REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. APPLICATION NO. 628 OF 2017

(FORMERLY MOMBASA JR 58 OF 2017)

IN THE MATTER OF AN APPLICATION BY KHELEF KHALIFA AND HASSAN ABDI ABDILLE FOR ORDERS OF CERTIORARI,

AND

IN THE MATTER OF AND/OR THE VIOLATION OF ARTICLES 10, 25, 38, 47, 50, 81 OF THE CONSTITUTION, 2010

IN THE MATTER OF: THE ELECTIONS ACT

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS, 2012

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORMS ACT, CHAPTER 26, LAWS OF KENYA

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC.....APPLICANT

AND

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....RESPONDENT

EX PARTE:

KHELEF KHALIFA

HASSAN ABDI ABDILLE

JUDGEMENT

Introduction

1. By a Notice of Motion dated 19th October, 2017, the ex parte applicants herein, **Khelef Khalifa** and **Hassan Abdi Abdille**, (hereinafter referred to as "the Applicants") who aver that they are public spirited citizens, registered voters in the Republic of Kenya and defenders of human rights seek an order of certiorari to move into this Court for purposes of being quashed a decision of the Respondent communicated in the Kenya Gazette Notice 9977 Vol. CXIX, dated the 12th October 2017 titled Appointment of Constituency and Deputy Constituency Returning Officers.

Applicants' Case

2. According to the applicants, the Respondent has made a decision communicated in the Kenya Gazette Notice 9977 Vol. CXIX, dated the 12th September 2017 titled Appointment of Constituency and Deputy Constituency Returning Officers which Notice purported to appoint persons who are to serve as constituency and deputy constituency returning officers in the general elections scheduled for the 26th October 2017. It was their case that the Respondent in a clear demonstration of bad faith and breach of the Constitution and the law has proceeded to purport to make the appointments of constituency and deputy constituency returning officers without following the laid down procedure of the law, ignoring the need for transparency and accountability in the process and violated the provisions of Regulation 3 of the ***Elections (General) Regulations, 2012*** (hereinafter referred to as "the Regulations").

3. The applicants averred that they made inquiries from several political parties including ***Chama Cha Uzalendo***, ***Orange Democratic Movement Political Party***, ***Amani National Congress*** political party and others, whether they had received the list of proposed constituency and deputy constituency returning officers and the Executive Directors of the said political parties informed them that as at 12th October 2017 they had not received any proposed list of persons to be appointed as constituency or deputy constituency returning officers for the fresh elections scheduled for the 26th October 2017. In verification of this fact the applicants relied on the supporting affidavits sworn by **Phillippe Opiyo Sadja**, the Secretary General of the **Chama Cha Uzalendo** and **Oduor Ong'wen**, the Executive Director of **Orange Democratic Movement**, both of whom confirmed that as at 12th October, 2017, their respective political parties had not been communicated to a list of persons proposed for appointment as Constituency Returning Officers (CROs) and Deputy Constituency Returning Officers (DCROs).

4. The applicants therefore contended that the Respondent had acted in an unconstitutional manner in that the Ex Parte Applicants, members of political parties, political parties and independent candidates have not been accorded an opportunity to make representations on persons to be appointed constituency and deputy constituency returning officers for the purposes of the 26th October 2017 fresh elections as required under the law. In their view, the persons purported to be appointed through the impugned Notice cannot purport to conduct constituency elections in the constituencies, their purported appointment having been done in an illegal manner that is contrary to express provisions of the law.

5. The applicants' case was that the process leading to the impugned decision is illegal, procedurally unfair and violates the basic tenets of the rule of law, principles of the electoral system captured in the Constitution and the requirements of the said Regulations.

6. It was further contended that the act of the Respondent is contrary to Articles 29, 47, 50 and 81 of the Constitution, Regulation 3 of the ***Elections (General) Regulations, 2012*** and the ***Fair Administrative Action Act***.

7. The applicants asserted that they have a legitimate expectation that the Respondent shall at all times be guided by the laws of the Republic in executing its mandate and that it shall respect and uphold the principles enshrined under the Constitution and the Rule of Law. However, the Respondent has in the present circumstances acted unreasonably, irrationally, arbitrarily and in blatant disregard of the law and the principles of the Constitution. Its act, they claimed, constitutes a threat to the rights and freedoms of a substantial portion of the people of Kenya to have free fair and democratic elections administered in an impartial manner by referees selected in a manner that is consistent with the principles of the electoral system captured in the Constitution and the provisions of the Electoral laws in Kenya.

8. It was the applicants' case that it will be a travesty of justice and an affront to the right to free fair democratic elections to have strangers whose integrity, competence and fidelity to the law are unknown to oversee the fresh elections.

9. Based on legal counsel the applicants believed that it is necessary and essential that for a person to exercise the functions, powers and mandate of a returning officer in any election, the person must be formally appointed in a manner consistent with the Constitution and the said Regulations. To them, under Article 259 of the Constitution, if a function or power is to be exercised on the advice, or recommendation, with the approval or consent of, or on consultation, with another person, the function may be performed or the power exercised, only on that advice, recommendation, with that approval or consent, or after that consultation. It was therefore their case that the Respondent having failed to seek the representation of political parties and independent candidates prior to making the appointment, lost the power to make the said appointments and any such appointments made without seeking representation from political parties are null and void.

10. It was therefore argued that the impugned decision ought to be quashed for being illegal, unreasonable and contrary to express provisions of the law and it aims to undermine the exercise of the free franchise of the voter in a free, fair and impartial manner that accords with democratic principles. The applicants insisted that the purported lists of constituency and deputy constituency returning officers appointed for the purposes of the 26th October 2017 fresh elections is illegal and contrary to the law and the persons therein cannot execute the statutory functions of returning officers in the fresh elections.

11. In their submissions which were highlighted by their legal counsel, **Mr Willis Otieno**, the applicants contended that the Respondent reached that decision unilaterally and did not adhere to the principles of good governance set out in Article 81 of the Constitution, the principles of the electoral system set out under Article 81 of the Constitution and the provisions of regulation 3 of the ***Elections (General) Regulations, 2012***. It was submitted that the Respondent's decision was instigated by amongst others illegality and unconstitutionality; irrationality and unreasonableness; and was in breach of legitimate expectation.

12. As regards illegality and unconstitutionality, it was submitted that Article 10 of the Constitution provides for national values and principles of governance which national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. These national values and principles include the rule of law and good governance. In this respect the applicants submitted that according to Dicey, the rule of law in the first place, is the absolute supremacy or predominance of the regular law as opposed to the influence of arbitrary power,

and excludes the existence of arbitrariness, of prerogative or even of wide discretionary power on the part of the government. It thus encompasses measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law among other values. Therefore, decisions made without considerations of the requirements of the rule of law are null and void, hence inconsequential.

13. In this regard the applicants relied on Article 88(5) the Constitution which provides that:

The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation.

14. They also relied on Article 2 (4) of the Constitution which is to the effect that '***Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid***,' and contended that as the Respondent acted in total disregard to the law, its act (the irregular appointment of officers) is therefore null and void. The Court was therefore urged to invoke its powers by providing checking on the acts by the Respondent and declaring the same an illegality as it was rightly pointed out by the Court in **Republic vs. Permanent Secretary/Secretary to The Cabinet and Head of Public Service Office of the President & 2 Others Ex-Parte Stanley Kamanga Nganga [2006] eKLR**, where it was pointed out thus:

"The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large."

15. The other principle dealt with by the applicants was the participation of the people. It was submitted that the impugned decision herein was reached without involving the general public and neither were they, through their respective political parties and/or independent candidates accorded an opportunity to present their views and considerations in regard to the appointments made. According to the applicants, citizen participation is a core part of the Constitution. It starts with Article 1, which states that all sovereign power is vested to the people of Kenya and to the applicants, the exercise of this power occurs at the national and county levels either directly through citizen participation or indirectly through democratically elected representatives. The principle seeks and facilitates the involvement of those potentially affected by or interested in a decision, as the participation of such people may influence the decision. This makes this value indispensable for any democracy. The recognition of this fact it was submitted, led to the drafting of the ***Public Participation Bill, 2016***. It is therefore incumbent upon every constitutional body which is under a duty to ensure that citizens are accorded the right to participate in the activities so contemplated by law as in the present case. In the circumstances therefore, any decision reached without public participation and the law contemplates that public participation ought to be conducted in such decisions; the failure to exercise that right renders such a decision null and void.

16. In support of this position the applicants relied on **R vs. Bishop Silas Yego and the Registrar of Societies ex Parte David Mulei Mbuvi and Others (Miscellaneous Application No. 155 of 2006).**

17. The applicants also dealt with integrity as a principle and contended that the authority assigned to a State officer/Public officer is a public trust and is to be demonstrated by respect for the people, honour to the nation, dignity to the office and public confidence in the integrity of the office. The officers have a responsibility to serve the people, rather than themselves. Thus, the law on integrity requires public officers to display high levels of personal integrity, selfless service based on public interest, accountability to the public for their decisions, high standards of professional ethics and should have been appointed on the basis of fair competition and merit among other values.

18. It was therefore submitted that the Respondent, by by-passing the due process that the law has prescribed for the appointment of its officers, denied all the stakeholders an opportunity to vet the appointed officers, and to satisfy themselves of their fitness or otherwise for the job, and whether they meet the requirements of chapter six of the Constitution. This, they contended renders such appointments null and void. To them, the touchstone for appointment is the institutional integrity as well as the personal integrity of the candidate, as was correctly held by the Indian Court in the case of **Centre for PIL & Another vs. Union of India & Another 2011 (2) UJ908 (SC)** as quoted in the Kenyan case of **International Centre for Policy and Conflict & 5 Others vs. Attorney General & 5 Others [2013] eKLR.**

19. The next principle which the applicants submitted on was transparency and according to them, Chapter Six of the Constitution is dedicated to leadership and integrity of public officers. It obligates public officers to make objective and impartial decisions with unqualified integrity and honesty in order to bring honour and pride in the offices held. It is the Applicant's other submission that in making the appointments that are the subject matter of this litigation, the Respondent acted in contravention of the law that requires it to be transparent in the execution of its duties. Therefore such appointments are null and void.

20. According to the applicants, Article 38 read together with Article 81 of the Constitution provides for general principles for the electoral system, specifically Article 81 (a) 'freedom of citizens to exercise their political rights under Article 38,' points to non-conformity with the law. It was submitted that by failing to provide an opportunity to those interested to apply to be its officers, the right to free and fair election was infringed by the Respondent. Reliance was also placed on Article 47 of the Constitution as read with section 4 (6) of the ***Fair Administrative Action Act, 2015*** and based on **Dawood vs. Minister of Home Affairs [2000] (8) BCLR 837 at 54 [28]** and **R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285*,*** it was submitted that JR is a 'vanguard to protect the Bill of Rights by requiring legislative guidance as to when limitation of rights will be justifiable.

21. According to the applicants, the Respondent acted in breach of the right to be heard under Article 50 of the Constitution which is a component of the right to fair hearing. Rules of common law require that a party whose interest is likely to be affected by the decision of an authority must be given an opportunity to present its views before that body, before the decision is made. Clearly, in the matter at hand, neither independent candidates nor political parties were given any opportunity to present their views on the appointments. They relied on **Michael Omole Oharo and Others vs. The Council for Legal Education (Miscellaneous Application Number 917 of 1996)** and **David Onyango Oloo vs. The Attorney General (Civil Appeal No. 152 of 1986).**

22. As regards illegitimate expectation, the applicants relied on **Rwanyarare & Others vs. Attorney General [2003] 2 EA 664** as quoted in the case of **James Opiyo Wandayi vs. Kenya National Assembly & 2 Others [2016] eKLR** that judicial power is derived from the sovereign people and is to be administered in their names. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. In this regard the applicants also relied on **Konway vs. Limmer [1968] 1 ALL ER 874** and based on the foregoing, it was the Applicants' contention that the action by the Respondent is contrary to the Constitution as read with regulation 3 of the Regulations. To the applicants, the Respondent has acted in bad faith by by-passing clear provisions of the law while proceeding to act unreasonably while ignoring the need for transparency and accountability in purporting to appoint strangers to oversee the conduct of the forthcoming elections. Further, the process leadings to the impugned decision is shrouded by secrecy; it is illegal, procedurally unfair and flawed; and directly contravenes the rule of law; principles of the electoral system and the basic tenets of democracy. The action by the Respondent is contrary to

Articles 27 (1), 29, 38, 47, 50 and 81 of the Constitution; Regulation 3 of the ***Elections (General) Regulations, 2012***; and the ***Fair Administrative Action Act, 2015***.

23. It was submitted that the Applicants had a legitimate expectation that the Respondent shall at all times be guided by the laws and shall uphold the tenure and spirit of the Constitution in executing its mandate and that it shall respect and uphold the principles enshrined in the Constitution and the rule of law. Contrary to the Applicants' expectations, the Respondent acted irrationally, arbitrarily and in blatant disregard of the law and the principles of the Constitution and the rule of law. The actions by the Respondent pose and continue to pose a threat to the rights and freedoms of a substantial portion of the people of Kenya to having a free and fair democratic elections administered in an impartial manner by referees selected in a manner that is consistent with the principles of the electoral system captured in the Constitution and the Electoral laws in Kenya.

24. It was contended that being an independent body, the Independent Electoral and Boundaries Commission in as much as it enjoys independence, it is bound by the Constitution and other laws of the Republic. It cannot purport to act outside the ambit of the law and the Constitution as affirmed by the Court in **Re The Matter of the Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011, where it was observed thus:**

[60] While bearing in mind that the various Commissions and independent offices are required to function free of subjection to *"direction or control by any person or authority",* we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the "independence clause" does not accord them *carte blanche* to act or conduct themselves on whim; their independence is, by design, configured to the *execution of their mandate,* and performance of their functions as prescribed in the Constitution and the law. For due operation in the matrix, "independence" does not mean "detachment", "isolation" or "disengagement" from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question. The moral of this recognition is that Commissions and independent offices are not to plead "independence" as an end in itself; for public-governance tasks are apt to be severely strained by possible "clashes of independences".

25. In the applicants' view, it is thus clear that independent bodies, such as the Respondent herein is bound by the Constitution and the laws of the country and they cannot at any times purport to act outside the law. The Respondent herein owes its duty and fidelity to the law and they are bound by the principles outlined in the Constitution. It was their case that the promulgation of the Constitution of Kenya, 2010 sought to cure the ills of the past and sought to streamline governance and the electoral system. The Constitution has been acknowledged to be a transformative charter with the greater public interest at heart and reliance was placed on **Speaker of the Senate & Another vs. Attorney-General & 4 Others, Advisory Opinion Reference No. 2 of 2013. It was their case that** the spirit and intentions of the framers of the Constitution was thus to have a transformative instrument geared towards having a transparent government with transparent independent constitutional institutions which abide by the principles set out in the Constitution and the various laws. The transformation was geared towards social

change including electoral transformation in order to involve principles such as transparency and openness.

26. In the circumstances of the present case, it was the Applicants' further submission that the integrity of the electoral system is crucial and the same begins from the recruitment of stuff to oversee the elections to the final declaration of the results and storage of the voters register and election materials. The failure by the Respondent herein to involve political parties and independent candidates as contemplated under the law compromises the forthcoming elections and the same is and continues to infringe on the Applicant's and the general public's constitutional right to free and fair elections. The right to vote is accepted as a fundamental right and its enforcement and protection is the duty of this Court. The right to free, fair and regular elections based on universal suffrage and free expression of the will of the people should never at any time be or appear to be compromised and they relied on **John Lokitare Lodinyo vs. Mark Lomunokol & 2 Others, Election Petition No. 5 of 2013, for the holding that:**

"The right to vote is accepted as a fundamental human right and its enforcement and protection must be the duty of every election court. Every election petition presents the court with an opportunity to give effect to such voting right. The Universal Declaration of Human Rights 1948 and The United Nations Conversant on Civil and Political Rights, are the main human rights instruments which emphasize the right of citizens to participate in genuine periodic elections which guarantee free expression of the Will of the electors for purposes of conferring specific authority on the duly elected leaders. These two instruments are part of our Kenya Laws by dint of Article 2 (6) of the Constitution which provides that:- "*Any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this Constitution*."

The right to free, fair and regular elections based on universal suffrage and the free expression of the Will of the elections is entrenched by Article 38 (2) and (3) of the Constitution. The right of every eligible citizen to determine who will represent them in any given position is a basic cornerstone of any democracy and a pre-requisite to social cohesion and solidarity.

Elections give voice to the political will of the people and must ordinarily be conducted in an environment which is respectful to human rights if they are to be truly free and fair. They are the means through which citizens directly exercise their sovereign powers and must be conducted in accordance with the value falling under Article 10 of the Constitution…Thus, Article 81 of the Constitution requires that the electoral system complies with principles "inter-alia" freedom of citizen to exercise their political rights under Article 38, universal suffrage based on the aspiration for fair representation and equality of vote and free and fair elections, which are by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

The I.E.B.C. is the body entrusted with the legal mandate to conduct elections. It is established under Article 88 of the Constitution and under Article 86, it is required to ensure that firstly, whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent. Secondly, the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station. Thirdly, the results from the polling stations are openly and accurately collated and promptly announced by the returning officer and fourthly, appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials."

27. The applicants also relied on **Khelef Khalifa & 2 Others vs. IEBC [2017] eKLR**.

28. In this case it was noted that the Respondent has not demonstrated that it invited and/or even involved independent candidates as contemplated under the law. No material has been adduced indicating that independent candidates were accorded an opportunity to present their views as required under the law. To the applicants, all organs are bound by the Constitution and the Rule of Law.

29. In response to the replying affidavit and submissions made on behalf of the Respondent, **Mr. Otieno** contended that whereas the Respondent alleged that the ROs are its permanent employees, their appointment must be as per Regulation 3 of the Regulations and that there was no evidence that they were in fact its permanent employees. In any case for them to undertake their duties as returning officers Regulation 3 had to be complied with since not employees of the Respondent are eligible to be CROs.

30. It was submitted that the earlier list alluded to by the Respondent was in respect of the general elections as opposed to the fresh presidential elections the subject of these proceedings. According to learned counsel, a perusal of both lists reveals that over 60 names are different names hence it cannot be contended that both Gazette Notices are the same.

31. As regards the issue of delay it was submitted that the impugned Gazette Notice was dated 12th October, 2017 and was published on 13t October, 2017 which was a Friday. The next working day was 16th October, 2017 which was the day when these proceedings were instituted hence there was no delay.

32. As regards the issue of public interest, it was submitted that the same requires that the law be obeyed and the illegality be cure in sufficient time by ensuring that what ought to be addressed is done in accordance with the law. According to him, the law requires that the list be given to all political parties and not just those parties participating in an election since the election of a president applies to all people and not just those participating political parties.

Respondent's Case

33. The application was opposed by the Respondent, the Commission.

34. According to the Commission, the Supreme Court of Kenya by its determination in **Election Petition No. 1 of 2017 - Raila Amolo Odinga & Anor vs. Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR** on 1st September, 2017 ordered, *inter alia*, the Respondent herein to organize and conduct a fresh Presidential Election within 60 days of the said determination. Following the decision, on 4th September, 2017 the Chairman of the Respondent released a press statement announcing that the fresh Presidential Election would be held on 17th October, 2017.

35. It was averred that the new date for the fresh Presidential Election was officially appointed through the Gazette Notice No. 8751 dated 5th September, 2017 and published in Vol. CXIX—No. 130 of the Special Issue of the Kenya Gazette on even date. The Respondent undertook to comply with the order of the Supreme Court but was unable to do so promptly pending the delivery of the detailed judgment which contained the complete, exhaustive and authoritative analysis of the Supreme Court and which analysis directly affected the Respondent in terms of timelines in planning and logistics in preparation for the fresh Presidential Elections. It was disclosed that the detailed judgment was delivered and made available on 20th September, 2017 and in a bid to fully understand the implications of the same on the Respondent and the fresh Presidential Elections, the Chairman of the Respondent through a press statement dated 21st September, 2017 announced that the date of the fresh Presidential Election would

be moved from 17th October, 2017 to 26th October, 2017. Accordingly, the second date for the fresh Presidential Election was officially appointed through the Gazette Notice No. 9800 dated 22nd September, 2017 and published in Vol. CXIX—No. 145 of the Special Issue of the Kenya Gazette on 29th September, 2017.

36. Dwelling on the employment history of CROs and DCROs at Respondent, it was averred that the Gazette Notice No. 9977 published in Volume CXIX-No. 145 of the Special Issue of the Kenya Gazette is dated 9th October 2017 and not 12th September, 2017 as averred by the ex parte Applicants. It was the Respondent's position that the Constituency Returning Officers and Deputy Constituency Returning Officers are permanent employees of the Respondent and on the premise of being permanent employees of the Respondent, they were appointed and participated in the General Election of 8th August, 2017 (hereinafter the 'General Election'), such that the CROs for purposes of the General Election were appointed in the Second Schedule of the Gazette Notice No. 4410 dated 3rd May, 2017 published in Vol. CXIX—No. 58 of the Special Issue of the Kenya Gazette on 5th May, 2017. For purposes of the General Election, the DCROs were appointed in the Second Schedule of the Gazette Notice No. 4979 dated 22nd May, 2017 published in Vol. CXIX–No. 67 of the Kenya Gazette on 26th May, 2017.

37. It was averred that through certain amendments were made to appointments of the CROs and DCROs whereby some officials were transferred to different constituencies. The changes to the CROs were made through two Gazette Notices. Gazette Notice No. 6670 dated 6th July, 2017 and published in Vol. CXIX—No. 94 of the Special Issue of the Kenya Gazette on 10th July, 2017. Only 7 (seven) changes were made as reflected in page 1 of the said notice. Gazette Notice No. 7591 dated 3rd August, 2017 and published in Vol. CXIX- No. 111 of the Special Issue of the Kenya Gazette on 4th August, 2017. Only 1 (one) change was made. Similar amendments were made to the persons appointed as DCROs as per paragraph 11(b) above whereby some officials were also transferred. The changes were made through two Gazette Notices. Gazette Notice No. 6670 referred to in paragraph 13(a) above. Twenty two (22) amendments were made as reflected on page 2 of the said notice. Gazette Notice No. 7591 referred to in paragraph 13(b) above. Only 4(four) amendments were made**.**

38. It was therefore averred that all the CROs and DCROs who participated in the General Election have been retained by the Respondent for purposes of the fresh Presidential Election. There has been no change in the employment status of these officials at the Respondent, save for some of the CROs and DCROs being transferred to different constituencies by the Respondent. In the Respondent's view, the officials have not ceased being employees of the Respondent and still retain their original Identification Numbers as initially assigned by the Respondent upon their employment. Furthermore, the transfers are well within the power and discretion of the Respondent to ensure a fair and transparent electoral process. It was in any case averred that the CROs and DCROs by virtue of being employees of the Respondent are not to subjected to the scrutiny of third parties as suggested by the ex parte Applicants.

39. The Respondent averred that through an order of the court issued on the 2nd of June, 2017 the Respondent fully complied with order and Regulation 3 of the ***Elections (General) Regulations***, as far as the appointment of CRO's and DCRO's was concerned. The Order and Regulation 3 requires that political parties would make their representation in writing on the list of proposed officers, which the Respondent complied with and there has been no new appointments by the Respondent save routine transfers of various within the power and capacity of the Respondent.

40. The Respondent's position was that the Supreme Court nullified the results of the Presidential Election and ordered a fresh election to be undertaken within a period of sixty (60) days. The Supreme Court did not, in its judgment, annul the entire electoral cycle which had been undertaken by the

Respondent, for the general election of 8th August, 2017, which includes the appointment of the CROs and DCROs. In the circumstances, the current gazette officers of the Respondent who were appointed after compliance with Regulation 3 of the ***Elections (General) Regulations*** and the court order of 22nd June, 2017 are properly fit to conduct the elections as per the powers vested in each of the officers by the law.

41. It was the Respondent's case that the Gazette Notice against which the ex parte applicants seek orders of certiorari is dated 9th October, 2017 and was published on 12th October, 2017. The application for leave is dated 16th October, 2017 and is therefore late given the circumstances and strict timelines surrounding the fresh Presidential Elections.

42. It was contended that leave was granted to file the substantive motion on 19th October, 2017, being only seven (7) days from the appointed date of the fresh Presidential Elections on 26th October, 2017. Under these circumstances it was the Respondent's position that public inconvenience and administrative chaos will be caused should this Court grant the orders sought by the ex parte Applicants.

43. The Respondent contended that it had done all that it was expected to do to fulfil its duty in ensuring fair, transparent and credible elections. In addition, it was its belief that the prayer for and order for certiorari has been overtaken by events in view of the elections being held on 26th October, 2017 hence it is in the public's interest for the fresh Presidential Election be allowed to proceed as scheduled.

44. It was submitted on behalf of the Respondent through its learned counsel, **Mr Wetangula**, that if the application is allowed, the Respondent would have to set aside time of at least fourteen (14) days to prepare a list of potential appointees for representations to be made by political parties and independent candidates, and thereafter publish another notice. Given the present circumstances, it is not possible to carry out such an exercise as the timeline is too short and further that the same will interfere with the fresh Presidential Elections.

45. It was reiterated that since the CROs and DCROs are the Respondent's employees on a permanent basis, the requirement for political parties to make representation to the persons appointed as such was done by the Respondent in preparation to the 8th August, 2017 and that pursuant to an order of the Court in **Judicial Review N0. 238 of 2017**, the procedure under Regulation 3 of the ***Elections (General) Regulations 2012*** was fully complied with after the political parties and independent candidates were allowed to make their representations as per the order of the court and the law.

46. The Respondent's position was that after the Judgment of the Supreme Court of 1st September, 2017 where it declared that the election of the President was invalid, the Respondent has a duty to organise a fresh election within a period of sixty (60) days. The fresh election has been deemed by the court to include all the candidates who participated in the Presidential Election. See **Petition No. 471 of 2017, Dr. Ekuru Aukot vs. IEBC and 3 others**.

47. In the Respondent's view, since there has been no change in the employment status of the since save for the transfers as particularised in the Replying Affidavit, the Respondent is not obligated to give out the lists of the names of the CROs and DCROs for scrutiny and representations to third parties. The Fresh Presidential election, is supposed to take place after (60) days of the date of the determination of the Supreme Court as provided under Article 140 (3). A period within which it is impracticable for the entire election cycle process not limited to the appointment of CROs and DCROs to be appointed afresh for the purpose of the fresh election. To the Respondent, such an interpretation may lead to absurd results and adverse to public interest due to the limited period of time within which a fresh election ought to be held.

48. It was further submitted that the ex parte Applicants have not demonstrated the prejudice that would be suffered before this Court if the order sought is not granted.

49. The Respondent reiterated that the order of certiorari ought not be granted as the same would be inefficacious and has been overtaken by events and that the *ex parte* Applicants delayed in bringing their application for leave dated 16th October, 2017 as the appointment of the CROs and DCROs was gazetted and published on 12th October, 2017. In this regard reliance was placed on **Vania Investments Pool Limited vs. Capital Markets Authority, Rea Trading Ltd, Centum Investments Ltd, Tausi Assurance Co Ltd, G A Insurance Ltd, Savco Stores Ltd & Kenyalogy.Com Ltd [2014] eKLR.**

50. Since there are now less than four (4) days left until the said fresh Presidential Elections, if granted, it was submitted that it would be in vain and inefficacious and reliance was placed on **Shanghai Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison (2007) 1 EA 354** and **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR.**

51. It was therefore submitted that the order being sought would cause great administrative chaos and public inconvenience by interfering with the scheduled fresh Presidential Elections. Accordingly the application should be dismissed with costs.

52. In response to the applicants' submissions, **Mr Wetangula** submitted that whereas ODM contends that it was never furnished with the list, its candidate indicated that he was not participating in the elections hence this contention is mischievous. Similarly, ***Chama Cha Uzalendo*** was not participating in the fresh presidential elections and one of the deponents to the supporting affidavits was an independent candidates.

53. It was submitted that in **Petition No. 471 of 2017, Dr. Ekuru Aukot vs. IEBC and 3 others** the Court held that the only parties who were entitled to participate in the fresh elections were those who had participated in the nullified elections and that these were the parties who had approved the earlier list. In learned counsel's view, there were no new appointments in the second list apart from routine transfers. To him, there is no legal requirement that the list be submitted for each election since section 2 of the Elections Act defines election as meaning Presidential, Parliamentary and County Election. In this case the fresh election is nothing but just a Presidential election occasioned by the invalidation of the earlier election.

54. Taking into account the limited period remaining to the elections, the Court was urged to weigh public rights with respect to sovereignty and the right to elect the President vis-à-vis the rights of persons who have indicated that they do not intend to participate in the elections and dismiss the application.

Determinations

55. I have considered the issues raised in this application.

56. That judicial review now has constitutional underpinning is not in doubt. This is necessarily so by the enactment of Article 47 of the Constitution which has elevated the right to fair administrative action as one of the constitutional rights under our Bill of Rights. It is therefore clear that the remedy of judicial review is not merely a common law development or creature. Nor is it just a statutory relief. It is a constitutional remedy. This therefore means that the demarcations between what were formerly considered purely judicial review reliefs and constitutional ones have become blurred. A violation of the principles of the constitution itself is therefore a ground for granting judicial review relief in judicial review

applications without necessarily filing a constitutional petition. Under Article 23 of the current Constitution that demarcation has been blurred and in granting remedies in judicial review applications constitutional principles clearly play a crucial part therein. Judicial review remedies presently have a constitutional basis in Kenya by virtue of Articles 10, 25, 27, 47 and 50 of the Constitution. In my view since the Constitution is incremental in its language, what the current constitutional dispensation requires is that both the grounds and remedies in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity. It is within those prescriptions that judicial review must be seen in our context. This is my understanding of the decision of **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, it was held that:

"Like the Biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness."

57. That judicial review is a constitutional relief has been appreciated in other jurisdiction with similar constitutional framework. Dealing with the issue whether constitutional principles apply to judicial review, the South African Constitutional Court (**Chalkalson, P**) expressed itself on the issue in **Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000)** at para 33 as follows:

"The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts."

58. This was the position adopted by the Court of Appeal in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR,** Civil Appeal 52 of 2014 in which the Court held that:

"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

59. It therefore follows that the the constitutional principles decreed under Article 10 of our Constitution

must similarly inform the manner in which judicial review jurisdiction is to be exercised. To attempt to distinguish judicial review under Article 23 of the Constitution from the same jurisdiction under the ***Law Reform Act***, the ***Fair Administrative Action Act*** and Order 53 of the ***Civil Procedure Rules*** is in my view a distinction without a difference. The Constitution itself enjoins this Court in Article Article 20(3)(a) thereof to develop the law to the extent that it does not give effect to a right or fundamental freedom. Therefore the provisions of ***Law Reform Act***, the ***Fair Administrative Action Act*** and Order 53 of the ***Civil Procedure Rules*** must be developed where a strict interpretation thereof does not give effect to a right or fundamental freedom.

60. While the rule is that the Court in presiding over judicial review proceedings does not proceed therein as if it was hearing an appeal, the development of judicial review grounds by consideration of such factors as proportionality and unreasonableness has introduced some element of subjectivity and merit consideration in judicial review proceedings, at least to a limited extent. This Court is however of the view that it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness. In other words, the courts will only interfere with the decision of a public authority if it is outside the band of reasonableness.

61. The matter before me revolves around the interpretation and application of Regulation 3 of the ***Elections (General) Regulations, 2012*** provides as follows:

(1) The Commission shall appoint a constituency returning officer for each constituency and may appoint such number of deputy constituency returning officer for each constituency as it may consider necessary.

(2) Prior to appointment under paragraph (1), the Commission shall provide the list of persons proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations.

62. Article 81(1) of the Constitution on the other hand provides that:

The electoral system shall comply with the following principles––

(a) ……

(b) ……

(c) …….

(d) …….

(e) …….

(f) free and fair elections, which are—

(i) by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner.

63. In my view, in determining the propriety of any electoral process, the first port of call must necessarily be Article 81 of the Constitution. That Article, it is my view prescribes the minimum threshold when it comes to propriety of an electoral process. Being the minimum threshold, the starting point must necessarily be the said Article and legislation and rules or regulations made pursuant thereto can only add to and not subtract from that minimum threshold. This must be so because the power to enact legislation given to Parliament under Article 81(2) of the Constitution does not include the power to restrict or guide the Court or Tribunals on how to interpret Article 81 of the Constitution.

64. By Article 165(3)(d) of the Constitution the people of this Republic in their wisdom reposed in the High Court –

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

65. In my view, unless that provision is amended, that power cannot by craft or innovation be abridged.

66. A determination as to the propriety or otherwise of any electoral process must therefore, before considering the requirements in any legislation, rules and regulations, meet the constitutional threshold of *free and fair; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner*. In other words any other stipulation whether in an enactment or in other instruments can only be secondary to the said Constitutional dictates.

67. This was the position adopted by the Supreme Court in **Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 others [2014] eKLR** where it was held that:

"Article 3(1) of the Constitution imposes an obligation on every one, without exception, to respect, uphold and defend the Constitution. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2) (e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of the Constitution being protected and promoted. However, all statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally-guided process. What this Court would not do is to extend time beyond that decreed by the Constitution. However, a process provided for by the Constitution and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorized. For that reason, this Court would, by no means be interfering with a constitutionally-mandated process, if the order for stay is granted. This is because an order for stay will be sufficient to bring to a halt the preparation of the by-election by the IEBC as well as stop the swearing in of the Speaker."

68. **Nyamu, J** was even more blunt in his opinion in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** where he expressed himself as follows:

"**To exempt a public authority from the jurisdiction of the Courts of law is, to that extent, to grant doctorial power…This is the justification for the strong, it might even be rebellious, stand which the courts have made against allowing Acts of Parliament to create pockets of uncontrollable power in violation of the rule of law…The law's delay together with its uncertainty and expense, tempts governments to take short cuts by elimination of the Courts. But if the courts are prevented from enforcing the law, the remedy becomes worse than the disease."**

69. **Professor Sir William Wade** in his authoritative work, ***Administrative Law***, 8th Edition at page 708 properly captured the failure of Parliamentary draughtsman as hereunder:

"The Judges, with their eye on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power."

70. This was the view adopted by **Ngcobo, J** in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT 12/05) 2006 ZACC 11** the following manner:

"The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe

upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation."

71. The learned Judge continued:

"It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation. By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does. While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution."

72. As was appreciated by **Langa, CJ** in **Hugh Glenister vs. President of the Republic of South Africa & Others Case CCT 41/08; [2008] ZACC 19** at para 33:

"In our constitutional democracy, the courts are the ultimate guardians of the constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds."

73. I associate myself with the positions adopted in these decisions and dare add that when any of the State Organ or State Officer steps outside its mandate, this Court will not hesitate to intervene. It is

therefore my view that this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation.

74. It is therefore my view and I hold that a Court of law tasked with the determination as to whether a particular electoral process met the legal standards cannot by any legal instrument be restricted in the manner in which the constitutional dictates is to be interpreted. It is the Court hearing an election petition to decide whether the irregularities or illegalities complained of are sufficient to nullify the elections. This must be so since the Constitution itself provides the manner in which it is to be interpreted in Article 259 which provides as hereunder:

(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

75. As this Court held in **The Council of Governors and Others vs. The Senate Petition No. 413 of 2014**:

“this Court [is] vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court”.

76. In my view, this is what informed the decision of **Rawal, J** (as she then was) in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006 [2007] 2 KLR 331** that:

“Whereas the court is mindful of the principle that the Legislature has the power to legislate and Judges shall give due deference to those words by keeping the balances and proportionality in the context of fast progressing issues of human rights which have given birth to the enshrinement of fundamental rights in the Constitution, the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits.”

77. Since the right of every citizen to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors is entrenched in Article 38(2) of the Constitution which falls

under the Chapter on the Bill of Rights, Article 20(3) obliges the Court in applying a provision of the Bill of Rights (including the right to free, fair and regular elections) to develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. In so doing the Court is under a Constitutional obligation pursuant to Article 20(4) of the Constitution to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom on one hand and the spirit, purport and objects of the Bill of Rights on the other.

78. A Court cannot therefore be expected to interpret the Constitution in any other manner than the one dictated by the Constitution itself.

79. It is therefore my view that the said values and principles enunciated in Article 81 of the Constitution cannot be treated as lofty aspirations. To paraphrase the decision in **Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others Petition No. 229 of 2012,** Kenyans were very clear in their intentions when they entrenched Article 81 in the Constitution. In my view, they were singularly desirous of cleaning up our politics, governance and electoral structures by insisting on certain minimum values and principles to be met in constitutional, legal and policy framework and therefore intended that Article 81 be enforced in the spirit in which they included it in the Constitution. The people of Kenya did not intend that these provisions be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations but intended that they should have substantive bite and that they will be enforced and implemented. They desired these values and principles be put into practice. I associate myself with the views of **Shields, J** in **Marete vs. Attorney General [1987] KLR 690** that the Constitution of this Republic is not a toothless bulldog nor is it a collection of pious platitudes or aspirations. It has teeth.

80. What the above discourse means is that general elections are a process as opposed to a one off event. All the processes leading to the elections are subject of scrutiny and may well be grounds for nullification of elections. Therefore to avoid such an eventuality, the preparations leading to the elections must meet the minimum standards articulated in both the Constitution and the law. This position was appreciated by **Emukule, J** in **Karanja Kabage vs. Joseph Kiuna Kariambegu Nganga & 2 others [2013] eKLR** in which the Learned Judge expressed himself as hereunder:

"Articles 88(4)(e) and Sections 74(1) and 110(1) of the Elections Act, and paragraphs 6 and 15 of the Code of Conduct are all provisions which regulate the conduct of public elections. In construing such elective statutes, no single provision would be read or construed in such a way as to render meaningless or absurd any other statutory provision. As these provisions flow one to the other, they shall be considered in *pari materia* and as they relate to the same subject matter they must be read together and applied harmoniously and consistently. This court's jurisdiction under Article 105(1)(a) of the Constitution is to determine the validity of the election of a Member of Parliament, National Assembly or Senate not nomination to contest or vie for an election post. However an election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by Gazettement. In determining the question of the validity of the election of a candidate, the court is bound to examine the entire process upto the declaration of results. This was acknowledged by the Supreme Court in *Advisory opinion No 2 of 2012 In the matter of the Gender Representation in the National Assembly and Senate [2012] eKLR* where that Court acknowledged that elections are not an event but a process: a continuum. The learned Judges, when considering the jurisdiction over presidential election disputes stated thus-

"It is clear to us, in unanimity, that there are potential disputes from Presidential elections other than those expressly mentioned in Article 140 of the Constitution. A Presidential election, much like other elected-assembly elections, is not lodged in a single event; it is, in effect, a process set in a plurality of stages. Article 137 of the Constitution provides for "qualifications and disqualifications for election as President" – and this touches on the tasks of agencies such as political parties which deal with early stages of nomination; it touches also on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute would still have clear bearing on the conduct of the Presidential election".

81. The Learned Judge continued:

"Thus in determining the Petition the court is enjoined to consider the conduct of the elections in terms of the principles of the Constitution as to free and fair elections and whether the electoral laws were upheld and adhered to, and the integrity of the election maintained and ultimately the will of the people was expressed, that is, there was substantial compliance with the law by the Third and Second Respondents.. The concept of free and fair elections is expressed not only on the voting day but throughout the election process from the registration of voters, to the nomination of candidates, casting of the ballot papers and ultimate declaration of the winner. Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament."

82. The Respondent has argued in effect that once Regulation 3 of the said Regulations is complied with during the general elections, it is nolonger necessary to comply therewith in a fresh presidential election conducted pursuant to the decision of the Supreme Court. I am cognisant of the fact that the forthcoming elections are fresh elections pursuant to the judgement of the Supreme Court of Kenya in **Raila Amolo Odinga & Another vs. Independent Electoral and Boundaries Commission & Others [2017] eKLR.** However Regulation 89 of the said Regulations provide as hereunder:

These Regulations shall, with the necessary modifications and adaptations, apply to a fresh election under this Part.

83. The part in question is Part XIV headed ***Presidential Fresh Election***. Therefore Regulation 3 must similarly apply to a fresh presidential election such as the forthcoming elections and the list of persons proposed for appointment as Constituency Returning Officers and their Deputies is required to be provided to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations. This Regulation in my view is meant to achieve the principles of transparency, impartiality, neutrality and accountability which are entrenched in Article 81 of the Constitution. In this regard this Court in **Judicial Review Misc. Application No. 447 of 2017 – Republic vs. Indepeneent Electoral and Boundaries Commission & Others ex parte Gladwell Otieno** expressed itself as hereunder:

"…the electoral body must comply with the letter and spirit of the Constitution, the relevant legislation and the regulations. Article 81 requires the electoral body to ensure that the elections are free and fair in the sense that they are by secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner. To ensure this is attained Parliament in its wisdom has enacted laws and approved regulations in that regard. Those legislation and the regulations must be followed in order to attain the constitutional

dictates."

84. In my view if the Legislature intended that Regulation 3 ought not to apply to fresh elections, nothing would have been easier than for it to have expressly stated so. To my mind the mere fact that Regulation 3 had been complied with during the general election does not necessarily mean that the CROs and the DCROs are thereby permanently eligible for those positions since in between events might have happened that rendered the said officers' status as CROs and DCROs nolonger tenable.

85. It was also contended that the CROs and the DCROs are permanent employees of the Respondent. First and foremost, no evidence was adduced to prove this contention. However even if the CROs and the DCROs are permanent employees of the Respondent, it is my view that not all permanent employees of the Respondent qualify or are eligible to act as CROs or DCROs.

86. The requirement is therefore not just directory but is mandatory for the purposes of ensuring that the elections are free and fair. In this respect I associate myself with the decision in **Khelef Khalifa & 2 Others vs. IEBC [2017] eKLR** where it stated as follows:

"It is important to mention that the word "shall" is used in Section 4 (1), (2) and (4) the act. The word "shall" in those provisions appear to me to be commanding enough to be regarded as mandatory rather than directory. The words are clear, positive and unambiguous and dictate that literal interpretation be given to them. To hold otherwise would, in my view, be for this Court to perpetuate the mischief intended by the legislators to be prevented by the enactment of that section…Statutory bodies derive their authority or jurisdiction from a legal instrument establishing them, and may only do what the law authorizes them to so. This is known as the principle of legality, which requires that administrative authorities not only refrain from breaking the law, but that all their content comply with the Constitution and particularly the Bill of Rights. Their decisions must conform to the Constitution; legislation; and the common law."

87. Where therefore it is proved to the satisfaction of the Court that this provision is not complied with such appointments ought, all things being equal, to be set aside. Where the Respondent sets out to conduct elections in breach of the provisions of the Constitution and the relevant legal instruments, such non-compliance will not be lightly excused. As this Court held in **Misc. Application No. 637 of 2016 – Republic vs. IEBC & Others ex parte Coalition for Reform And Democracy:**

"Whereas the Court agrees with the IEBC that it owes Kenyans a duty to ensure that unnecessary obstacles are not permitted to prevent the IEBC from preparing and carrying out the general elections of 8th August 2017, this Court's mandate is to ensure that the elections are conducted in accordance with the Constitution and the law, and will not allow itself to be a rubberstamp for a process that is clearly flawed and whose result is unlikely to meet the constitutional and legal threshold."

88. This Court has the power and I dare say the mandate pursuant to Article 165(3)(5) of the Constitution to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Therefore this Court does not have to wait until after the infringement has occurred in order to intervene where it is clear to it that such violation is in fact threatened. So where it is brought to the attention of the Court that certain electoral processes are being undertaken which are not in accordance with the Constitution and the law, the Court must give appropriate directions and ought not to wait until the country goes into flames before undertaking its mandate. Unless Kenyans are assured that their will in the ballot box will be upheld, they are likely to be disillusioned with the electoral process.

89. The Respondents contended that since there are now few days left to the said fresh Presidential Elections, if the orders sought herein granted, it would be in vain and inefficacious. In this case the Respondent averred that the date for the conduct of the forthcoming election was announced by the Chairman of the Respondent through a press statement dated 21st September, 2017 as 26th October, 2017. Accordingly, the second date for the fresh Presidential Election was officially appointed through the Gazette Notice No. 9800 dated 22nd September, 2017 and published in Vol. CXIX—No. 145 of the Special Issue of the Kenya Gazette on 29th September, 2017. It is therefore clear that as far back as 21st September, 2017, the Respondent was aware that the fresh elections would be conducted on 26th October, 2017. Instead of proceeding to submit the list of the proposed CROs and the DCROs to the political parties, the Respondent waited until 9th October, 2017 to prepare the Gazette Notice which was eventually published on 12th October, 2017. With due respect the Respondent's conduct in this regard can only be termed as being mischievous. The Respondent cannot in my view be permitted to rely on its own mischief as a ground for not complying with its legal obligations.

90. Whereas the Respondent contends that it was not under an obligation to comply with Regulation 3 in light of the earlier gazettement and the consent order, it has failed to explain on what basis it was re-gazetting CROs and the DCROs if the fresh election was, as it were, a continuation of the general elections. In my view the Respondent cannot approbate and reprobate in the same breadth. To my mind the Respondent must have appreciated that there was a need to gazette the CROs and the DCROs afresh.

91. An issue was raised that the ODM candidate had intimated an intention not to participate in the said elections hence had no business questioning the process in question. It was also submitted that since ***Chama Cha Uzalendo*** was not fronting any candidate in the said election, it had no business being informed about the list. Regulation 3 of the said Regulations is however clear that *the Commission shall provide the list of persons proposed for appointment to political parties and independent candidates*. It does not state that the list is to be provided only to the political parties participating in the elections. In **Law Society of Kenya vs. Kenya Revenue Authority & Another (2017) eKLR** the learned judge stated as follows:

"In construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the Court has to see at the very outset is, what does the provision say" The Courts are bound by the mandate of the Legislature and once it has expressed its intention in words which have a clear significance and meaning, the Court is precluded from speculating. If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature. Where the words of a statute are plain, precise and unambiguous, the intention of the Legislature is to be gathered from the language of the statute itself and no external aid is admissible to construe those words. It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning that the external aid may be looked into for the purpose of ascertaining the object which the Legislature had in view in using the words in question."

92. The import, according to me, therefore is that where the words in a Statute in their plain and ordinary meaning are unambiguous, the Courts work in interpretation is done and the Court has no further role in the interpretation of a statute. In this case the law is clear that political parties and independent candidates are to be provided with the list of the proposed appointees. The Respondent cannot adopt an

interpretation that suits its default in complying with the law which is meant to attain the constitutional values and principles.

93. It was the Respondent's position that there has been no change in the employment status of these officials at the Respondent, save for some of the CROs and DCROs being transferred to different constituencies by the Respondent. The position of the Applicants is however to the contrary. In my view the mere fact that a person was appointed as a CRO for a particular Constituency does not necessarily qualify him or her to be suitable as a CRO for another Constituency. It may well be that the person may operate in that capacity very well but may not be able to do so in another Constituency. This can only be determined when the list is provided to the political parties for the purposes of representations as required by the law. The least that the Respondent would have done would have been to provide the names of the proposed transferees to the political parties and independent candidates fourteen days prior to the proposed appointments.

94. In this case having considered the case for the respective parties, the inescapable conclusion I come to is that it was mandatory for the Respondent to comply with Regulation 3 of the ***Elections (General) Regulations*** and that the Respondent did not fully comply therewith.

95. That brings me to the consequence of the non-compliance. According to the Respondent, the order of certiorari ought not be granted as the same would be inefficacious and has been overtaken by events and that the *ex parte* Applicants delayed in bringing their application for leave dated 16th October, 2017 as the appointment of the CROs and DCROs was gazetted and published on 12th October, 2017.

96. The issue of delay poses no difficulty. The impugned Gazette Notice was published on Friday, 13th October, 2017. The following two days fell on a weekend and on the next working day the applicants filed their application. There was absolutely no delay on the part of the applicants.

97. With respect to the issue of efficaciousness of the order, the general legal position was stated in in **Resley vs. The City Council of Nairobi [2006] 2 EA 311** where the Court held that:-

"In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid…That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's statements that the Court's role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed (sic)…If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and *it will not listen readily* to suggestions of "chaos" and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed." [Emphasis added].

98. This issue is related to the submission that in the circumstances of this case public interest should override the applicants' concerns. As this Court has held before, a proper constitutional understanding – especially of Articles 1 and 159 of the Constitution as well as the interpretive theory in Article 259 of the Constitution obliges the Court in cases such as this to balance the public interest and the private interest in determining whether to grant orders and in fashioning appropriate remedies. However, balancing between the public interest and the rights of successful litigants before the Court is a fact-intensive inquiry. It must be based on facts and permissible inferences of the likely consequences of granting the

orders. It is not enough for a party to warn the Court that administrative chaos will ensue, that the heavens will shatter, and that the sky will fall down if the orders sought are granted. A party seeking to rely on this doctrine of public interest to inoculate its otherwise unlawful actions against Judicial Review orders bears a heavy burden to demonstrate that it will burden under the yoke of impossibility if the merited orders are granted. As aforesaid, in balancing the competing aspects, the nature of the right which was breached and its importance in the constitutional scheme of rights must be considered. The starting point however was propounded in **Republic vs. County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya [2014] eKLR** thus:-

"There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision."

99. Therefore a party cannot transgress the law with impunity and then tell the Court that public interest dictates the action should not be reversed. Such posture will be frowned upon by the Court. In other words contravention of the Constitution or a Statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute.

100. However, as appreciated by **Francis Bennion** in ***Statutory Interpretation*****,** 3rd Edition at page 606:

"it is the basic principle of legal policy that law should serve the public interest. The court…should therefore strive to avoid adopting a construction which is in any way adverse to the public interest".

101. Further, in **Kenya Anti-Corruption Commission vs. Deepak Chamanlal Kamani and 4 Others [2014] eKLR** it was held that:

"…a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large".

102. As is appreciated in ***Black's Law Dictionary, 9th Edn***. "public interest" is the general welfare of the public that warrants recognition and protection and it is something in which the public as a whole has a stake; especially an interest that justifies governmental regulation.

103. In **Re McBride's Application [1999] NI 299** the Court expressed itself as follows:

"…it appears to me that an issue is one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally and not merely on an individual or group…it seems to me to be equally clear that a matter may be one of public law while having a specific impact on an individual in his personal capacity."

104. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution while under Article 1(3)(c) sovereign power under the Constitution is delegated *inter* alia to the Judiciary and independent tribunals. Dealing with a similar provision in **Rwanyarare & Others vs. Attorney General [2003] 2 EA 664**, it was held with respect to Uganda that Judicial power is derived from the sovereign people of Uganda and is to be

administered in their names. Similarly, it is my view and I so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. I therefore associate myself with the decision in **Konway vs. Limmer [1968] 1 All ER 874** that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

105. It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination.

106. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

107. I defer to the case of **East African Cables Limited vs. The Public Procurement Complaints, Review & Appeals Board and Another [2007] eKLR** where the Court of Appeal set out principle of public interest:

“We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable.”

108. With respect to efficaciousness of the remedy in the exercise of discretion, it is not in doubt that the decision whether or not to grant judicial review reliefs is an exercise of discretion which must however be exercised judicially. As is stated in ***Halsbury’s Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. *The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant.* In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court

declining to grant relief. *Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders*." [Emphasis added].

109. In the instant case both the applicants and the Respondent claim that public interest favours them. Paradoxically both arguments are hinged on Article 38 (2) and (3) of the Constitution which provides for the right to free, fair and regular elections based on universal suffrage and the free expression of the Will of the electors.

110. In this case this Court must balance the said interests. If the Court grants the prayers sought herein it would mean that the CROs and the DCROs will not preside over the fresh Presidential elections proposed for tomorrow as Regulation 3 requires the Respondent to provide the list of the proposed CROs and the DCROs 14 days before gazettement; yet there is no prayer before me seeking an order for either cancellation or postponement of the said elections. For the said elections to proceed in the absence of the said officers would in my view constitute a crisis of unimaginable magnitude. Simply put, it would be a recipe for chaos.

111. I must however make it clear that where a party who is injured in the enjoyment of his fundamental rights will not be deprived of relief simply because there is no time to remedy the injury *where the victim has no other way of getting redress*. The answer to such a weighty matter as the violation of the Bill of Rights would not be to drive the applicant out of the seat of justice empty handed when the Court has the power to remedy the injury and when by so doing the applicant is left with no alternative but to resort the rule of the jungle. In those circumstances the Court as the temples of justice would have failed to protect the Constitution and the rule of law.

112. However where there is an avenue for redress available to the victim and the harm likely to be occasioned to the public by granting the reliefs sought instantly outweighs the benefits to be achieved by granting the same, then the Court in the exercise of its discretionary powers, notwithstanding the finding of transgressions may decline the orders sought in the meanwhile and deal with the matter at such later stage.

113. In this case, as I have shown hereinabove, election is a process and not an event. Every stage of the electoral process is important and failure to adhere thereto may, depending on the weight attached to it warrant the nullification of the election. That being the position, the failure by the Respondent to comply with Regulation 3 of the Regulations may well be raised as a ground in a subsequent petition. It will be upon the Court before which such an issue is raised to determine the weight to be attached to it.

Summary of Findings

114. Having considered the issues raised herein and pursuant to section 11 of the ***Fair Administrative Action Act, 2015***, these are my findings:

1) The Respondent was under a constitutional and statutory obligation pursuant to Regulation 3(2) of the *Elections (General) Regulations, 2012* to provide the list of persons proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations.

2) The Respondent did not provide the list of persons proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations.

3) In so doing the Respondent violated Regulation 3(2) of the said Regulations as read with Articles 38 and 81 of the Constitution.

4) Since there is no prayer seeking either the cancellation of the fresh elections due for 26th October, 2017 or their postponement, it would not be efficacious to grant the orders herein in the manner sought.

115. Therefore without sanitising the said process, I decline to issue the reliefs sought herein in the exercise of my discretion not based on lack of merit, but on public interest.

116. I however award the costs of this application to the applicants to be borne by the Respondent.

117. This Judgement is delivered despite today being a public holiday pursuant to the authority of the Hon. The Chief Justice Ref. CJ/90 dated 24th October, 2017.

118. It is so ordered.

Dated at Nairobi this 25th day of October, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Otieni Willis with Miss Achieng Orero for the ex parte applicants

Mr Wetangula for the Respondent

CA Ooko