REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga, CJ & P; Mwilu, DCJ & V-P; Ojwang, Wanjala & Lenaola, SCJJ)

ELECTION PETITION NO. 1 OF 2017

–BETWEEN–

1. RT. HON RAILA AMOLO ODINGA.....1ST PETITIONER

2. H.E. STEPHEN KALONZO MUSYOKA .....2ND PETITIONER

–AND–

1. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

2. THE CHAIRMAN, IEBC.....2ND RESPONDENT

3. H.E UHURU MUIGAI KENYATTA.....3RD RESPONDENT

–AND–

1. DR. EKURU AUKOT .....1ST INTERESTED PARTY

2. PROF.MICHAEL WAINAI.....2ND INTERESTED PARTY

–AND–

1. THE ATTORNEY GENERAL.....1ST *AMICUS CURIAE*

2. THE LAW SOCIETY OF KENYA .....2ND *AMICUS CURIAE*

(Being an application under certificate of urgency by the 2nd respondent by way of Notice of Motion seeking Orders for the Honourable Court to correct/or clarify its Judgement delivered on 20th September, 2017)

RULING OF THE COURT

A. INTRODUCTION

[1] The 2nd respondent/applicant has moved this Court by way of a Notice of Motion dated 4th October, 2017 premised upon Articles 138, 163 and 159 of the Constitution of Kenya 2010, Section 21(4) of the Supreme Court Act, Rule 3(2), (4) & (5) of the Supreme Court Rules, 2012 seeking the following Orders:

(a) That the Court be pleased to certify the application as urgent and to hear it on a priority basis;

(b) That the Court be pleased to correct and/or clarify its Judgment delivered on 20th September, 2017 as regards:

(i) Which results as between the tallies contained in Forms 34B submitted by the Returning Officers to the National Tally Centre and the totals of Forms 34A as verified by 1st and 2nd respondents the 2nd respondent should use in declaring the results of the presidential election as envisaged under Article 138(10) of the Constitution;

(ii) Whether the 1st and 2nd respondents can correct errors identified in Forms 34B and/or amend the Forms 34B where the same differ with results contained in the relevant Forms 34A after the verification exercise envisaged by Article 138(3)c of the Constitution.

(c) That the costs of the application be provided for.

[2] This application emanates from the decision of the Supreme Court in Presidential Petition No. 1 of 2017 whose determination was delivered on the 1st of September, 2017 and the reasons thereof delivered on 20th September, 2017. In its decision, the Court annulled the election of the 3rd respondent as the President of the Republic of Kenya and ordered the 1st respondent to organize and conduct a fresh presidential election in strict conformity with the Constitution and the applicable election laws within 60 days under Article 140(3) of the Constitution.

[3] On 11th October, 2017, this matter came up for mention before the Court and all parties were ordered to file their responses/submissions for hearing on 13th October, 2017.

B. PARTIES' SUBMISSIONS

(i) The 2nd Respondent's Submissions

[4] The 2nd respondent filed his written submissions dated 9th October, 2017, on 10th October 2017. He also filed a notice of preliminary objection dated 11th October, 2017 seeking to expunge from the record the 2nd *Amicus Curiae* (the Law Society of Kenya) submissions dated 10th October, 2017 for exceeding the role of *amicus curiae* and for being biased.

[5] In his submissions, the 2nd respondent submits that the application is not an appeal or review of the Supreme Court majority Judgment delivered on 20th September, 2017 (the Judgment) or ***The Independent Electoral and Boundaries Commission v. Maina Kiai & 5 Others*** Civil Appeal No. 105 of 2017 ***(the Maina Kiai decision***) as the application does not seek to overturn any of the findings in the two matters. The submissions are therefore broadly hinged on two aspects – jurisdiction and clarification sought.

[6] On jurisdiction, the 2nd respondent submits that the Supreme Court has jurisdiction to clarify its Judgment or Orders as set out in Section 21(4) of the Supreme Court Act. He stated that the scope of the power under that Section was considered in ***Nick Kiptoo Arap Korir Salat v. The Independent Electoral and Boundaries Commission & 7 Others*** (2014) eKLR while its purpose was identified in ***Fredrick Otieno Outa v. Jared Odoyo Okello & 3 Others*** (2017) eKLR ***(Fred Outa case.)***

[7] To further support his case, the 2nd respondent relies upon the decision of the Supreme Court of Appeal of South Africa in ***Butters v. Mncora*** (419/13) [2014] ZASCA 86 (30 May, 2014) to the effect that a court may clarify its Judgment or Order if, on proper interpretation, the meaning remains uncertain and it seeks to give effect to its true intention. He also cites the decision of the Supreme Court of British Columbia in ***British Columbia Teachers' Federation v. British Columbia,*** 2011 BCSC 1372, wherein it was stated that the inherent jurisdiction of the Court can be invoked to clarify an ambiguity in the Court's Ruling, where the meaning and intention of the Court is not clearly expressed in its Judgment or Order.

[8] Further, the 2nd respondent refers to the decision of the Superior Court of Justice, Ontario (Canada) in ***Re Nortel Networks Corporation*** *et al,* 2015 ONSC 4170 where it was stated that clarification is a less contentious matter and it may be given where the original Judgment was so expressed as to lead to uncertainty and confusion or contains a latent ambiguity. He also refers to the decision of our Court of Appeal (when it was a final court) in ***Standard Chartered Financial Services & Another v. Manchester Outfitters (Suiting Division) Ltd (now known as King Woollen Mills Ltd) & 2 Others*** [2014] eKLR, where the jurisdiction of a final Court to clarify its Judgment was considered. The 2nd respondent also refers to the East African

Court of Appeal decision in ***Mawji v. Arusha General Store***, [1970] EA 137 on the same point.

[9] On the issue of clarification being sought, the 2nd respondent submits that there are matters requiring clarification in the Court's Judgment and he has identified areas likely to raise implementation challenges and therefore requiring clarification. He also compares the ***Maina Kiai decision*** and this Court's decision specifically at pages 36 and 38 of the ***Maina Kiai decision*** and paragraphs 290, 292 and 294 of the Supreme Court Judgment. He submits that it is his understanding in that context that the Supreme Court expected him to compare results in forms 34A as against the tallies in Forms 34B and that it was not open to him as stated at paragraph 294 of the Judgment to ignore any discrepancies arising from such comparison. It is his further submission that for purposes of ensuring the implementation of the true intention of the Court, it is necessary for this Court to fill the omission occasioned by the absence of a direction as to what the 2nd respondent is required to do in the event of a discrepancy. In addition, the possibility of tallies in Forms 34B conflicting with the results in Forms 34A cannot be ruled out and the 2nd respondent would be properly guided if it is clarified by the Court what results he should declare between the tally of the results in Form 34B and the verified tally of the result in Forms 34A at the National Tallying Centre.

[10] The 2nd respondent further urges the Court to find that it has jurisdiction to make the clarification sought, for purposes of creating certainty and ensuring that the 2nd respondent is clear on what this Court considered to be the valid results in accordance with the provisions, spirit and the intention of the Constitution.

[11] The 2nd respondent's position above, was reiterated by his Advocate, Mr. Karori Kamau, when he orally highlighted the submissions before the Court. Learned counsel thus pointed out that the petitioners had in their grounds of objection to the application, acknowledged the possibility of the discrepancies

alluded to by the 2nd respondent and the petitioners had gone a step further to give their understanding of how to resolve any discrepancy by approaching the election Court. Counsel further argued that the 2nd respondent seeks to avoid a situation where he would willingly be made to read incorrect results and anticipate an inevitable petition arising out of the 2nd respondent's actions. Elections being a highly emotive issue, counsel submitted that the 2nd respondent has disclosed an issue that he is likely to encounter and the court should clarify the same.

(ii) 1st Respondent's Submissions

[12] The 1st respondent relies on its submissions dated 10th October, 2017, in which they submitted that the clarification being sought is in respect of the following two issues: Firstly, which results, between those declared in Form 34A at the polling station and those declared in Forms 34B at the constituency tallying centre should the 2nd respondent rely on in declaring the result of the presidential election? Secondly, in conducting verification as directed in the Judgment of this Court, can the 2nd respondent alter the Forms 34B where the same differ with results as declared in Form 34A?

[13] It is their submission in the above regard that the clarification sought is in respect of the manner in which the officials of the 1st respondent are to manage the presidential election results in the event the verification exercise as envisaged divulges inconsistencies and/or clerical/mathematical errors between the results declared at the polling station and the subsequent tallied results.

[14] The 1st respondent makes reference to the ***Maina Kiai decision*** with regard to verification of presidential election results and submits that from the Judgment of the Court of Appeal, the presidential election results declared at the polling station were final and the 1st respondent could not verify or vary the

results. Further, that the role of the 2nd respondent in the verification of the result was restricted to confirmation and verification that the candidate to be declared president elect has met the threshold set under Article 138(4) of the Constitution, whereas, the Supreme Court had allegedly held that verification of election results is conducted by the 1st respondent as follows; the presiding officer at the polling station; the returning officer at the constituency level and the chairperson at the National Tallying Centre (at paragraphs 283, 286,287 and 290 of the Judgment).

[15] The 1st respondent thus urges the Court to offer clarification on the Judgment as this clarification will elucidate the finality of the presidential election results as declared at the polling station and the constituency tallying centres.

[16] Mr. Paul Muite, SC whilst orally highlighting the submissions on behalf of the 1st respondent, adopted the submissions made by Mr. Karori, advocate on behalf of the 2nd respondent. He submitted in addition that the Court has a discretion to elect whether or not to allow the application and that the matter involved the interpretation of Section 39 of the Elections Act and the Regulations made under the Elections Act both of which should all be in consonance with the Constitution. Counsel cited the provision of Article 1(4) of the Constitution on the exercise of the sovereign power in arguing that the matter raises constitutional questions. He urged the Court to allow the application.

(iii) 3rd Respondent's Submission

[17] The 3rd respondent filed its submissions dated 10th October, 2017. He submits that indeed after reviewing the authorities and the provisions of law cited by the 2nd respondent, this Court has jurisdiction to admit the 1st respondent's notice of motion dated 4th October, 2017 for hearing and determination. To

support his argument, he relies upon the case of ***Cohens v. Virginia*** 19 U.S 264 404 where it was held that the Court should not decline the exercise of a jurisdiction given to it.

[18] He further submits that the Court should invoke its jurisdiction by assessing whether or not the motion properly invoked the jurisdiction of the Court in a manner that restores confidence in the administration of justice or where invoking such jurisdiction serves to promote public interest and enhance public confidence in the rule of law and our system of justice. He also urges that this Court should be guided by the provisions of Articles 163(3), 163(7) and 259 of the Constitution together with Section 3 of the Supreme Court Act. He further relies upon the cases of ***Jennifer Koinante Kitarpei v. Alice Wahito Ndegwa & Another*** (2014) eKLR; and ***Benjoh Amalgamated Ltd & Anor v. Kenya Commercial Bank;*** Civil Application No. Sup. 16 of 2012 (2014)eKLR; in support of that proposition.

[19] It is the 3rd respondent's further submission that there is a dissonance between the majority decision of this Court and the Court of Appeal's ***Maina Kiai decision***. He emphasizes in that regard that it is important for the Court to clarify what the 2nd respondent, as the National Returning Officer, can do and what he cannot do in terms of verifying the results at the National Tally Centre.

[20] The 3rd respondent also urges the Court to find that the final results tallied by the 2nd respondent at the National Tallying Centre, should be based on the entries in Forms 34A rather than the entries in Form 34B in the event that there are any inconsistencies between the tallies reflected in Forms 34B and a proper tallying of the results obtained from polling stations as entered in Forms 34A.

[21] In his oral submissions on behalf of the 3rd respondent, Mr. Kiragu Kimani advocate, further submitted that the application is sound based on the role and function of the Supreme Court under Section 3 of the Supreme Court Act and Article 163 of the Constitution. He thus argued that the Court should be allowed

to entertain any motion before it and interrogate it. Counsel further submitted that the application seeks to avoid a situation such as the one where the former Chairman of the defunct Electoral Commission of Kenya, as noted in the Kriegler report, spoke to the effect that he did not know who had won the 2007 General Election and which statement may have triggered violence. Counsel concluded that a party coming to court in such situation should, in the circumstances, not be criticized.

(iv) Petitioners' Submissions

[22] In opposing the application, the petitioners herein filed their grounds of opposition together with submissions all dated 10th October, 2017.

[23] The petitioners submitted that, this application is an abuse of the Court process, is misconceived and bad in law. They contend that there is neither an error whatsoever that is being sought to be corrected nor is there any clarification to be given. According to the petitioners, the question being raised has been determined by a Court of competent jurisdiction in the ***Maina Kiai decision*** which was upheld by this Court. Further, that the application is a mere attempt by the applicant to sneak and/or lodge an appeal through the backdoor in regard to the decision in the ***Maina Kiai decision***; that the issue of the role of the Chairperson as the Returning officer for the *purpose of the presidential election was at the core of litigation in the decision in* ***Maina Kiai decision,*** High Court Petition No. 207 of 2016, which was subsequently appealed to the Court of Appeal by the applicant vide Civil Appeal No. 105 of 2017.

[24] The petitioners further argued that this Court became *functus officio* upon the rendering of its decision as regards the presidential election conducted on 8th August, 2017 and cannot sit to hear and/or open up issues that had been previously litigated upon before the Court of Appeal. Further, they argue that this

Court has no jurisdiction to entertain the application herein, or to sit as an interpretative Court over the decision of a lower Court. In addition, the petitioners submitted that pursuant to Article 140 of the Constitution, the mandate of this Court to determine questions arising from the presidential election was time bound and the same lapsed within 14 days from the filing of the petition challenging the validity of the presidential elections.

[25] It is the petitioners' other submission that this application is merely trying and/or purporting to ask this Court to sit as an appellate Court over its own decision and to cast doubts and aspersions as to the validity of this Court's Judgment rendered on 20th September 2017. They submit that this does not fall within the purview of section 21(4) of the Supreme Court Act. To buttress this submission, the petitioners rely upon the cases of ***Fred Outa*** as well as ***Sow Chandra Kanta & Another v. Sheik Habib*** (1975) AIR 1500, 1975 SCC (4) 457. In addition to the above, they urged the Court to rely on the persuasive decision of the High Court of Australia in ***D'orta-Ekenaike v. Victoria Legal Aid*** (2005)HCA 11, in which it was held that controversies once resolved are not to be reopened except in a few narrowly defined circumstances. Further reliance was placed on the Supreme Court of Philippines decision in ***Emeterio O Pasiona JNR v. Court of Appeals, National Labour Relations Commission*** GR 165471 on the doctrine of finality or immutability of a Judgment.

[26] It is their other contention that there is no disconnect between the direction by the Court of Appeal in the ***Maina Kiai decision*** and paragraph 294 of this Court's Judgment as alleged by the applicants in that this Court expounded on the constitutional mandate of the Chairperson of the Independent Electoral and Boundaries Commission to verify the results by checking whether there is any discrepancy in the Forms 34A and 34B. It is their submission that both Courts stated such discrepancies, if found, are to be addressed and/or

rectified by an election Court. They emphasized that without prejudice, Article 81 of the Constitution as read together with Article 86 of the Constitution outline the guiding principles in regard to the conduct of elections. In this regard, the petitioners make reference to the ***Maina Kiai decision*** that relied upon ***Hassan Ali Joho & Another v. Suleiman Said Shabhal & 2 Others***, Petition No. 10 of 2013 (2014)eKLR and the case of ***Suleiman Said Shahbal v. The Independent Electoral and Boundaries Commission and 3 Others;*** Election Petition No. 8 of 2013 (2013) eKLR, that defined the term "declaration".

[27] During the highlighting of submissions, Mr. Willis Otieno, learned counsel for the petitioner, added that the questions for clarification belong to the Court of Appeal as the Supreme Court merely recognised the effect of the Court of Appeal decision. He submitted that the questions now being raised were indeed posed to counsel by learned *Justice Kiage JA* during the hearing before the Court of Appeal and the role of the 2nd respondent was well circumscribed in the ***Maina Kiai decision*** which has all answers if only the 1st and 2nd respondents had faithfully read the Judgment. In any event, counsel added, the 1st and 2nd respondents are not prevented from petitioning the election Court in the event that they encountered any discrepancies mentioned by them.

[28] On his part, Prof. Ben Sihanya, another advocate for the petitioners, submitted that this court lacks inherent jurisdiction, the application being neither a presidential election petition, an advisory opinion nor an appeal unless parties approach this Court through the backdoor, by way of review, interpretation or clarification or in any circumstances granting this Court jurisdiction. Counsel thus submitted that the application does not fall within the ambit of Section 21(4) of the Supreme Court Act and there is nothing for the Court to correct in its Judgment.

[29] Counsel added that just like in 2013, in the presidential election petition before it, the Court can, on its own, correct its decision in the event there was such need and basis for it. He submitted that the matter is now *res judicata*, the court having been *functus officio*. He further urged the Court to take judicial notice of the 1st respondent's consistency in non-compliance with law and the fact that the Court of Appeal in the ***Maina Kiai decision*** took time to rebuke the Commission for so doing. In conclusion, counsel argued that being a court of justice and equity, he who comes to court must come with clean hands and thus urged the Court to dismiss the present application with costs.

(v) The Attorney General's Submissions

[30] The Attorney General in his submissions dated 10th October, 2017, supported the application on the ground that the 2nd respondent is neither seeking a review nor appealing this Court's Judgment which upheld the ***Maina Kiai decision***.

[31] It is his further submission that the 2nd respondent seeks clarification as to the effect of the Judgment of the Supreme Court in Presidential Petition No. 1 of 2017 which obligated the 2nd respondent to compare the results in Forms 34A against the tallies of those results in Forms 34B to establish if the results are correct or they indicate some discrepancies between the two sets of results. Furthermore, that it is not clear from the Judgment of this Court what the 2nd respondent is expected to do if he observes some discrepancies between the results declared in Forms 34A and 34B and secondly which results should he use in tallying the final totals in the event of differences between the two.

[32] As such, the Attorney General sets out the following issues for determination namely; whether this Court has the jurisdiction to hear and determine this application and whether in the circumstances of the present case

the Court should clarify its Judgment to avoid ambiguity and to give effect to the true meaning and intention of the said Judgment.

[33] On the issue of jurisdiction, the Attorney General submits that the Supreme Court, in exceptional circumstances has the mandate to avoid the *functus officio* doctrine and invoke its inherent jurisdiction to give effect to its Judgment through clarification. He relies upon the decision in the ***Fred Outa case*** in which the Court held that it is clothed with inherent powers which it may invoke if the circumstances so demand to do justice. Also relied upon was the Court of Appeal decision in ***Benjoh Amalgamated Limited*** where the Court of Appeal defined inherent power as the authority possessed by a Court implicitly without it being derived from the Constitution or statute.

[34] The Attorney General, in addition submits that this application seeks clarification on a matter of grave public interest whose importance cannot be overemphasized. To support this argument, he relies upon the case of ***Speaker of the Senate & Another v. Attorney General & 4 Others*** (2013) eKLR, that emphasized the Supreme Court's obligation as set out in Section 3 of the Supreme Court Act.

[35] Upon being reminded by court that the Attorney General's admission as amicus curiae in the petition was specific that he should not address the ***Maina Kiai decision***, Mr. Bitta, State Counsel appearing on behalf of the Attorney General, limited his submission to the inherent jurisdiction of the Court as was determined in paragraph 91 of the ***Fred Outa case***. He argued in that regard that there is necessity to have clarity in the conduct of presidential elections as it is a matter of great public interest to the extent that it was a ground for nullifying elections, the 2nd respondent having been faulted for not following the process envisaged in law. He added that the ambiguity sought to be clarified relates to what amounts to verification of results which is an important issue.

[36] He concluded by reiterating that the 2nd respondent has amply demonstrated the ambiguity in the Judgment that needs clarification.

(vi) 2nd Amicus Curiae's Submissions (The Law Society of Kenya)

[37] In their written submissions dated 10th October, 2017 and filed on 11th October, 2017, the Law Society of Kenya submitted that there is no ambiguity identified in the Judgment of the Court which calls for clarification or enhancement of comprehension and appreciation of the Court's intention. They thus refer to the Notice of Motion application and submit that the application does not identify any error or provide for a way of correcting the error but has only set out questions for the Court to answer.

[38] Further, that the applicant is seeking a plain opinion statement on his functions under Article 138(1) and 86(3) of the Constitution. The Law Society in that regard urged the Court to disregard the ground breaking decision in ***Fred Outa case*** being relied upon by the applicant who does not appreciate the Court's holding in that case discounting any possibility of applying Article 163 of the Constitution in an application such as this and that the main purpose of section 21(4) of the Supreme Court Act is to steer a Judgment, decision, or order of this Court towards logical or clerical perfection.

[39] It is their further submission that the principle of the slip rule that a court has residual jurisdiction to review, vary or to rescind its decision in exceptional circumstances as enunciated in the Court of Appeal case *of* ***Nguruman Limited v. Shompole Group Ranch & Another*** *(*2014) eKLR**,** had not been met thus this Court should disallow the application.

[40] On the issue of costs, the Law Society of Kenya's submission is that this Court should not award costs on an application concerning a matter in which a party seeks purely to be guided on its state officer duties.

[41] However during hearing, before Mr. Mwenesi, advocate for the Law Society of Kenya rose to highlight his client's submissions, Mr. Karori, Advocate for the 2nd respondent raised a preliminary objection as filed on 11th October, 2017. The objection sought to expunge the submissions by the Law Society of Kenya on the grounds that they had exceeded the scope within which the said Society had been admitted as an *amicus curiae*. Mr. Karori submitted in that context that the Law Society of Kenya was expected to limit its submissions to the interpretation and application of Section 83 of the Elections Act but had instead responded to the application and taken a partial position. That an *amicus curiae* is not supposed to pursue an active position and outcome, as that is left to the parties to the dispute. On that submission, counsel relied on this court's decision in ***Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others,*** SC PT 12 of 2013, (2015)eKLR.

[42] Mr. Mwenesi was, upon the objection being raised, accordingly guided by the Court to limit his submissions to the interpretation and constitutionality of Section 83 of the Elections Act. He thus submitted that in compliance with the law, the result notwithstanding, the 1st respondent has not set out any ambiguity in Section 83 as interpreted by this Court to warrant the present application. That paragraph 294 of the Judgment does not raise any doubt or ambiguity, in his view, contrary to the 2nd respondent's submission. It is his argument instead that, Article 138 of the Constitution is in tandem with the announcement and declaration of results and the 1st respondent's anxiety that the court may have gone overboard does not arise. He referred to Article 10 of the Constitution as being instructive on the interpretation of the Constitution and submitted that the court cannot confer more mandate beyond that what is in the Constitution.

(vii) 1st Interested Party's Submissions (Dr. Ekuru Aukot)

[43] By his written submissions dated 10th October, 2017, the 1st interested party opposes this application on the grounds that; firstly, the application seeks an interpretation of Article 138(3)(c) and 138(10)(a) of the Constitution yet this Court has no original jurisdiction to interpret the Constitution and that this application ought therefore to have been filed in the High Court. He relies upon the case of ***Re IIEC*** Supreme Court Application No. 2 of 2011, on the competency of the Court to interpret the Constitution.

[44] The 1st Interested party also refers to his application in this petition dated 6th September, 2017 in which this Court, in making an Order declining to hear the application, issued on 21st September, 2017, observed that it has no original jurisdiction to interpret the Constitution save as stated in Article 163(3) and (6) of the Constitution. He thus urges the Court to strike out this application on the ground of want of jurisdiction in that it is similar to the one dated 6th September, 2017.

[45] Secondly, that the subject matter for clarification herein is *res judicata* having been fully and finally determined and settled by the Court of Appeal in the ***Maina Kiai decision***. In this regard, he relies upon the Court of Appeal decision in ***Uhuru Highway Development Ltd v. Central Bank of Kenya*** (1999) eKLR.

[46] Thirdly, that the Court is now *functus officio* having pronounced itself with finality on the matter vide its determination delivered on 1st September 2017 and reasoned Judgment of 20th September 2017. He makes reference to the English Court of Appeal case in ***Re St. Nazaire Co.*** (1879) 12 Ch.D 88 where the Court held that there are two exceptions to this rule namely; where there had been a slip in drawing it up and where there was an error in expressing the manifest intention of the Court.

[47] The 1st interested party thus urges the Court to dismiss this application and find that the applicant has not demonstrated any error apparent on the face of the said Judgment that requires correction hence the exceptions herein do not apply.

[48] Mr. Mutuma for the 1st interested party, reiterated the above position adding that the High Court is best suited to address the application. He further submitted that should this Court grant the application, it would inevitably review the Court of Appeal decision and the Court should resist the temptation to do so and instead strike out the application with costs.

C. DETERMINATION

[49] Having heard and considered the submissions by the parties, the following is our opinion:

(i) On Jurisdiction

[50] At the outset, it is important to determine whether this application is properly before us. On this question, we have considered the written and oral submissions by all the parties including the *amicus curiae*. There is no doubt in our minds that, this is a unique, if not an extra-ordinary application, for it is neither an appeal, nor a reference for an advisory opinion. Although the applicant has therefore invoked Articles 138, 159 and 163 of the Constitution, as the foundation for the Notice of Motion, we do not see how these provisions can be a basis for us to assume jurisdiction so as to determine the questions as framed.

[51] At best, it may be said to be an application for review of this Court's Judgment delivered on 20th September 2017. This may also explain why the Notice of Motion is also brought under Section 21(4) of the Supreme Court Act, for it seeks to "correct/or clarify this Court's Judgment." Yet, given this Court's

decision in the ***Fred Outa case,*** it is doubtful whether, strictly speaking, Section 21(4) of the Supreme Court Act has been properly invoked as a jurisdictional basis for the application. That Section provides as follows:

> "***Within fourteen days of delivery of its Judgment, Ruling or Order, the Court may, on its own motion or on application by any party with notice to the other or others, correct any oversight or clerical error of computation or other error apparent on the face of such Judgment, Ruling or Order and such correction shall constitute part of the Judgment, Ruling or Order of the Court."***

[52] At paragraph 86 of the ***Fred Outa Case,*** this Court pronounced itself thus:

> *" ...Section 21(4) of the Supreme Court Act, does not confer upon this Court, jurisdiction, or powers, to sit on appeal over its own Judgments. Neither, does it confer upon the Court, powers to review any of its Judgments once delivered, save to correct any clerical error, or some other error, arising from any accidental slip or omission, or to vary the Judgment or Order so as to give effect to its meaning or intention. ...The main purpose therefore, of Section 21(4) of the Supreme Court Act, is to steer the Judgment, decision, or Order of this Court, towards logical, or clerical perfection."*

[53] The jurisdiction granted by Section 21(4) is in consonance with jurisprudence from comparative jurisdictions. We thus concur with the persuasive authorities of the decision of the High Court of Australia in ***D'orta-Ekenaike v. Victoria Legal Aid*** (2005)HCA 11, cited by counsel for the

petitioner, where it was held that controversies once resolved are not to be reopened except in a few narrowly defined, circumstances; and that of the decision of the Supreme Court of Philippines in ***Emeterio O Pasiona JNR v. Court of Appeals, National Labour Relations Commission*** GR 165471 on the doctrine of finality or immutability of Judgment.

[54] It is thus clear that Section 21(4) of the Supreme Court Act, grants the Court, very limited powers or room, to tinker with its Judgment or Orders, once delivered. Towards this end, we sought to know from senior counsel, Mr. Muite, as to what aspects of the Judgment delivered on 20th September, 2017, the applicant wanted corrected. In response, counsel was categorical that, the application, did not in any way seek to correct the Judgment of this Court. What the applicant was seeking, urged counsel, was a clarification of the issues, as framed in the Notice of Motion. Mr. Kiragu, counsel for the 3rd respondent on his part, had difficulties as to how to classify this application, but nonetheless urged the Court, not to dismiss it off-hand, given the immense public interest in the subject matter as framed.

[55] The petitioner and the 1st interested party have on their part strongly urged the Court to dismiss the application for want of jurisdiction. These sentiments were supported by the Law Society of Kenya as 2nd *Amicus Curiae*. Counsel for the 1st interested party submitted in that regard that this Court needed to be consistent in the manner it determines applications before it. In his view, the application before us was similar to the one brought to this Court recently by the 1st interested party, in which he sought an interpretation of the meaning of the words "Fresh Elections" in Article 140 (3) of the Constitution. The application was struck out on the ground that the proper forum for the determination of that issue was the High Court. Counsel therefore urged us to treat the present application similarly and remit the same to the High Court.

[56] We have considered all submissions as to whether this Court has jurisdiction to entertain the application or not. From our sentiments expressed in the foregoing paragraphs, it must be clearly discernible that we entertain serious doubts as to whether this Court has jurisdiction to clarify its Judgments. Having pronounced ourselves authoritatively on the issues that were placed before us in Petition No. 1 of 2017, it was this Court's expectation, that all parties thereto, would act in accordance with what they understood the Court to have meant. This application does not also fall within the purview of Section 21(4) of the Supreme Court Act. This Court has no jurisdiction to interpret its decisions or those of other courts. On the face of it therefore, in ordinary circumstances, an application, which is based on tenuous jurisdictional foundations, such as the one before us ought therefore to be dismissed.

[57] However, we are keenly aware that, the questions whose clarification the applicant seeks, arise from the recently decided presidential election petition, a determination that continues, to elicit considerable public interest. It is also our view that this application is not similar to the one by the 1st interested party that was recently dismissed by this Court. In that application, the applicant had sought an interpretation of a constitutional provision, a matter that was not an issue in Petition No. 1 of 2017. Had this Court entertained the application, it would have usurped the jurisdiction of the High Court contrary to its established traditions and tenets.

[58] We have in the above context, critically considered the submissions made by Messrs. Muite and Kiragu, urging us not to turn the applicant away, given the enduring public interest in the Judgment that has triggered the application. To that limited extent of great public interest, we think that the submissions by the two counsel are not without merit. In exercise of the inherent powers of this Court, we shall therefore proceed to determine whether there is any matter to be clarified, and if so, to what extent. This assumption of jurisdiction, is all the more

necessary, so as to avert the danger of an impression being created in the mind of the public, that there exists an ambiguity, in the Court's Judgment, even where there might be none. If indeed there is an ambiguity, the assumption of jurisdiction will help eliminate the same. Having so decided, we now turn to the two questions as framed in the Notice of Motion.

[59] The applicant poses the first question thus:

> "***Which results as between the tallies contained in Forms 34B submitted by the Returning Officers to the National Tally Centre and the totals of Forms 34A as verified by 1st and 2nd respondents, the 2nd respondent should use in declaring the results of the presidential election as envisaged under Article 138 (10) (a) of the Constitution.***"

[60] With due respect, we find this question as framed, either mischievous, or informed by an inexplicable lack of understanding of the Constitution, the Elections Act, and the Judgment of this Court, not to mention the Judgments of the Court of Appeal and the High Court regarding the duty of the 1st respondent to verify, accurately tally, and transmit the results of a presidential election coupled with the duty of the 2nd respondent to verify, accurately tally, and declare the results of the election of the President.

[61] These stages and concomitant responsibilities are so elaborately explained in the Judgment of this Court, that it confounds the mind, that the 2nd respondent would pose such a question. The way in which the question is framed appears to be based on the assumption that the results in Forms 34A and those in Forms 34B are mutually exclusive. Is it not a rudimentary fact, that the

latter, is the aggregate of the former? And if this is so, how would it be a matter of choice as to which results between Forms 34A and Forms 34B, the 2nd respondent is to declare? Who aggregates what into what? Again, is it not an established fact that the Constituency Returning Officer, aggregates Forms 34A from the polling stations into Form 34B? Before generating Form 34B, doesn't the Returning Officer verify the figures in Forms 34A? Is it not a fact that the 2nd respondent as the National Returning Officer aggregates the results from forms 34B into form 34C? Did this Court not categorically state that before declaring the final aggregated results in Form 34C, the 1st respondent on behalf of the 2nd respondent must verify the said results against those in the transmitted Forms 34A? Is this not why Form 34A is considered the "primary document" in the verification process? Is the verification exercise not meant to establish the accuracy or otherwise of the results, which is a basic tenet of the Constitution? If the 2nd respondent notices some inaccuracies as brought to his attention by the 1st respondent, what is his duty? Is he not supposed to simply bring those to the attention of the candidates, the public and election observers, even as he declares the final result as aggregated from Forms 34B? What did this Court say about the effect of inaccuracies that may be unearthed by the verification exercise on an election?

[62] At paragraph (f) of the Notice of Motion, the applicant states that "despite agreeing with the finding in the ***Maina Kiai case***, at paragraph 294 of its Judgment, *the Supreme Court criticized the reliance by the 1st and 2nd respondents on the* ***Maina Kiai case*** *for the position that any errors identified by the 1st and 2nd respondents in the verification can only be corrected by an election court. The Court emphatically stated that in the course of verification, the numbers must add up.*"

[63] We do not understand the genesis of the foregoing assertion by the applicant. Nowhere in its majority Judgment did this Court *criticize the 1st and 2nd respondents' reliance on the* ***Maina Kiai case***. On the contrary, what this Court took issue with, was the decision by the 2nd respondent to declare the results that had not been tested against the transmitted results in Forms 34A from the 40, 833 polling stations countrywide. This Court disagreed with the 1st and 2nd respondents' submissions to the effect that the ***Maina Kiai decision*** had relieved them of the duty to verify the results against Forms 34A. This was clearly stated by the Court at paragraph 293 thus:

> *"It was further urged in Court by a number of counsel for the 1st and 2nd respondents, that by disregarding Forms 34A and exclusively relying on Forms 34B…the said respondents were simply complying with the Court of Appeal's decision in* ***Maina Kiai.*** *We have already held, that we find little or nothing in this decision, to suggest that, by deciding the way it did, the appellate Court restrained or barred the 1st respondent from verifying the results before declaring them, or that it was relieving the former from the statutory duty of electronically transmitting the results. What the 2nd respondent was barred from doing by the Court of Appeal and the High Court, was to vary, alter, or change the results relayed to the National Tallying Centre from the polling stations and constituency Tallying Centres, under the guise of verifying."*

[64] So where does the need to clarify such a pronouncement by this Court emanate from? We reiterate that the responsibility to verify results is not a creation of this Court but an imperative of the Constitution and Section 39(1C)(b) of the Elections Act. The verification required of the 1st and 2nd respondents is meant to ensure accuracy or prevent fraud and also to confirmation that the

candidate to be declared president elect has met the threshold set under Article 138(4) of the Constitution. It is therefore the duty of the 2nd respondent, to bring to the attention of the public, any inaccuracies discovered by the verification of Forms 34A and Forms 34B even as he declares the results as generated from Forms 34B to generate Form 34C. The effect of such inaccuracies on an election depends on their gravity or otherwise and the 2nd respondent must state whether the discrepancies affect the overall results or not. The institution vested with the mandate to make a determination of the effect of the inaccuracies is an election Court, a matter clearly settled by both the Court of Appeal in the ***Maina Kiai decision*** and in this Court's Judgment.

[65] This brings us to the second question which is:

> "W*hether the 1st and 2nd respondents can correct errors identified in Forms 34B and/ or amend the Forms 34B where the same differ with results contained in the relevant Forms 34A after the verification exercise envisaged by Article 138 (3) (c) of the Constitution."*

[66] To this, the answer is rather obvious. The issue was dealt with in the ***Maina Kiai decision*** *by the Court of Appeal. But for whatever it may be worth, we hereby reiterate that the 1st and 2nd respondents cannot correct errors identified in Forms 34B or amend the Forms 34B where the same differ with the results contained in the relevant Forms 34A. Theirs, is to expose such discrepancies and leave the resolution of such issues to the election Court, in this case, the Supreme Court.*

[67] This opinion represents our understanding and answer to the two questions posed before us by the 2nd respondent.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **17th Day** of **October, 2017.**

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D. K. MARAGA **CHIEF JUSTICE & PRESIDENT** **OF THE SUPREME COURT**	**P. M. MWILU** **DEPUTY CHIEF JUSTICE & VICE** **PRESIDENT OF THE SUPREME COURT**
.....	.....
J. B. OJWANG **JUSTICE OF THE SUPREME COURT**	**S. C. WANJALA** **JUSTICE OF THE SUPREME COURT**

.....

I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a

true copy of the original

REGISTRAR

SUPREME COURT OF KENYA