interim orders but were adviced by the commission that the commission does not have the mandate to give such interim conservatory orders. It therefore follows that the only recourse to justice is the Employment and Labour Relations Court which

has the power to grant the orders sought.

The European Court of Human Rights in the case of **Shkalla vs Albania** observed that it is incumbent on the party alleging non-exhaustion to satisfy the court that the remedy is an effective one available in theory and in practice at the relevant time, which is to say that it was accessible and capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. The Respondents have not demonstrated that the Commission can grant the conservatory orders sought by the Applicants. The Commission admitted that it cannot grant the orders. The proper forum for granting the orders is the ELRC which empowered by the constitution and relevant statutory provisions.

As such, the Applicants duly complied with Regulation 13 of the Public Service Commission (County Appeals Procedures) Regulations, 2022 and only moved this Court after the Commission admitted to its lack of powers to grant the orders.

3. **Section 87(2) of the Public Service Commission Act, 2017**

Section 87(2) of the Public Service Commission Act, 2017 states, "**A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government public service unless the procedure provided for under this Part has been exhausted.**"

The Respondents have cited the above provision in Ground 3 of the Preliminary Objection contending that the said provision precludes this Court from handling the legal proceedings and applications relating to matters within the jurisdiction of the Public Service Commission. However, at the tail end of the above section, the provision provides an exception where the procedure provided for has been exhausted.

Firstly your Ladyship, the respondents, in filing their Preliminary objection, have failed to appreciate that the issue for determination before this court is not the same as that before the Public Service Commission. Your Ladyship, at the Public Service Commission, the applicants have filed the substantive appeal and they seek the following reliefs:-

1. There be a declaration that the issuance of the compulsory leave letters dated 4th October 2022 and 3rd November 2022 was against illegal
2. A declaration that the County Secretary had no powers or mandate to issue the letters sending the appellants for compulsory leave.

3. A declaration that the extension of compulsory leave beyond the 30 days after the expiry of the 30 days that commenced on the 4th October 2022 was illegal
4. A declaration that the issuance of interdiction letters by the Acting County Secretary was illegal.
5. A declaration that advertising and conducting of interviews for the jobs/positions that were held by the appellants was illegal.
6. A declaration that the disciplinary process against the appellants has not been concluded and the appellants ought to be given a fair hearing in accordance with the Provisions of the Employment Act.
7. A declaration that the County Public Service Board Bungoma County cannot issue the appointment letters for the positions held by the applicants as the disciplinary process is not concluded.

Your Ladyship, the above reliefs are not what you are being asked to determine. What is before you is a Miscellaneous Application in which the applicants are seeking for conservatory orders as the substantive issues are being addressed by the Public Service Commission.

The Applicants have exhausted the procedure available to them at the Commission. They duly filed an application on 14th April 2023 seeking conservatory orders and it is only after the commission failed to act on the same that they moved this Honourable Court. The Respondents are duly aware of this but they have chosen to ignore the same and filed a Preliminary Objection clearly based on false and misguided grounds. The Respondents are not disputing that the Public Service Commission is not making a determination on the issue of interim reliefs. In fact the Public Service Commission has since written to parties vide a correspondence dated 10th May 2023 asking them to make written submissions on the Appeal. As such the issue of interim reliefs is not pending determination before any other forum.

Your Lordship, we agree with the holding in the case of **Geoffrey Muthinji & Another V Samuel Henry & 7 Others (2015) eKLR**, where the court held that it is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked, and that, courts ought to be a fora of last resort, and not the first port of call the moment a storm brews. In a further case of **Republic v National Environment Management Authority Ex Parte Sound Equipment Ltd [2011] eKLR**, the Court of Appeal held that a party should not be allowed to bypass the statutory appellate process provided under the County Governments Act, and the Public Service Commission Act, save in exceptional circumstances.

The above cases amplify the doctrine of exhaustion, a fact that the Applicants are aware of and have fully complied with. Noting that the Public Service Commission did not deal with the issue of interim reliefs,

then this court could properly be moved to ensure the ends of justice are met even as the substantive issues are being determined by the Public Service Commission.

Your Ladyship we have considered your decision in ***Oliver Mukhebi & 28 others v County Public Service Board of Bungoma & another [2022] eKLR*** where you respectifully departed from your sister's decision in ***Zena Achieng Mohammed -vs- County Public Service Board of Kilifi and 6 Others (2021)*** **eKLR.** In Oliver Mukhebi's case it was your finding that you had no jurisdiction over the subject matter which was to set aside employment contracts for successful ward administrators. Your Ladyship in this instant case, employment letters have not yet been issued and if they had been issued, then the applicants would have approached this court with a different cause of action for unlawful termination. The Oliver Mukhebi case is further distinct from this since in this instant case Your Ladyship actually has jurisdiction only that exercising of the same is subject to the doctrine of exhaustion, which is what the applicants are doing.

Lastly on this issue, we submit that this court is called upon to consider the provisions of Section 12(5)of the Employment and Labour Relations Court Act which provides that

5) The Court shall have jurisdiction to hear and determine appeals arising from -
   (a) Decisions of the Registrar of Trade Unions; and
   (b) Decisions of any other local tribunal or commission as may be prescribed under any written law.

It cannot therefor be argued that the issues before the commission are issues which you are divested of jurisdiction. This court has jusrdiction to handle the issues only that the applicant must have first approached the commission.

4. <u>The Ruling of the court dated 23rd March 2023</u>

Justice Jemimah Keli vide the ruling dated 23rd March 2023 held that the petition by the Applicants is premature and the same ought to have been filed before the Public Service Commissions on the basis of section 77 of the County Governments Act, 2012 and Sections 85, 86(1) and 87(2) of the Public Service Commission Act, 2017. The Applicants duly complied with these directions and filed an appeal before the Commission. The said appeal is annexed to the Notice of Motion Application dated 20th April 2023 as **EXHIBIT 9.**

Your Lordship, the Notice of Motion Application dated 20th April 2023 that is before you is an Application

seeking conservatory orders and NOT a replication of the appeal before the Commission. As has been extensively discussed above, the Applicants have complied with the exhaustion doctrine and the instant application seeks conservatory orders on account of the fact that the Commission lacks the requisite powers to grant the conservatory orders.

The reading of the ruling dated 23rd March 2023 is clearly with reference to the Petition that was filed by the Applicants, which was later accordingly commenced as an appeal before the Commission. The Appeal before the Commission and the Application are entirely different proceedings seeking different orders. While the Appeal seeks final orders which the Commission is empowered to grant, the Notice of Motion Application dated 20th April 2023 seeks interim conservatory which only this Honourable is empowered to grant.

Jurisdiction only became an issue during the filing of the premature petition, an issue which does not in any way arise in the instant application given that Applicants have exhausted other administrative avenues before coming to court. Again, the Respondents are aware of this and the Preliminary Objection is only designed to impede the hearing of the Application by the Applicants so as to enable the Respondents to unfairly replace the Applicants from their jobs. If the Preliminary Objection is allowed, then nothing stops the Respondents from confirming the appointment of nominees who will go on to take the Applicants' jobs and essentially render the Appeal at the Commission nugatory and a pure academic exercise.

5. <u>Ground that the proceedings are sub-judice</u>

Under Ground 5 of their Preliminary Objection, the Respondents contend that the proceedings are sub-judice to the similar proceedings filed on 14th April 2023 by the Applicants against the Respondents before the Public Service Commission.

Your Lordship, the Applicants on 14th April 2023 filed an Application and an Appeal before the Commission. The Appeal filed on 14th April 2023 before the Public Service Commission seeks final declaratory orders against the Respondents regarding issues such as illegal issuance of compulsory leave letters, illegal extension of compulsory leave, illegal issuance of interdiction letters, advertising and interviewing for the Applicants' positions, need for a disciplinary process and the issue of the purported issuance of appointment letters. The Application that was filed on 14th April 2023 before the Commission sought interim conservatory orders and the same was never determined as the Commission orally communicated that it lacks the powers to grant conservatory orders and it follows that this Honourable Court is the forum rightly empowered to grant the conservatory orders. The only subsisting proceedings before the Commission is the Appeal which clearly seeks final orders.

On the other hand, the Notice of Motion Application dated 20th April 2023 before this Honourable Court seeks issuance of interim conservatory orders pending the hearing and determination of the Appeal before the Public Service Commission. In no way are the proceedings in the two fora similar. Whereas one seeks final orders, the other seeks conservatory orders to protect the subject matter of the Appeal.

In the case of David Ndii & others vs. Attorney General & others [2021 eKLR, the learned Judges in granting Conservatory Orders held that;

> *"... Such orders are granted to preserve the substratum of the Petition and therefore, where it is contended that there is a threat of violation of the Constitution, any stage in the chain of a constitutional process under challenge may properly be the subject of a conservatory order as long as that action is consequential to the process under challenge..."*

The Public Service Commission either declined to exercise, or lacks the power to grant conservatory orders and this was relayed to the Applicants when they went seeking conservatory orders before the Commission. As such, the Applicants have approached this Honourable, not seeking final orders encapsulated in the Appeal but conservatory orders that the Commission lacks powers to grant.

Justice Mativo in Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR had this to say about the criteria for determining the issue of sub-judice:

> "Paraphrasing what I said in the above case, the key words in applying *sub judice* rule is that *"the matter in issue is directly and substantially in issue in the previously instituted suit."* The test for applicability of the *sub judice rule* is whether on a final decision being reached in the previously instituted suit, such decision would operate as *res-judicata* in the subsequent suit.
>
> At the risk of repeating myself, for the doctrine of *sub judice* to apply the following principles ought to be present:- (a) There must exist two or more suits filed consecutively; (b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

In distilling the above position, we wish to further clarify that firstly, the matter in issue in the Appeal before the Commission are not directly and substantially in issue in the Application before the Court.

Whereas the Appeal is concerned with final declaratory orders, the Application before this Court is concerned with interim conservatory orders. Secondly, the granting of the conservatory orders as per the Application before this Court will not in any way dispense off with the proceedings at the Appeal or operate as res judicata.

Thirdly, the two proceedings are not before two Courts/fora having jurisdiction to grant the relief sought. This is because it has already been determined that the Commission has no jurisdiction and cannot grant conservatory orders. If at all the Commission had powers to grant the said orders, the same would have been granted in the Application that was before the Commission and there would have been no need to file an Application before the Court to seek the interim orders. As such, based on the foregoing, the issue of sub-judice does not arise in relation to the Application before this Honourable Court vis-à-vis the Appeal before the Commission.

On the issue application not being premised on an existing suit before this court

Your Ladyship, the objectors contend that there is no substantive suit filed to anchor the notice of motion. Whilst we confirm that this is true, we equally submit that the orders sought do not warrant the existence of a substantive suit. Under the Employment and Labour Relations Court (procedure) Rules 2016 defines a claim under section 2 to include **any** complaint, **application,** reference, **motion** or labour dispute referred to the Court by a party for adjudication under any written law; the same section equally defines "suit" to include a "claim" Your Ladyship, section 4 thereafter allows for referring of disputes to the court by filing of statement of "claim". An application has already been denied as part of what can constitute a claim. As such your Ladyship, the notice of motion before you is validly filed in court and it bears the substantive orders which you are called upon to determine. This should not be confused with the orders being sought at the commission. Should this Honourable court allow the application and grant prayers 5, 6 and 7, then the court will have substantively deal with the issues before it and the commission will be dealing with the issues before it. Your ladyship, it ought to be appreciated that our judicial system and indeed the creation of the Employment and Labour relations court are meant to be governed by the principle objective as provided in Section 3 of the act which is

> to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act.

Your Ladyship, the respondents want this court to give a blind eye to this hallowed principle and insist on technicalities which will only render the dispute unresolved . Unlike in the cited case of **Lukale Moses Sande v Governor of Kakamega (2022) Eklr,** the granting of the orders sought herein will not interfere

with the jurisdiction of the commission because the court will not be making a determination of the merits or otherwise of the case in the Commission. You are not being asked to determine whether a prima facie case has been established before you or before the commission. The applicants simply seek to have just, fair and equal playing field at the commission without the risk of having their appeal rendered nugatory should their positions be filled during the pendency of appeal. And your Ladyship we submit that justice will favour a situation where parties can have their disputes resolved fairly without undue duress and pressure.

Your Ladyship, not granting the orders sought herein will expose public servants to a judicial system that does not accord them any protection since they will not be able to approach the court directly (because of the doctrine of exhaustion) and they will not be able to get any conservatory orders (sisnce the commission has declined to exercise that jurisdiction)

Your Ladyship, the applicants cannot file another substantive suit before you where the notice of motion could be "anchored". The same would have been struck out. The only way to approach the court remains by way of a miscellaneous application.

On the 3rd and 4th Respondents

It is our submissions that the 3rd and 4th respondents have properly been joined in these proceedings since they are the ones who necessitated the need for these proceedings. The 4th respondent nominated the persons to replace the applicants and the 3rd respondent is the head of the county public service. As such the orders sought if granted should be executed and implemented by that office.

Analysis

Under Article 162(2)(a) of the Constitution, the Parliament is empowered to establish a court with the same status as the High Court to hear and determine disputes relating to employment and labour relations. Consequently, this Court was established under the Employment and Labour Relations Court Act. Section 12 (1) (a) of the Act, grants this Court exclusive original and appellate jurisdiction to hear and determine all disputes relating to or arising out of employment between an employer and an employee.

Under Articles 22(2)(c) and 258(2)(c) court proceedings may be instituted by a person acting in the public interest where a person's right or fundamental freedom in the Bill of Rights has been violated or denied or where the Constitution has been contravened or threatened with contravention. The Court in **Abdikadir Suleiman vs. County Government of Isiolo & Another [2015] eKLR** held-

"...The original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the Constitution and enforcement of the Constitution under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court's jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of the Constitution and as amplified in the Employment and Labour Relations Court Act, 2011 and not the remedies sought or the procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant."

In view of the foregoing, this Court has the jurisdiction to hear and determine the Application dated 20th April 2023 whether the issues arising relate to employment law, policy or individual public officer's grievances, the jurisdiction of the Court would properly be available in that regard.

Your Lordship, we further wish to draw this Honourable Court's attention to the turn of events occasioned by the Respondents which are prejudicial to the Applicants. Notwithstanding the fact that there is an Appeal before the Commission, the Respondents have gone ahead to announce nominated person to take up the jobs held by the Applicants. The 1st Respondent has invited the nominees for the various chief officers for vetting. This is in blatant disregard and violation of the rights of the Applicants who are still lawfully employed. The Applicants' employment has not been terminated yet they are being replaced. The filing of the Preliminary Objection is in itself a ploy designed by the Respondent to drag the matter to give them ample time to appoint the replacement in violation of the Applicants' rights. It is only proper that the conservatory orders be granted barring the Respondents from appointing the nominated persons until the Appeal at the Commission has been heard and determined.

The Court in Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW) [2016] eKLR defined a conservatory order as follows: -

"A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter."

In Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR the Court had the following to say about the nature of conservatory orders:

> "Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."

The law on conservatory orders is now well settled in this jurisdiction and is backed by myriads of authorities for instance, in Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others (2017) eKLR the Court was emphatic that:-

> *"A party who moves the court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition."*

Your Lordship, not only does this Honourable have the jurisdiction to determine the Application dated 20th April 2023 but the Applicants have met the threshold for granting the conservatory orders against the Respondents. The Applicants have an arguable prima facie case with a likelihood of success and in the absence of the conservatory orders, the Applicants run the risk of being replaced in their jobs without legal employment requirements being followed. The denial of the conservatory reliefs will pave way for the Respondents to appoint persons in positions already held by the Applicants, a fact that will be in violation of the constitutional values and objects of the rights and freedoms of the Applicants in the Bill of Rights. Further, in the event that the interim conservatory orders are not granted the Appeal before the Commission will be wholly rendered nugatory. Lastly, public interest will be served by the decision of this Court to strike out the Preliminary Objection and grant the conservatory orders.

CONCLUSION

Your Lordship, the Applicants have come to the court for redress with clean hands, the motive being to assist the court reach a fair and just outcome having considered the facts and circumstance of the Appeal before the Public Service Commission as well as the Application dated 20th April 2023 before this Honourable Court.

On the other hand, the Respondents have embarked on forcefully trying to replace the Applicants from the jobs that they lawfully hold. Despite there being an Appeal before the Commission, the Respondents have announced that nominated persons will be taking over the positions held by the Applicants. The nominees have since been invited for vetting and subsequent appointment. The basis of the present Preliminary Objection is to drag the Application dated 20th April 2023 to give time for appointments to be made. The grounds therein are clearly falsified as the Applicants have clearly complied with the doctrine of exhaustion and have brought the Application before this court, the Commission having ruled that its has no powers to grant the conservatory orders

We invite your Lordship, to invoke your discretionary powers flowing from **Order 45, Rule 1(b) of the Civil Procedure Rules** and **Article 159 (2) (d) of the constitution of Kenya 2010** that provides that:

"(2) (d) Justice shall be administered without undue regard to procedural technicalities"

By dint of the above, it is the Applicants' submission that this Honourable Court has the requisite jurisdiction to hear and determine the Application dated 20th April 2023 and on that basis, the court be pleased to strike out the Preliminary Objection for being an abuse of court process and fix the Application dated 20th April 2023 for hearing on its merits.

Most obliged.

DATED at **NAKURU** this **22th** day of **May** 2023.

MURIMI, NDUMIA, MBAGO & MUCHELA,
ADVOCATES FOR THE APPLICANTS

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COUNTY ASSEMBLY OF BUNGOMA

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT BUNGOMA

PETITION NO. E009 OF 2021

CATHERINE GATHONI OTENYO.....PETITIONER

VERSUS

THE GOVERNOR,

COUNTY GOVERNMENT OF KAKAMEGA.....1ST RESPONDENT

THE KAKAMEGA COUNTY PUBLIC SERVICE

BOARD.....2ND RESPONDENT

THE COUNTY GOVERNMENT OF KAKAMEGA.....3RD RESPONDENT

CATHERINE RAINI OMWENO.....4TH RESPONDENT

RULING

1. The Ruling is on the Notice of Preliminary Objection dated 12th November 2021 against the Notice of Motion Application by the Petitioner dated 1st November 2021 filed by Law firm of Behan & Okero Advocates seeking the following reliefs: -

(a) Service of this Application be dispensed with for the hearing hereof exparte in the first instance for the issue of temporary orders in terms of prayer 2 pending the hearing inter parties hereof.

(b) Conservatory orders do issue against the Respondents restraining them, their employees, servants and/or agents from advertising for applications to the office of Secretary and Chief Executive Officer of the Kakamega County Public Service Board and from taking any step towards the recruitment or installation of the Petitioner's replacement as Secretary and Chief Executive Officer of the Kakamega County Public Service Board pending the hearing and determination of the Petitioner's appeal to the Public Service Commission from the purported termination of her appointment as such and removal from said office.

2. The Application is supported by the affidavit of Catherine Gathoni Otenyo, the Petitioner, sworn on the 1st November, 2021 and grounds stated therein. The Applicant annexed documents in support of the Application to her Affidavit. Together with the Application the Applicant filed Petition dated 1st November 2021 and filed on the 4th November 2021.

3. Prayer 1 of the Application is spent.

4. The Respondents through the County Attorney Office entered appearance and filed Notice of Preliminary Objection in response to the Application dated 12th November 2021 . The Respondent seeks for the striking out of the Application on the following grounds:-

(a) That the matter has been commenced unprocedurally and is thus fatally defective as there is no petition properly before court for determination.

(b) That the application as filed offends Rule 7 (1) of the Employment and Labour Relations Court(Procedure) Rules, 2016 and rules 10 (1) and 19 of the Constitution of Kenya (protection of Rights and Fundamental Freedoms) practice and Procedure Rules, 2013 for being filed without a substantive petition outlining the alleged contravention of rights or fundamental freedoms rendering it incurable, untenable and a clear abuse of court process.

(c) That this Honourable Court lacks jurisdiction to entertain this petition as (by the Petitioner's own admission), an appeal brought under the provisions of Section 77 of the County Government Act, 2012 is currently pending before the Public Service Commission and the Petitioner seeks to mischievously to bypass the available mandatory alternative employee disciplinary mechanisms as provided for by the following provisions of the law namely:-

- Article 234(2)(a)(c) of the Constitution of Kenya

- Sections 85(c) and 87(2) of the Public Service Commission Act, 2017 which provides for hearing and determination of appeals in respect of County Government Public Service by the Public Service Commission and prohibits any legal proceedings in any court of law before exhaustion of the procedure therein.

d. That Regulations 9,10,11,12,13,15,16, 17 and 21 of the Public Service Commission (County Government Public Services Appeals Procedures) Regulations, 2016 provides for the procedure of lodging and Hearing appeals and the timelines involved in an appeal before the Public Service Commission.

e. That the Application and this matter is premature , misplaced, incurably defective , incompetent, a blatant abuse of court process and cannot stand on its feet thus ripe for striking out with costs.

5. On the 11th February 2022 the court gave directions for the Preliminary Objection to be canvassed by way of written submissions. The parties filed their written submissions. The Applicant's /Petitioner submissions are dated 14th January 2022 and filed on same date. The Respondent's submissions are dated 22nd December 2021 and filed in court on the 6th January 2022.

DETERMINATION

6. On Grounds 1 and 2 of the Preliminary Objection.

The Respondent objects to the Application for being fatally defective and for being filed without a substantive petition. The court on Perusal finds that the Applicant filed a Petition dated 1st March 2022 on the 4th November 2021 concurrently or together with the Application.

The Respondent submits that there ought to be a petition under Rule 7 (1) of the Employment and Labour Relations Court (Procedure Rules) 2016 and Rules 10 (1) (19) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 and this the application is defective for being filed without a substantive petition outlining the alleged contravention. The Petitioner/ Applicant submits that Grounds 1 and 2 of the preliminary objection are based on factual misrepresentation and relies on the Petition dated 1st November 2021 filed together with the Application.

7. The court on perusal of the pleadings finds that the Applicant filed a Petition on 4th November 2021. The Petitioner pleads on matters within the jurisdiction of the Public Service Commission as they all concern her terms of service and states her grievance. The court finds that there is a petition on record hence no basis for grounds 1 and 2 of the Preliminary Objection.

8. Grounds 3 and 4 relate to the question of jurisdiction of the Court to grant the Conservatory order sought under the Application.

The Respondent submits that an appeal is pending before the Public Service Commission (PSC) under Section 77 of the County Governments Act 2012. That the Public Service Commission jurisdiction to handle appeals in respect of decision of County Governments Public Service Board is provided for under Article 234 (2) (a) (c) of the Constitution of Kenya and Section 85 (c) and 87 (2) of the Public Service Commission Act of 2017.

The Respondent further submits that Regulations 9,10,11,12,13 15,16.17 & 21 of the Public Service Commission (County Government Public Services Appeals) Procedural Regulations 2016 provide for the procedure of lodging and hearing appeal and the timeline involved in an appeal before the Public Service Commission. The Respondent submits that Article 234 (2) (a) (i) of the Constitution is couched in mandatory terms. The Respondent submits that the Applicant rightly filed appeal before Public Service Commission but jumbed gun by filing instant application before the outcome of the appeal by Public Service Commission.

9. The Court opines the grounds 3 & 4 raised question of the jurisdiction this court. The Applicant submits that the petitioner does not seek by the Petition a resolution as to whether or not the termination was lawful. That is not the issue before court. The Applicant submits that the relief sought concerns only the issuance of conservatory orders pending hearing and determination of her appeal aforesaid to preclude recruitment of her successor, which order she submits the Public Service Commission has no power or jurisdiction to grant. The Applicant relies on the decision of Justice *Byran Ongaya in Abdikadir Suleiman -vs- County Government of Isiolo & Another (2015) eKLR* where the Judge held at page 3 last paragraph as highlighted that, in part, " *It is this court's opinion and holding that in appeals to the Commission, the Commission can only make decisions that the County Public Service Board or relevant lawful authority could have made or vary such decision by simply setting aside or making a decision that was in the Board's or the other relevant lawful authority's jurisdiction to make. .*

The court has guided itself that on appeal the appellate authority applies the same substantive law and facts as applied by the Primary authority that made the decision appealed against and generally considers facts as they were presented before the primary authority so that the appellate authority in absence of anything else may only set aside the decision appealed against or substitute the decision with any of the remedies that the primary authority was empowered to make, in other words, the appeal process deals with the merits or substance of the case and not procedural or legal propriety of the case".

10. The court in that case held it had jurisdiction on the claim on merit as constitutional and legality issues on the dismissal were raised. This court is not pursued with the opinion of that court as such action by the Court is tantamount to meddling with the jurisdiction of the Public Service Commission as granted under the constitution and statutes. Further, the court also notes that the cited case is different from the instant case as the appeal is pending before the Public Service Commission.

11. This court has in the recent past addressed itself on similar application and held it has no jurisdiction to grant conservatory orders on matters falling under Public Service Commission jurisdiction pursuant to Section 77 of the County Governments Act, 2012. In the Case of *Oliver Mukhebi & 28 others -vs- County Public Service Board of Bungoma & Another* (2022) e*KLR*, this court considered in detail the jurisdiction of this court on a similar application . In that case the court upheld the decision in *Owners of the Motor vessel " Lilian S" -vs- Caltex Oil (Kenya) ltd (1989*) e*KLR* the decision of Nyarangi JA on jurisdiction being everything and that without it the court must down its tools.

12. The court appreciated it has original and appellate jurisdiction in all Employment and Labour matters including Constitutional issues under such matters pursuant to Article 162 (2) (b) of the Constitution. In the *Oliver Mukhebi Case (supra*) the court considered the decision of the Court of Appeal in the case of *Secretary County Public Service Board and another -vs- Hulbhai Gedi Abdalla (2017) eKLR Makhandia, Ouko, Minoti (JA*) where the court allowed appeal as Respondent had failed to utilize the process under Section 77 of the County Government Act. The Court of Appeal also further stated that Section 77 of County Governments Act has placed no fetter to the jurisdiction of the Public Service Commission. Since there is no fetter to its powers, this court is of the considered opinion that the conservatory orders sought by the Petitioner from this court to preserve a position is not merited.

13. In the aforesaid *Oliver Mukhebi case*, the court opined that for it to grant conservatory order as sought it needed to establish there is a prima facie case in the appeal and without jurisdiction over the appeal against the decision of the Respondent. It has no way of establishing a prima facie case within the threshold established under the Giella Cassman Brown Case. The court found it had no basis to grant the conservatory order as doing so would be tantamount to usurping or meddling with the jurisdiction of Public

Service Commission.

14. This court has not found a reason in the instant application to deviate from the Oliver Mukhebi case decision in the instant case. The Court upholds its own decision in *Oliver Mukhebi & 28 others -vs- County Public Service Board of Bungoma & Another* (2022) e*KLR*, and holds it has no jurisdiction to grant the conservatory orders sought in the Application and Petition and upholds the Preliminary Objection on basis of lack of jurisdiction.

15. Consequently the Application dated 1st November 2021 is dismissed and the Petition dated 1st November 2021 struck off.

16. Costs to the Respondent.

17. The orders of this court dated 5th November 2021 are hereby vacated.

DATED, SIGNED AND DELIVERED AT BUNGOMA COURT THIS 17TH DAY MARCH, 2022.

J.W.KELI,

JUDGE.

IN THE PRESENCE OF:-

COURT ASSISTANT: MS WESONGA

FOR APPLICANT /PETITIONER: MR. OKERO.

FOR RESPONDENT: WABUKO holding brief for MMBAKA ADVOCATES

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Ojwang & Wanjala, SCJJ.)

APPLICATION NO. 5 OF 2014

-BETWEEN-

GATIRAU PETER MUNYA..... APPLICANT

-AND-

DICKSON MWENDA KITHINJI.....RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....RESPONDENT

FREDRICK NJERU KAMUNDI COUNTY RETURNING

OFFICER, MERU COUNTY.....RESPONDENT

RULING

A. INTRODUCTION

[1] This is an application by way of Notice of Motion under certificate of urgency

seeking Orders from this Court to:

a. stay the execution of the judgment and order of the Court of Appeal at Nyeri in *Civil Appeal No. 38 of 2013* pending the hearing and determination of an appeal against the said judgment;

b. stop the Independent Electoral and Boundaries Commission (IEBC) from declaring the Meru County gubernatorial office vacant pending the hearing and determination of the appeal;

c. stop the Speaker of the County Assembly of Meru from assuming the Office of Governor pending the hearing and determination of the appeal; and

d. stop IEBC from announcing and/or conducting the gubernatorial elections for Meru County pending the hearing and determination of the appeal.

[2] The applicant has filed an appeal seeking to set aside the whole judgment of the Court of Appeal in *Civil Appeal No.38 of 2013* at Nyeri dated 12th March, 2014.

[3] On 20th March, 2014 Wanjala SCJ, having heard Senior Counsel, Mr. Omogeni for the applicant, certified the application as urgent. The Hon. Judge directed the applicant to serve all the respondents and ordered the parties to appear before a two-Judge Bench of the Court for an *inter partes* hearing on 21st of March, 2014. He declined to issue a one-day conservatory order, since the matter had already been certified as urgent.

[4] Mr. Omogeni filed written submissions in support of the application on 21st March 2014, while Mr. Muthomi for the 1st respondent filed a preliminary objection to the application and intended appeal, on the same date. The 1st respondent contended that this Court lacked jurisdiction to entertain the application and the intended appeal. The gist of the preliminary objection was that the appeal, not being one concerning the interpretation or application of the Constitution, could not be brought under Article 163 (4) (a) of the Constitution; and neither could the appeal be brought under Article 163 (4) (b) of the Constitution, since the requisite certification had not be sought and obtained by the applicant from the Court of Appeal.

B. BACKGROUND

[5] The applicant was declared the duly elected Governor of Meru County after the Meru gubernatorial elections held on 4th March, 2013. He won the election by 3,436 votes, which translates to a margin of 0.819%. The 1st respondent, a registered voter in North Imenti Constituency in Meru County, filed a petition in the High Court at Meru on 26th March 2013 seeking a nullification of the election results. The petitioner alleged that the election was marred by voter bribery, violence, intimidation, harassment, electoral malpractices, undue influence, discrepancy in the results announced, and contraventions of the regulations governing elections.

[6] The petitioner sought, *inter alia* (i) an immediate scrutiny and recount of the votes cast in Imenti South, Tigania East, Igembe South and Buuri Constituencies; (ii) a declaration that the applicant, Mr. Munya, was not validly elected as Governor of Meru County; and (iii) a declaration that the election for Governor of Meru County was a sham and was, therefore, void.

[7] The respondents in that case argued that the elections were free and fair, and that any non-compliance with the law was insignificant, and did not materially affect the outcome of the election. They urged the court to dismiss the petition.

[8] The Court identified three issues for determination: (i) whether Mr. Munya (the applicant in this case) committed electoral offences and malpractices; (ii) whether IEBC and the Meru County Returning Officer conducted the elections in contravention of the Constitution and the Electoral Laws; and (iii) if the elections were not conducted in accordance with the principles of the Constitution and written law, whether the said non-compliance materially affected the election results.

[9] The Court (Makau J), heard the petitioner's allegations and on 23rd September, 2013 dismissed the petition, and confirmed the applicant as the duly-elected Governor of Meru County. Aggrieved by this decision, the 1st respondent appealed to the Court of Appeal (in Nyeri *Civil Appeal No. 38 of 2013*).

[10] At the Court of Appeal the 1st respondent sought, *inter alia*, (i) the setting aside of the judgment and orders made by the High Court on 23rd September 2013; and (ii) a declaration that Mr. Munya had not been validly elected as Governor of Meru County.

[11] The matter was heard before a three-Judge Bench: Visram, Mohammed and Odek JJA. The Court identified three issues as central to the appeal before it: (i) whether the errors and irregularities disclosed by the evidence on record materially affected the quantitative margin and the qualitative aspects of the election; (ii) whether the trial judge was right in ordering a scrutiny and recount of only 7 polling stations; and (iii) whether the trial judge independently evaluated the evidence on record.

[12] The Court of Appeal held that the results of the Meru gubernatorial elections were not verifiable by the paper-trail left behind. The Court came to this conclusion after applying the "qualitative and quantitative test," as required by law, and relying on the case of ***Winnie Babihuga v. Masiko Wimmie Komuhangi & Others***, HCT-00-CV-EP-0004-2001, which held that the quantitative test is most relevant where numbers and figures are in question; and the qualitative test is most suitable where the quality of the entire election process is questioned, and the Court has to determine whether or not the election was free and fair.

[13] The Court further held that the trial Judge had erred in ordering a scrutiny and recount in only 7 polling stations, as opposed to the four constituencies cited by the petitioner. The Court also held that the trial Judge did not independently evaluate the evidence on record, and appeared to rely on the submissions of the respondent to the extent of including errors found in the respondent's written submissions.

[14] The Court of Appeal held that: the declared results of the Meru gubernatorial elections were not accurate, verifiable and accountable; the tallying process was not efficient and accurate; the trial judge erred and misdirected himself in finding that a margin of 0.819% could be described as wide; quantitatively, the errors and irregularities disclosed materially affected the results of the elections, given the margin between the winner and the runner-up; the trial judge erred in denying the appellant the right to cross-examine one of the defence witnesses.

[15] The Court of Appeal set aside the High Court's judgment, and declared that the Meru gubernatorial election did not meet the threshold of Article 81(e)(iv) and (v) and Article 86 of the Constitution. The appeal was allowed, and the election of Mr. Munya as Governor of Meru County declared null and void.

[16] Aggrieved by the said judgment, the appellant, on 20th March, 2014, filed a Notice of Motion under certificate of urgency at the Supreme Court – hence these proceedings. After hearing the submissions by the applicant and respondents, on all interlocutory matters including the preliminary objection by the 1st respondent, Ojwang and Wanjala SCJJ set the Ruling for today, 2nd March, 2014. The Hon. Judges ordered the *status quo* to be maintained, and the swearing in of the Speaker of the County Assembly as acting Governor, to remain in abeyance until the Ruling.

C. THE PARTIES' RESPECTIVE CASES

i. The Applicant

[17] Senior Counsel, Prof. Tom Ojienda, for the applicant, commenced his submissions by laying the basis for the application for stay dated 20th March, 2014. Counsel submitted that the application was anchored upon Section 21 (1) (b) and (2) of the Supreme Court Act, 2011 (the Supreme Court Act) as read together with Rule 23 of the Supreme Court Rules, 2012 (the Supreme Court Rules) which allow the Supreme Court to hear interlocutory applications. The application sought: an Order of stay against execution of the Orders of the Court of Appeal in ***Dickson Mwenda Kithinji v. Gatirau Peter Munya & 2 Others,*** *Nyeri Civil Appeal No. 38 of 2013* issued on 12th March 2014; an Order stopping the IEBC

from certifying the gubernatorial seat of Meru County vacant; an Order stopping the Speaker of the Meru County Assembly from assuming office as the Governor of Meru County; and an Order stopping the IEBC from announcing or conducting gubernatorial elections for Meru County.

[18] Counsel submitted that the Court had the competence and jurisdiction to entertain the application for stay, provided it was properly demonstrated that: the appeal raised triable issues with a high chance of success; the balance of convenience tilted in favour of granting the orders sought; there was a possibility of the appeal being rendered nugatory if the Court failed to grant the Orders sought; and finally, a demonstration that there was need for the Court to carefully balance the interests of the parties at play.

[19] Counsel urged the Court to apply the guiding principle regarding the grant of interlocutory orders which had been laid down in the case of ***Board of Governors, Moi High School Kabarak & Another v. Malcolm Bell,*** *SC Petition No 6 & 7 of 2013 [2013] eKLR,* as the guiding precedent on this limb. He urged that, for the Court to grant a stay, it would exercise the same power as that exercised by the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules. However, counsel submitted, the proper forum to lodge such an application would be the Supreme Court and not the Court of Appeal, where an appeal lies at the Supreme Court. In particular, he referred to the Court's holding that:

"where the Supreme Court has appellate jurisdiction derived from the Constitution and the law, it is equally empowered not only to exercise its inherent jurisdiction, but also to make any essential or ancillary orders such as will enable it to sustain its constitutional mandate as the ultimate judicial forum. A typical instance of such exercise of ancillary power is that of safeguarding the character and integrity of the subject-matter of the appeal, pending the resolution of the contested issues."

[20] To buttress his argument, Prof. Ojienda also cited as persuasive authority, the American case of ***Nken v. Holder 556 U.S. 418 (2009);*** before granting a stay, a Court had to consider: *whether the stay-applicant has made a strong case showing that he is likely to succeed on the merits; whether the applicant will be irreparably injured, absent a stay; whether the issuance of a stay order will substantially injure the other parties interested in the proceedings;* and *where the public interest lies.* Counsel sought to extrapolate these principles to the application by referring to the provisions of *Article 182* of the Constitution and in particular, *Article 182(4).* He submitted that the swearing in of the Speaker of Meru County as Governor was set to take place on 24th March, 2014. Thereafter, the mechanics of time requiring IEBC to conduct elections within 60 days would begin. Therefore, it was urged, a grant of stay was critical, to shield the applicant from suffering "irreparable injury".

[20A] Specifically, counsel made reference to Article 182 of the Constitution, which provide as follows:

"....

(4) If a vacancy occurs in the office of county governor and that of deputy county governor, or if the deputy county governor is unable to act, the speaker of the county assembly shall act as county governor.

(5) If a vacancy occurs in the circumstances contemplated by clause (4), an election to the office of county governor shall be held within sixty days after the speaker assumes the office of county governor.

(6) A person who assumes the office of county governor under this Article shall, unless otherwise removed from office under this Constitution, hold office until the newly elected county governor assumes office following the next election held under Article 180 (1)".

[21] In addition, counsel submitted that another apparent effect if stay is not granted, under the provisions of the County Governments Act, 2012 (Act No. 17 of 2012) (the County Governments Act), would be that the Governor of Meru County, the Executive Committee and all members of staff serving under the said officer would be out of office and, therefore, all transactions within the County would stall in substance until a Governor was elected.

[22] Counsel also submitted that the Court of Appeal had considered issues of fact, as opposed to law, contrary to the provisions of Section 85A of the Elections Act, (Act No. 24 of 2011) (the Elections Act), during the hearing and determination of the appeal.

[22A] The said Section (85A) provides as follows:

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

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

*(b) heard and determined within six months of the filing of the appeal" [*Emphasis supplied].

[23] In this regard, counsel submitted that the Court of Appeal in reopening the evidence, had disregarded its own decision in the case of ***Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 Others*** *Civil Appeal No. 36 of 2013; [2014] eKLR,* where, in urging caution as to how the Court should approach issues law and fact, it stated as follows:

"This caution is of greater significance in an appeal such as the one before us where the right of appeal is limited to matters of law only, because the jurisdiction of this Court to draw its own conclusions can only apply to conclusions of law. We must therefore be careful to isolate conclusions of law from conclusions of facts, and only interfere if two conditions are met. Firstly, that the conclusions are conclusions of law, and that secondly, the conclusions of law arrived at cannot reasonably be drawn from findings of the lower Court on the facts."

[24] He further submitted that the Court of Appeal in its judgment had shifted the burden of proof by holding that the respondent (the applicant herein) had the onus of proving the allegations mounted by a petitioner (the 1st respondent herein). In the circumstances, counsel urged that the appeal before the Court raises substantive issues of non-compliance with the terms of the Constitution.

[25] In his response to the issues raised in the preliminary objection, regarding the jurisdiction of the Court, counsel cited the case of ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others,*** *Petition No. 10 of 2013, urging* that the Supreme Court had jurisdiction to entertain the appeal before it. He argued that the Court in the ***Joho case*** had embraced a purposive interpretation of the Constitution, and held that where there were issues of law before the appellate Court, a direct appeal lay to the Supreme Court. He cited Article 163(4)(a) of the Constitution, arguing that so long as the Constitution had been applied or interpreted by the High Court or Court of Appeal, then an appeal lay directly to the Supreme Court. In this regard, counsel submitted that the Court of Appeal had interpreted *Articles 81(e)* and *86* of the Constitution.

[25A] Article 163(4) of the Constitution thus provides:

"Appeals shall lie from the Court of Appeal to the Supreme Court—

(a) as of right in any case involving the interpretation or application of this Constitution; and

(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)."

[26] Counsel submitted that the Court of Appeal had also interpreted Section 85A of the Elections Act, and fell into error by purporting to legislate, giving Rule 33 (4) of the Elections (Parliamentary and County Election) Petition Rules, 2013 a new meaning, by substituting *"polling stations"* with "*constituency";* and such action, it was urged, violated the provisions of *Articles 94(1), 1(2), 3(a) and 87(1) of the Constitution.* In this regard, counsel urged, the Court contravened the provisions of *Article 87(1)* of the Constitution and *Section 96 of* the Elections Act, which provisions formed a substantial part of the Court's judgement. Counsel submitted that, in the circumstances, the Court of Appeal had been engaged, on a substantial scale, in the *interpretation of the Constitution.*

[27] In addition, counsel submitted that the Court of Appeal had disregarded the provisions of *Articles 50(1) and 25* of the Constitution, by making a *fact-related* finding, that certain bits of evidence had been struck out of the record – while such was not the case. According to counsel, this had compromised the applicant's right to fair trial, and was compounded by the fact that the *notion of exclusion of evidence* influenced the decision of the Court of Appeal. As a result, counsel submitted, there was a *prima facie* case, and that the balance of convenience tilted in favour of granting stay orders.

[28] Learned Senior Counsel, Mr. Omogeni appearing with learned Senior Counsel, Prof. Ojienda, questioned the findings by the Court of Appeal regarding the evidence of DW10. He submitted that DW10, contrary to the findings by the Court, had been cross-examined at length on the contents of his affidavit. He referred to *page 173 of Volume 1 of the record* to support his contention. He submitted that DW10 and not DW8 was the witness who had annexed to the depositions Forms 35 and 36 which were used in the trial Court. Counsel submitted that the finding by the Court of Appeal that DW10 was never cross-examined on the contents of Form 35 was a misinterpretation of the trial record. Further, counsel urged, the fact that the Court of Appeal held the alleged omission to be a critical aspect of the appeal, prejudiced the applicant and compromised his right to fair trial. Counsel referred to *Volume 4 of the record (page 510)* to show the Court that the affidavit of DW8 did not contain an annexation of Forms 35 and 36, and urged that the Court of Appeal, in the circumstances, misdirected itself by finding that this witness ought to have been cross-examined.

[29] Counsel also submitted that the Court of Appeal at *page 111 of its judgement,* had misdirected itself by finding that the appellant's (the 1st respondent herein) annexures, *DMK2, DMK3 and DMK4* had been expunged from the record at the High Court, whereas this was not the case.

[29A] The impugned part of the judgement of the Court of Appeal (para.159) thus reads:

".....The trial Judge could not properly make a determination on the weight to be given to exhibits DMK2, DMK3 and DMK4 in relation to the alleged irregularities and malpractices after striking these exhibits from the record and denying himself the opportunity to test in judicial proceedings the veracity of the allegations made....."

[30] As a consequence of the said misdirection by the Court, counsel submitted that the applicant

had a sufficient basis for the contention that his right to fair trial had been violated, and that he was deprived of his seat as Governor of Meru County.

[31] In arguing that the balance of convenience was in favour of granting the application, counsel referred to the public nature of the office in question. He submitted that the balance of convenience would tilt in favour of preserving the *status quo,* to avoid unnecessary expenditure of public funds, when the petition of appeal could be heard and determined expeditiously. He submitted that the respondent stood to suffer no prejudice if orders of stay were granted, pending the hearing of an appeal which raised serious and substantial issues of law; and that it was relevant, in this regard, that the respondent had not been a contestant in the last general elections.

[32] Mr. Omogeni addressed the Court on the issue of violations of the Constitution, and the integral role of such violations in placing this matter within the scope of ***Article 163(4)(a).*** In this regard, counsel referred to the petition that had been instituted in the High Court. He referred to *paragraph 5b of the Petition appearing at pages 13 and 14 of Volume 4.* This paragraph challenged the conduct of the gubernatorial elections by the 2nd and 3rd respondents, as being inconsistent with *the Constitution.* Counsel further referred to *paragraph 5c*, and submitted that the petitioner's case before the High Court had been that the 2nd and 3rd respondents did not conduct the elections in accordance with *Articles 1, 3, 38 and 81 of the Constitution.* He referred to *paragraph 220 of the finding of the Court of Appeal at page 160 of the Judgement,* to argue that the sole basis for the nullification of the election by the Court of Appeal, was a finding on *constitutionality.*

The Court of Appeal thus held (para. 220):

"Based on the findings and reasoning stated above, we hereby set aside the judgment of the High Court dated 23rd September 2013 and set aside all consequential orders and decree made pursuant thereto. We declare that the Meru gubernatorial elections conducted on 4th March, 2013 did not meet the Constitutional threshold in Article 81 (e) (iv) & (v) and Article 86 of the Constitution by not being administered in an efficient, accurate and accountable manner..."

[33] Finally, counsel revisited the concept of public interest. He referred to the public profile of the Constitution of Kenya, and submitted that public funds ought to be saved, by halting any action occasioning substantial expense, pending final determination by the Court. He invoked *Article 201(d)* of the Constitution, to persuade the Court to halt any further activities occasioning the use of public money, pending the outcome of the substantive appeal.

ii. The 1st Respondent

[34] Counsel for the 1st respondent, Mr. Muthomi submitted that the central issue in the 1st respondent's preliminary objection was the jurisdiction of the Court to hear both the application and the substantive appeal. He submitted that not every Court of Appeal decision is amenable to challenge before the Supreme Court. Counsel submitted that the test for jurisdiction is not dependent on "how wrong or bungled the Court of Appeal decision is," or "how aggrieved the petitioner is by the Court of Appeal's decision"; rather, the true test is derived from the plain reading of *Article 163(4)(a)* and *(b)* of the Constitution, and the satisfaction of the two ingredients therein. Counsel urged that in this instance, only *Article 163(4)(a)* was applicable. He contended that the law-maker's policy was that the Supreme Court was not meant to hear just any appeal.

[35] Counsel submitted that the Supreme Court had provided a guiding principle with regard to its appellate jurisdiction in the case of ***Peter Oduor Ngoge v. The Hon Francis Ole Kaparo & 5***

Others, *Petition No. 2 of 2012* where the Court held as follows:

"In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs to resolve all matters turning on the technical complexity of the law, and only cardinal issues of law or of jurisprudential moment will deserve the further input of the Supreme Court" (Emphasis supplied).

[36] Counsel urged that "matters deserving further input from the Supreme Court" are only cardinal issues of law, or of jurisprudential moment, and not just ordinary issues of law. Counsel argued that in this instance, the Supreme Court was being asked to accept each and every matter of a political nature, yet such cases are not instances of cardinal jurisprudential moment. Counsel urged that if the Court allowed the appeal, then it would run the risk of opening a *floodgate of appeals* divorced from cardinal issues of law. Counsel submitted that all statutes are made pursuant to the Constitution, and that there is no general right of recourse to the Supreme Court. Counsel cited the case of ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board*** *SC Petition No. 5 of 2012; [2012] eKLR*, where the Supreme Court also considered the relevant issues of jurisdiction.

[37] Counsel submitted that given the broad outlook of the Constitution, the question posed was whether this appeal falls within the terms of *Article 163(4)(a)* of the Constitution. Counsel submitted that first, from the foregoing provision, it is anticipated that any grievance coming up before the Supreme Court is in the form of an appeal. Second, he urged, those constitutional provisions of relevance must have been canvassed and argued at the Court of Appeal; the lower Courts must have had the opportunity to pronounce themselves upon such constitutional issues.

[38] Counsel submitted that the applicant's object in invoking the Supreme Court's jurisdiction is that, the following provisions of the Constitution were allegedly breached: *Articles 25(c), 50(1), 87(1), 94(1), 123(4)(a), 159(2)(a), 27(1), 86(d), 88(5), 163(4)* and *163(7).* However, counsel contended, the dispute was not about the interpretation or application of the Constitution, because the applicant "did not complain, invoke, protest or otherwise raise any issue before the Court of Appeal", as to the several Articles now being relied upon. He submitted that the essence of the dispute at the High Court and the Court of Appeal was *whether the election was fair or not.*

[39] Counsel respectfully disagreed with the appellant's allegation that the Court of Appeal had overlooked the precedents of the Supreme Court. Counsel directed the Court's attention to the Court of Appeal decision in ***Dickson Mwenda Kithinji v. Gatirau Peter Munya and 2 Others*** *Civil Appeal No. 38 of 2013,* which indicates that the Court cited and relied on decisions of the Supreme Court, especially as shown at paragraphs 6, 47, 95, 99,100,138, 208 and 214 of the decision.

[40] Counsel took up the appellant's reference to *Section 85A* of the Elections Act, urging that the concern here was the interpretation of an ordinary statute, and did not qualify as an interpretation or application of the Constitution, so as to bring the appeal within the terms of Article 163 (4) (a). Mr. Muthomi urged that, by the same token, due to the limitations under *Article 163* of the Constitution, the Supreme Court has no jurisdiction (except upon the grant of leave and certificate) to entertain an appeal arising from the interpretation of Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.

[41] Mr. Muthomi submitted that the constitutional provisions cited in the appeal, other than Articles 81 and 86, had not been canvassed before the Court of Appeal, and that this undermined the integrity of the appeal brought before the Supreme Court.

[42] Regarding the appellant's application for stay of execution of the whole judgement or Orders of the Court of Appeal, counsel submitted that there are two main issues to be dealt with: first , whether there is an arguable appeal; and second, whether the appeal will be rendered nugatory. Counsel contended that the purpose of filing the application was to allow an elected person whose election had been declared null and void, to continue being a Governor while the appeal is pending. It was counsel's submission that even if a stay was granted as prayed, the Order would not in itself vacate the judgement.

[43] Counsel contended that the grounds contained in the petition of appeal did not give rise to an arguable appeal. In his view, most of the grounds in the petition of appeal had little to do with the interpretation or application of the Constitution. At best, counsel submitted, the applicant had alleged violations of his rights to a fair trial, when "he did not protest the alleged violation during the proceedings at the Court of Appeal". Regarding allegations of violations of *Articles 81(e), 86, 87* and *88* of the Constitution, Mr. Muthomi submitted that only *Articles 81(e)* and *86(a)* deal with the requirement that elections need to be conducted in a free and fair manner.

[44] Counsel supported the Court of Appeal's finding that DW8 was not cross-examined after the trial Judge disallowed the petitioner's (respondent herein) application to cross-examine him. He also maintained that, indeed, annexures "DMK2", "DMK3" and "DMK4" had been expunged from the pleadings by the trial Judge.

[45] Counsel dispelled the applicant's claim that County operations would stall if a fresh election were to be immediately conducted. He submitted that there were constitutional provisions already in place dealing with County processes, and this would seal any probable *lacunae*. Mr. Muthomi contended that public policy would suffer if the Supreme Court were to expand its jurisdiction beyond the contemplation of the Constitution.

[46] Counsel submitted that the dispute at hand was not a private matter, but a public law issue *in rem*. He cited the ***Hassan Ali Joho*** case, where the Supreme Court held that electoral disputes were disputes *in rem*. This meant, counsel argued, that the applicant's office was an elective office, and thus, a public-interest issue where the office remained, regardless of the different individuals who would occupy it. It was counsel's contention that the main issue in this case was whether the election was "free and fair". Counsel urged the Court to strike out both the application and intended appeal, on the basis that the Court lacked jurisdiction to entertain the same, and that, in any case, the petition had not disclosed an arguable appeal.

iii. The 2nd and 3rd Respondents

[47] Learned counsel for the 2nd and 3rd respondents, Mr. Martin Munyu, submitted that the election had been nullified by the Court of Appeal on grounds that it *did not meet the threshold under Article 81 of the Constitution.* Counsel drew the attention of the Court to the replying affidavit sworn by Ms. Ruth Mutuku, a legal officer with the 2nd respondent, which specified the several constitutional issues which arose before the Court of Appeal, and which were now before the Supreme Court for determination on appeal. The issues were:

(a) whether the declaration of the election of the applicant as the duly- elected Governor of Meru County was in contravention of *Article 81* of the Constitution, 2010;

(b) whether the declaration of the election of the applicant as the duly-elected Governor of Meru County was in contravention of *Article 38* of the Constitution, 2010;

(c) whether the Court of Appeal upheld the provisions of *Article 50* of the Constitution of Kenya; and whether the 2nd respondent discharged its constitutional obligations as set out in *Articles 81, 86, 88 (4), 249* and *252* of the Constitution;

(d) whether *Section 83* of the Elections Act, 2011 is in contravention of *Articles 81* and *86* of the Constitution of Kenya; and

(e) whether the Court of Appeal contravened the provisions of *Article 164(1)(b)* of the Constitution by disregarding the provisions of *Section 85A* of the Elections Act.

[48] Mr. Munyu submitted that the issues for determination concerned the *interpretation and application of the Constitution*, and therefore, this Court was seized of jurisdiction to entertain the appeal.

[49] On the application for stay, learned counsel argued that there was a need to stay the swearing-in of the Speaker of the County Assembly as Governor, pending a determination of the appeal before the Supreme Court. The Order for stay would prevent, and for good cause, the setting in motion of the election machinery under Article 182(4) and (5) of the Constitution.

[50] Counsel also contended that interim stay would not prejudice the parties if they were to wait for the ruling of the Court, and it would save public resources, in the event that the appeal succeeded. He submitted that the balance of convenience, therefore, was on the side of issuing an interim order stopping the election of a new Governor. Mr. Munyu disagreed with the 1st respondent's argument that allowing the appeal would open "floodgates for other election petitions" coming to the Supreme Court's docket. He submitted that, not every election petition would come up before the Supreme Court on appeal. Counsel contended that under *Article 163 (7)* of the Constitution, the Supreme Court would have the opportunity to guide other Courts on the interpretation of the principles under *Articles 81* and *86* of the Constitution, and the Elections Act, Rules and Regulations.

iv. The Applicant, again

[51] Senior Counsel, Prof. Ojienda in response to the submissions by the 1st respondent, asserted that the Petition of Appeal had set out in concise format the various Articles of the Constitution considered at the High Court and the Court of Appeal. He argued that the right to hold office under *Article 38(3)(c)* of the Constitution was a constitutional right and, where an individual had been denied this right, he is entitled to lodge an appeal at this Court, for appropriate orders.

[52] Counsel urged that this Court ought to deal with the interpretation of the Constitution and the statutes which the Court of Appeal considered, in arriving at its decision. He submitted that any decision rendered by the Supreme Court held a special constitutional status, in the terms of Article 163(7) which stipulates:

"All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court."

[53] Arguing that counsel for the respondent had misunderstood the import of the principle of *stare decisis*, Prof. Ojienda urged that the application before the Court was challenging the lowering of the threshold of the burden of proof, that had previously been set by this Court, and which the Court of Appeal had not accommodated while interpreting *Article 81(e)* of the Constitution.

[54] Prof. Ojienda distinguished the cases of ***Peter Oduor Ngoge v. The Hon Francis Ole Kaparo & 5 Others,*** *SC Petition No. 2 of 2012* and ***Erad Suppliers & General Contractors Limited v. National***

Cereals & Produce Board, *SC Petition No. 5 of 2012,* from the matter before the Court. He submitted that there had been no substantial issue touching on the application or interpretation of the Constitution before the Court in the ***Peter Oduor Ngoge*** *case,* and therefore the Court was right to hold that it had no jurisdiction to entertain the same under the provisions of *Article 163(4)(a)* of the Constitution.

[55] On the other hand, in ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board,*** *SC Petition No. 5 of 2012,* counsel submitted that the only matter before the Court and which arose as a matter of inference, was the interpretation of *Article 160 (1)* of the Constitution, and not the direct interpretation of Articles of the Constitution, in the manner applicable to the petition herein.

[56] Counsel submitted that if the Court were to decline jurisdiction, it would leave the law unsettled and uncertain. Counsel urged that contrary to the submissions of counsel for the 1st respondent, the risk of opening floodgates of electoral matters coming up before the Court subsequently, was negligible.

[57] Learned Senior Counsel, Mr. Omogeni revisited the issue of annexures DMK 2, DMK3 and DMK4. He drew the Court's attention to page 763 of volume 5 of the Petition bundles, to illustrate that the application seeking to strike out these annexures had in fact, been *denied* by the High Court. The judges of the Court of Appeal were, therefore, not properly guided in reaching a different finding. It was submitted that this oversight curtailed the right of the applicant to fair trial.

[58] Regarding the question as to whether constitutional issues were canvassed at the Court of Appeal, thereby entitling the appellant to file an appeal pursuant to Article 163 (4) (a) of the Constitution, counsel referred to pages W1247, W1251 of Volume 3 of the record, to demonstrate that the issue canvassed at the Court of Appeal revolved around the interpretation and application of *Articles 81 and 86 of the Constitution.* Counsel submitted that the Court of Appeal's misdirection as far as the said Articles were concerned, gave a basis for an appeal before this Court. Therefore, one of the issues before this Court revolved around the exercise of jurisdiction by the Court of Appeal, pursuant to *Article 164 (3) (b)* of the Constitution; and thus, if that Court did not exercise this jurisdiction as directed by the Constitution, or an Act of Parliament, it became a question of violation of *Article 164,* and hence, a *constitutional issue.*

[59] In response to Mr. Muthomi's assertion that no issue touching upon the violation of the rights of the applicant had been canvassed at the Court of Appeal, counsel submitted that he could not have anticipated that the Judgment of the Court of Appeal would violate the applicant's rights to the extent detailed in the submissions, and on principle, issues of violation of the Constitution needed not be argued before they became issues meriting protection by the machinery of the Supreme Court.

D. ISSUES FOR DETERMINATION

[60] The square issues for resolution at this interlocutory stage in relation to the appeal, are plainly stated, namely:

i. whether the appeal lodged is in compliance with the Supreme Court's jurisdictional mandate;

i. whether, if (i) above is fulfilled, this particular appeal merits being admitted to hearing;

i. whether, in the event both (i) and (ii) above are fulfilled, this Court should grant interlocutory stay orders on the scheduling of fresh gubernatorial elections, pending the hearing and determination of the appeal;

ii. whether, in the event both (i) and (ii) above are fulfilled, this Court should order a stay on the process of swearing-in the Speaker of Meru County Assembly as Governor, in an acting capacity.

E. ANALYSIS

i. Jurisdiction of the Court

[61] Counsel have correctly perceived the extent of the Supreme Court's appellate jurisdiction as prescribed in Article 163(4) of the Constitution: such appeal may lie –

a. as of right in any case involving the interpretation or application of this Constitution; and

b. in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to sub-Article 5.

Such is the framework of constitutional principle that guides us in this Court, in determining the interlocutory matter herein.

[62] It is Mr. Muthomi's submission that this Court lacks jurisdiction to entertain the appeal under Article 163 (4) (a), since the appeal does not involve the interpretation or application of the Constitution; and the appeal does not, therefore, lie before this Court as of right. In other words, there is no automatic right of appeal available to the applicant. Counsel's submissions to this effect have been elaborately set out in the foregoing paragraphs of this Ruling.

[63] If the appeal does not lie from the Court of Appeal to this Court as of right, then it follows that it could be brought under the second limb of Article 163 (4) of the Constitution. But even this window, according to Mr. Muthomi, is not open to the applicant since he did not seek and obtain certification from either the Court of Appeal or this Court, before filing the appeal.

[64] Learned Senior Counsel, Messrs Ojienda and Omogeni, on the other hand, submit that, indeed, this appeal falls squarely within the ambit of Article 163 (4) (a) of the Constitution. Their submissions to this effect are set out in detail elsewhere in this Ruling.

[65] This Court has, since the commencement of its operations, pronounced itself on the various dimensions of its jurisdiction as decreed by the Constitution. Towards this end, there is now a steady stream of decisions by the Court in which it has clarified, and delimited the nature and scope of its jurisdiction. When can a case be said to involve the interpretation or application of the Constitution, so as to bring it within the ambit of Article 163(4) (a) of the Constitution" This question fell for consideration before a two-Judge Bench of this Court in the case of ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another*** *(Tunoi and Wanjala SCJJ) SC Petition No. 3 of 2012;* ***(2012) eKLR.*** At paragraph 27, the Court was categorical that:

"Article 163 (4) (a) ***must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court.....Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application."***

[66] The Court expounded upon this principle at paragraph 28 where it thus pronounced itself:

"the appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)" [emphasis supplied].

[67] This principle was affirmed by the Court in ***Samuel K. Macharia and Another v. Kenya Commercial Bank and Others,*** Supreme Court Application No. 2 of 2011.

[68] In the case of ***Peter Oduor Ngoge v. Hon. Ole Kaparo & Others,*** *S.C. Petition No. 2 of 2012,* while declining to admit the Petitioner's case under Article 163 (4) (a), the Court stated as follows:

"In the Petitioner's whole argument, we think he has not rationalized the transmutation of the issue from an ordinary subject of leave-to appeal, to a meritorious theme involving the interpretation or application of the Constitution such that it becomes, as of right, a matter falling within the appeallate jurisdiction of the Supreme Court."

[69] The import of the Court's statement in the ***Ngoge*** case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional *interpretation* or *application.*

[70] These two cases, in our view, adequately clarify the frontiers of the appellate regime of the Supreme Court embodied in *Article 163 (4) (a) of the Constitution.* They provide a basis upon which the jurisdictional question before us may be decided.

[71] Turning to the matter herein, therefore, we must advert to the nature of the issues from which this appeal has arisen. The Record of Appeal reveals that in the course of the proceedings at the High Court, the trial Judge identified *inter alia*, the following issues:

(i) whether the Independent Electoral and Boundaries Commission and the Meru County Returning Officer conducted the elections in contravention of the Constitution and Electoral Laws; and

(ii) If the elections were not conducted in accordance with the principles of the Constitution and written law, whether the said non-compliance with the principles of the Constitution and written law, materially affected the outcome of the election.

[72] The record also shows that on appeal, the appellate Court identified three issues as being central in the appeal:

(i) whether the errors and irregularities disclosed by the evidence on record materially affected the quantitative margin and the qualitative aspects of the election;

(ii) whether the trial judge was correct in ordering the scrutiny and recount of only 7 polling stations; and

(iii) whether the trial Judge independently evaluated the evidence on record.

[73] While the High Court found that the respondent (applicant herein) had been duly elected, and dismissed the petition, the Court of Appeal found to the contrary, and allowed the appeal. In setting aside the judgment of the High Court, the appellate Court stated (at paragraph 220) as follows:

"We declare that the Meru gubernatorial elections conducted on 4th March 2013 did not meet the Constitutional threshold in Article 81 (e) (iv) & (v) and Article 86 of the Constitution by not being administered in an efficient, accurate and accountable manner."

[74] Counsel for the 1st respondent urged the Court to strike out the appeal on grounds that none of them raised issues of constitutional application; and that, other than Articles 81 and 86 of the Constitution, there were "no constitutional issues that were canvassed at the Court of Appeal." We agree with Mr. Muthomi that *not every election petition decision is appealable to the Supreme Court under Article 163 (4) (a) of the Constitution.* What we must decide, however, is whether this appeal has arisen from a decision of the appellate Court in *which issues of the interpretation and application of the Constitution* were at play. Is the applicant faulting the interpretation or application of the Constitution by the Court of Appeal in reaching the decision to set aside the judgment of the High Court, that had declared him to be validly elected"

[75] Mr. Muthomi contends that the applicant is, basically, impugning the Court's interpretation of Section 87 of the Elections Act. This, he argues, has nothing to do with the interpretation or application of the Constitution, it being an ordinary statute. It is the same shortfall, urges counsel, as regards the Court's contested interpretation of Rule 33 (4) of the Elections (Parliamentary and County Election) Petition Rules 2013. Both Prof. Ojienda and Mr. Omogeni, however, submit that the Court of Appeal must be taken to have interpreted among others, the provisions of Articles 81 and 86 of the Constitution. Mr Munyu, representing the 2nd and 3rd respondents, was even more specific as to the *constitutional nature* of the controversy.

[76] We note that, right from the High Court, the central issue revolving around the petition against the applicant's election was: whether this election was conducted in accordance with the *principles of the Constitution.* The operative principles in question, in our view, were the provisions of *Articles 81 (e) and 86 of the Constitution.* Although the issues, as later formulated by the Court of Appeal, narrowed down to the specifics of irregularity, scrutiny and recount of the vote, the central theme of the *application of Articles 81 and 86 to the dispute,* was never lost. Throughout its analysis and assessment of the evidence on record, in determining the integrity of this particular election, the Court of Appeal was applying the provisions of *Articles 81 and 86 of the Constitution*. This is illustrated by the Court's own conclusion at paragraph 220 (quoted above) of its judgment.

[77] While we agree with Mr. Muthomi, regarding his contention that Section 87 of the Elections Act cannot be equated to a constitutional provision, we must hasten to add that the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in *Articles 81 and 86 of the Constitution*, and that in interpreting them, a Court of law cannot disengage from the Constitution.

[78] Applying these principles to the matter at hand, we hold that this appeal, indeed, falls within the ambit of Article 163(4) (a) of the Constitution.

[79] Although learned counsel for the 1st respondent has urged that the applicant can only move this Court on the basis that his case entails a matter of general public importance, we are more in agreement with counsel for the applicant, that the case rests on *clear issues of constitutional interpretation* – and that, therefore, the matter properly falls to the jurisdiction of this Court, even without any certification emanating from the Court of Appeal. The reasoning in this regard is well articulated in the submissions

by counsel for the applicant, and for the second respondent. The Court of Appeal's decision and the appeal therefrom, have raised *issues of first impression as to the interplays in a wide range of constitutional provisions, touching simultaneously on individual fundamental rights, and upon collective political rights and interests of many, notably those falling under Articles 38, 81 and 182 of the Constitution.* This Court, by the terms of the Constitution, and specifically under the Supreme Court Act, 2011 (Act No. 7 of 2011) which reposes the mandate to "assert the supremacy of the Constitution" [Section 3(a)] and to "provide authoritative and impartial interpretation of the Constitution" [Section 3(b)], has the responsibility to hear the parties and to *interpret the Constitution* as appropriate.

[80] It follows that we disallow the preliminary objection, insofar as it contests this Court's jurisdiction to entertain the applicant's appeal.

[81] It also follows that, apart from our holding on the question of jurisdiction, we rule that the applicant's appeal, in and of itself, passes the merit test for being heard and determined.

[82] We are fortified by the decision of this Court in ***Hassan Ali Joho and Another v. Suleiman Said Shahbal and 2 Others,*** Petition No. 10 of 2013; wherein the Court observed thus:

"Applying a principled reading of the Constitution, this Court responds to the demands of justice by adjudicating upon issues that tend to bring the interpretation or application of the Constitution into question. However, it is to be affirmed that any appeal admissible within the terms of Article 163 (4) (a) is one founded upon cogent issues of constitutional controversy. The determination that a particular matter bears an issue or issues of constitutional controversy properly falls to the discretion of this Court...."

ii. Should Orders of Stay of Execution be granted"

[83] The question as to whether this Court has jurisdiction to grant inter-locutory orders in the nature of a stay of execution was long settled in ***Board of Governors, Moi High School, Kabarak & Another v. Malcolm Bell,*** *SC Applications Nos. 12 and 13 of 2012,* wherein the Court stated as follows (paragraph 33):

"It is clear to us that if interlocutory applications are excluded as a necessary step to preserve the subject-matter of an appeal, the Supreme Court's capability to arrive at a just decision on the merits of an appeal, would be substantially diminished. Both the Constitution and the Supreme Court Act have granted the Court the appellate jurisdiction; and within that jurisdiction, the parties are at liberty to seek interlocutory reliefs, in a proper case."

[84] That leaves pending the main interlocutory matters: *whether we should stay the hand of the Independent Electoral and Boundaries Commission, and the Speaker of Meru County Assembly, so they do not move to alter the state of affairs at the Meru County gubernatorial office, pending the hearing and determination of the applicant's appeal.*

[85] These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by *injunctions, orders of stay, conservatory orders* and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of "stay orders" is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.