



Thuranira & 4 others v Attorney General & 2 others; Registrar of Political Parties & 3 others (Interested Parties) (Petition E043, E057 & E109 of 2022) [2022] KEHC 482 (KLR) (Constitutional and Human Rights) (20 April 2022) (Judgment)

Salesio Mutuma Thuranira & 5 others v Attorney General & 2 others; Registrar of Political Parties & 4 others (Interested Parties) [2022] eKLR

Neutral citation: [2022] KEHC 482 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E043, E057 & E109 OF 2022
HI ONG'UDI, EN MAINA & DO OGEMBO, JJ
APRIL 20, 2022
IN THE MATTER OF THREATENED CONTRAVENTION OF
ARTICLES 1, 2, 3, 4(2), 10, 12(1) (A), 19, 20, 21, 22, 23, 24,
27, 35,38,47,81, 82, 83,84, 91, 92,93,94, 163, 250,258,
259 AND 260 OF THE CONSTITUTION OF KENYA 2010.
AND
IN THE MATTER OF RULES 23 AND 24 OF THE
CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013
AND
IN THE MATTER OF THE POLITICAL PARTIES ACT NUMBER
11 OF 2011
AND
IN THE MATTER OF ELECTIONS ACT NO 24 OF 2011
AND
IN THE MATTER OF THE POLITICAL PARTIES (AMENDMENT)
ACT, 2021.
IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION



OF KENYA
AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 1(3), 10,
1 | PAGE
25(C), 27(1), 47(1) AND (2), 50, 159 AND 168(2) OF THE
CONSTITUTION OF KENYA

BETWEEN

SALESIO MUTUMA THURANIRA 1ST PETITIONER
KATIBA INSTITUTE 2ND PETITIONER
AFRICA CENTER FOR OPEN GOVERNANCE (AFRICOG) ... 3RD PETITIONER
KENYA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS
(ICJ-KENYA) 4TH PETITIONER
USAWA KWA WOTE PARTY 5TH PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT
SPEAKER OF THE NATIONAL ASSEMBLY 2ND RESPONDENT
SPEAKER OF THE SENATE 3RD RESPONDENT

AND

REGISTRAR OF POLITICAL PARTIES INTERESTED PARTY
AZIMIO LA UMOJA INTERESTED PARTY
JUBILEE PARTY OF KENYA INTERESTED PARTY
JOHN KINYANJUI THEURI INTERESTED PARTY

Section 34(fd) of the Political Parties Act 2022 was unconstitutional as regulation of political party nominations was the mandate of Independent Electoral and Boundaries Commission and not the Registrar of Political Parties.

Reported by John Ribia

Constitutional Law – national values and principles – public participation - duty of the legislature to subject bills to public participation - whether the Political Parties (Amendment) Act, 2022 was unconstitutional for lack of meaningful public participation – Constitution of Kenya, 2010, article 10.

Constitutional Law – fundamental rights and freedoms – right to equality and freedom from discrimination - whether section 4 of the Political Parties (Amendment) Act, 2022 in so far as it made it discretionary for political parties to promote gender parity and promote representation in Parliament of youth, persons with disabilities, ethnic and other marginalized communities was unconstitutional – Constitution of Kenya, 2010, article 91(1) (f); Political Parties (Amendment) Act, 2022, section 4.



Constitutional Law – fundamental rights and freedoms – political rights – indirect nominations – role of party members in indirect nominations - whether section 24 of the Political Parties (Amendment) Act 2022 in so far as it did not require participation of registered party members in selection of delegates for purposes of indirect nominations was a violation of political rights and public participation – Constitution of Kenya, 2010, articles 10 and 38; Political Parties (Amendment) Act 2022, section 24.

Electoral Law – integrity of the elections – introduction of amendments to electoral laws a few months to the general election - whether the implementation of significant changes to the structure of political parties at the later stage of the electoral process undermined the reliability and credibility of the electoral process – Constitution of Kenya, 2010, article 81.

Statutes – interpretation of statutes – interpretation of the Political Parties (Amendment) Act, 2022 - whether provisions of the Political Parties (Amendment) Act, 2022 were vague, ambiguous and/or uncertain.

Statutes – interpretation of statutes – interpretation of section 22 of the Political Parties (Amendment) Act, 2022 – duty of the Auditor General to audit and report on the accounts of political parties funded from public funds – Constitution of Kenya, 2010, articles 229(4)(f),(7) and (8); Political Parties (Amendment) Act, 2022, section 22.

Words and Phrases – political party – definition - an organization of voters formed to influence the government’s conduct and policies by nominating and electing candidates to public office - United States has traditionally maintained a two party system which comprises the Democratic and Republican parties - often shortened to party - The Black’s Law dictionary 9th Edition.

Words and Phrases - ideology – definition of - system of ideas and ideals forming the basis of an economic or political theory; set of beliefs characteristic of a social group or individual - Concise Oxford English Dictionary 11th Edition.

Brief facts

The petitioners challenged the legality of the Political Parties (Amendment) Act, 2022 (the Act) that was assented to on January 27, 2022 on multiple grounds. Among them were the grounds that there was no sufficient public participation undertaken as the stakeholders were not consulted, that the Act was discriminatory, that the Act was unconstitutional for taking away the Auditor General’s constitutionally mandated role of auditing and reporting on the accounts of political parties funded from public funds; and that the Act was vague, ambiguous and uncertain.

Issues

- i. What was the definition of a political party?
- ii. Whether creation of a coalition political party without dissolving the constituent political parties curtailed the enjoyment of the citizens’ political rights under article 38 of Constitution.
- iii. Whether the Political Parties (Amendment) Act, 2022 was unconstitutional for lack of meaningful public participation.
- iv. Whether provisions of the Political Parties (Amendment) Act, 2022 were vague, ambiguous and uncertain.
- v. Whether section 22 of the Political Parties (Amendment) Act 2022 that removed the obligation by the Auditor General to audit accounts of political parties was contrary to the constitutional obligation on the Auditor General to audit and report on the accounts of political parties funded from public funds.
- vi. Whether section 4 of the Political Parties (Amendment) Act, 2022 in so far as it made it discretionary for political parties to promote gender parity and representation in Parliament of youth, persons with disabilities, ethnic and other marginalized communities was unconstitutional.
- vii. Whether section 24 of the Political Parties (Amendment) Act 2022 in so far as it did not require participation of registered party members in selection of delegates for purposes of indirect nominations was a violation of political rights and public participation.
- viii. Whether the implementation of significant changes to the structure of political parties at the later stage of the electoral process undermined the reliability and credibility of the electoral process.



Relevant provisions of the Law

Constitution of Kenya, 2010

Articles 91, 260

Article 91

1. Every political party shall--

- a) have a national character as prescribed by an Act of Parliament;
- b) have a democratically elected governing body;
- c) promote and uphold national unity;
- d) abide by the democratic principles of good governance, promote and practise democracy through regular, fair and free elections within the party;
- e) respect the right of all persons to participate in the political process, including minorities and marginalised groups;
- f) respect and promote human rights and fundamental freedoms, and gender equality and equity;
- g) promote the objects and principles of this Constitution and the rule of law; and
- h) subscribe to and observe the code of conduct for political parties.

2. A political party shall not--

- a) be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis;
- b) engage in or encourage violence by, or intimidation of, its members, supporters, opponents or any other person;
- c) establish or maintain a paramilitary force, militia or similar organisation;
- d) engage in bribery or other forms of corruption; or
- e) except as is provided under this Chapter or by an Act of Parliament, accept or use public resources to promote its interests or its candidates in elections.

Article 260

“political party” means an association contemplated in Part 3 of Chapter Seven of the Constitution.

Elections Act

Section 31(1)(a)

(1) A person qualifies to be nominated by a political party for presidential, parliamentary and county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person—

(a) is selected in the manner provided for in the constitution or rules of the political party concerned relating to members of that party who wish to contest presidential, parliamentary and county elections.

Held

1. Previously the Political Parties Act defined a political party as having the meaning assigned to it under article 260 of the Constitution of Kenya, 2010. The Political Parties (Amendment) Act, 2022 defined it as an association of citizens with an identifiable ideology or programme that was constituted for the purpose of influencing public policy of nominating candidates to contest elections; and included a coalition political party.
2. Article 260 of the Constitution did not define a political party as such. Instead it made reference to chapter 7 part 3 of the Constitution. Article 91 which dealt with political parties only gave direction on what a political party should be or not be. It did not give a direct definition of what a political party was.
3. The Political Parties Act was enacted to give effect to article 92 of the Constitution. The Act did not define a political party and instead it referred to article 260 of the Constitution. Parliament must have noted the *lacuna* in both the Constitution and the Political Parties Act 2011, and so it gave the definition in the amended Act. The definition assigned to the term political party in section 2 of the Political Parties (Amendment) Act, 2022, resonated with the ordinary and general meaning of a



- political party. There was no inconsistency in the definition of political party as stated in section 2 of the Political Parties (Amendment) Act and articles 260 of the Constitution.
4. The general and ordinary meaning of a political party would require it to have an ideology, meaning the principles and policies that it stood for or advocated. Although articles 91(1) and 260 of the Constitution did not make mention of the word ideology, the court was bound by article 10(1)(a) and 259 of the Constitution to interpret the Constitution in a manner that promoted its purposes, values, rule of law, permitted the development of the law and contributed to good governance. The requirement for parties to have an ideology would enhance Kenya's democracy. Nothing in the Constitution prohibited a political party from having an ideology as long as such ideology was not founded on a religious, linguistic, racial, ethnic, gender or regional basis or sought to engage in advocacy of hatred on any such basis.
 5. As for coalitions, the same had always existed in the law as they were provided for in section 10 of the Political Parties Act, 2011. There had been coalition political parties in existence Kenya. Examples included the Jubilee Political Party which comprised parties like TNA, URP among others. The only difference was that at that time the constituent parties would be dissolved, but in the new definition the constituent parties would retain their individual identities. Therefore all that the amendment had done was to formalize those practices through legislation. The creation of a coalition political party, did not curtail the enjoyment of the citizens' political rights under article 38 of the Constitution because each constituent political party remained in existence with its operational constitution, its rights and status. Members of the parties retained their right to participate in the activities of their respective parties.
 6. The indirect nomination under section 38A(b) of the Political Parties Act was not unconstitutional for reasons that each political party had to have its own delegate system entrenched in its own constitution as required in Schedule II of the Political Parties Act. It was expected that it was members of political parties who would select the delegates. In that way they would have exercised their political rights under article 38 of the Constitution. The amendment would develop the law, more so section 31(1)(a) of the Elections Act.
 7. The word "shall", could be construed to mean "may" and vice versa, depending on the circumstances. Statute had to be interpreted within the legal context in which the words were used. The legal context was to be derived from Kenya's national values and principles and articles 27 and 91 of the Constitution, which all gave a mandatory meaning. The word "may" had to be interpreted to conform to articles 27 and 91 of the Constitution. Political parties were bound by the national values and principles of the Constitution as well as the Constitution itself. It was also instructive that section 7(2) of the Political Parties Act which was not affected by the amendment required a political party to comply with gender parity before being registered. The mere use of the word "may" was not a good reason for striking out the amendment.
 8. There was no dispute to the fact that all political parties had to comply and be duly registered under the aforementioned provisions. A coalition political party was made up of political parties who had already been registered. The coalition political party did not have a list of individual members. The list it had was of political parties that made up its membership. The coalition political party was a *sui generis* organ. That being the case the rules of formation of ordinary political parties could not apply to it. There was no discrimination in the amended section.
 9. Section 14A(1) to (6) of the Political Parties Act confirmed that any party allegedly deemed to have resigned was given an opportunity to be heard on the issue. The deeming resignation was not automatic. Even where the political party notified the Registrar of the resignation and the Registrar was not satisfied that section 14A (2) of the Political Parties Act had been complied with, he/she would refer it back to the party for reconsideration. That was not cast in stone. Section 14A was therefore not unconstitutional.



10. With the new amendment, the constitutional obligation of the Auditor General to audit the accounts of political parties funded through public funds was lost. The section ought to have been amended to align it to article 229 of the Constitution. The deletion of section 31(3) of the Political Parties Act was in conflict with article 229 of the Constitution and was unconstitutional.
11. There was no conflict between the roles of the Independent Electoral and Boundaries Commission and the Registrar of Political Parties. In the Amendment the role of the Registrar was limited to only certifying whether the symbol of an independent candidate resembled that of any other political party. The Independent Electoral and Boundaries Commission retained the power and duty to accept or reject the symbol as set out in section 32 of the Elections Act as the same was not amended. There wasn't any usurpation of the power of Independent Electoral and Boundaries Commission as far as section 34(fb) of the Political Parties Act was concerned. The court made a similar finding in respect to the amendments in section 34(da), (fa), (fc), and (fe).
12. Section 34(fd) of the Political Parties (Amendment) Act was in contravention of article 88(4)(d) and (k) of the Constitution, which vested the power to regulate political party nominations in the Independent Electoral and Boundaries Commission. Statute could not purport to bestow the same powers in the Registrar of the Political Parties. That would amount to usurpation of Independent Electoral and Boundaries Commission's constitutional mandate. That was unconstitutional.
13. Section 38E of the Political Parties Act did not include any usurpation of the Independent Electoral and Boundaries Commission's powers by the Registrar of the Political Parties. All that a political party was required to do was to notify the Registrar in writing of all the requirements under the section. The section did not give the Registrar any power to make any decisions in regard to that information. Following receipt of the notification the Registrar only published it in its website.
14. Section 27 of the Elections Act provided that nomination rules were submitted to the Independent Electoral and Boundaries Commission, and not the Registrar. The powers of the Independent Electoral and Boundaries Commission had not been affected and had not been usurped by the Registrar of Political Parties.
15. Nowhere in the impugned amendment did the Act exempt a coalition political party from the jurisdiction of the Political Parties Disputes Tribunal. A political party was defined to include a coalition political party, hence a dispute between a political party and a coalition political party was deemed to be a dispute between political parties under section 40(1) (c) of the Act. It was deemed to be a dispute subject to trial by the Tribunal. The plea by the petitioners in respect of that amendment could not stand.
16. The amendment to section 41 of the Political Parties Act was not unconstitutional. It did not deny disputants the right of appeal to the Supreme Court. The right of appeal to the Supreme Court was not automatic it was subject to the provisions of article 163(4) of the Constitution.
17. It was impractical for political party candidates to enjoy the same timelines as independent candidates for the following reasons:
 1. Unlike independent candidates, the party nominations elicited disputes and reasonable time had to be allocated for the disputes to be resolved.
 2. There had to be discipline in political parties activities, hence need for compliance with the timelines.
 3. IEBC had a timetable which enabled them to work on their activities such as preparation of registers, printing ballot papers, undertaking trainings for the agents and other officials.
18. There was no element of unfair discrimination in the provisions of sections 28(1) and 28A of the Elections Act.
19. Public participation was enshrined in articles 10(2)(a) and 232(1)(d) of the Constitution as one of the values and principles of governance. Article 259 (1)(a) of the Constitution enjoined courts to interpret the Constitution in a manner that promoted its values, principles and purposes.



20. Public participation and consultation was a living constitutional principle that went to the constitutional tenet of the sovereignty of the people. It was through public participation that the people continued to find their sovereign place in the governance they had delegated to both the National and County Governments.
21. The guiding principles for public participation were:
1. Public participation applied to all aspects of governance.
 2. The public officer and or entity charged with the performance of a particular duty bore the onus of ensuring and facilitating public participation.
 3. The lack of a prescribed legal framework for public participation was no excuse for not conducting public participation; the onus was on the public entity to give effect to that constitutional principle using reasonable means.
 4. Public participation had to be real and not illusory. It was not a cosmetic or a public relations act. It was not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There was need for both quantitative and qualitative components in public participation.
 5. Public participation was not an abstract notion; it had to be purposive and meaningful.
 6. Public participation had to be accompanied by reasonable notice and reasonable opportunity. Reasonableness would be determined on a case to case basis.
 7. Public participation was not necessarily a process consisting of oral hearings, written submissions could also be made. The fact that someone was not heard was not enough to annul the process.
 8. Allegations of lack of public participation did not automatically vitiate the process. The allegations had to be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation would be determined on a case to case basis.
22. Components of meaningful public participation included the following:
1. clarity of the subject matter for the public to understand;
 2. structures and processes (medium of engagement) of participation that were clear and simple;
 3. opportunity for balanced influence from the public in general;
 4. commitment to the process;
 5. inclusive and effective representation;
 6. integrity and transparency of the process;
 7. capacity to engage on the part of the public, including that the public had to be first sensitized on the subject matter.
23. Consultative meetings were held since 2017 after the general elections to January 2022. The 1st interested party invited a good number of participants in good time and even facilitated their attendance. There was clarity about the matters under discussion and resolutions were made. The lists of the invitees and attendants confirmed that there was inclusivity.
24. The court took judicial notice of the fact that even during the Covid -19 pandemic and the Ministry of Health in its protocols had prohibited receipt of hard copies of documents. Even the Judiciary was not receiving hard copies of submissions and pleadings which had to be sent electronically or through email.
25. There was meaningful public participation prior to the enactment of the impugned Political Parties (Amendment) Act. The ground of lack of public participation had not been demonstrated.
26. Vagueness could have constitutional significance and one such significance was that a law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty could arise either from the generality of the discretion conferred on the donee of the power or from the use of language that was so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools.



27. The impugned amendment and creation of the coalition political party did not affect the meaning of a political party as stipulated under article 260 as read with article 91 of the Constitution. The court did not find any ambiguity, confusion or uncertainty. There was a clear distinction between a political party and a coalition political party in both their formation and operation. The amendment showed what the mind of Parliament was on the formation of a political party, a coalition and coalition political party. There was no doubt about what Parliament intended.
28. The Kreigler recommendation considered the fact that people needed time to participate in the entire process, to raise any objections, interact with the changes *inter alia*. The changes were made slightly more than six(6) months to the general election which resonated well with the Kreigler recommendation. It had not been demonstrated how the amendments on timelines would affect the elections. Those timelines were meant to enable the political parties, candidates and the Independent Electoral Boundaries Commission manage their timetables so as not to affect the election date.
29. The interest of an individual(s) could not outweigh or override public interest. It was within the public domain that parts of the principal Political Parties Act, Political Parties (Amendment) Act and the Elections Act in relation to the August 9, 2022 general elections had been implemented. Many parties had done their primaries and nominations.
30. The 2nd to 5th petitioners had failed to prove any vagueness or uncertainty in the impugned amendments, which were very clear on their intent.

Petition partly allowed.

Orders

- i. *There was no unconstitutionality in the amended sections 2, 4A, 6(2)(a), 7(6), 14A, 22, 34(da) (fa) (fb), (fc),(fe),40(3),41(2) of the Political Parties(Amendment)Act 2022.*
- ii. *There was no unconstitutionality in sections 28(1) and 28A of the Elections Act.*
- iii. *The deletion of section 31(3) of the principal Political Parties Act was unconstitutional.*
- iv. *Section 34(fd) of the Political Parties Act 2022 was unconstitutional as regulation of political party nominations was the mandate of Independent Electoral and Boundaries Commission and not the Registrar of Political Parties.*
- v. *The public participation that took place before the enactment of the impugned amendments was consultative, meaningful and reasonable. The amendments could not be nullified on that ground.*
- vi. *The impugned amendments did not render the principal Political Parties Act ambiguous, uncertain or vague.*
- vii. *Save for what the court found in respects of sections 31(3) and 34(fd) of the Political Parties (Amendment) Act, 2022 the petitions failed and were dismissed.*
- viii. *Each party was to bear its own cost.*

Citations

Cases

Kenya

1. *Alila, Titus & 2 others (Suing on their own Behalf and as the Registered Officials of the Sumawe Youth Group) v Attorney General & Independent Electoral & Boundaries Commission* Constitutional Petition 22 of 2018; [2019] KEHC 3778 (KLR) - (Explained)
2. *Anarita Karimi Njeru v Republic* [1979] 1 KLR 54; [1976 - 1980] 1 KLR 1272 - (Explained)
3. *Andare, Geoffrey v Attorney-General & 2 others* Petition 149 of 2015; [2016] eKLR - (Explained)
4. *Bidco Oil Refineries Ltd v Attorney General & 3 others* Petition 177 of 2012; [2013] eKLR - (Explained)
5. *British American Tobacco Kenya, PLC(formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party)* Petition 5 of 2017; [2019] eKLR - (Explained)



6. *Bwana, Mohamed Bwana v Silvano Buko Bonaya & 2 others* Election Petition 7 of 2013; [2013] eKLR - (Explained)
7. *Center for Rights Education and Awareness & anothers v John Harun Mwau & 6 others* Civil Appeal Nos 74 & 82 of 2012; [2012] eKLR (Consolidated) - (Explained)
8. *CKC & another v ANC* Civil Appeal 121 of 2018; [2019] eKLR - (Explained)
9. *Commission for Implementation of the Constitution v Parliament of Kenya & 5 others* Petition 454 of 2012; [2013] eKLR - (Explained)
10. *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others* Petitions 14, 14A, 14B & 14C of 2014; [2014] eKLR (Consolidated) - (Explained)
11. *Council of County Governors v Attorney General & another* Constitutional Petition 56 of 2017; [2017] eKLR - (Explained)
12. *Council of Governors & 3 others v Senate & 53 others* Petition 381 & 430 of 2014; [2015] eKLR (Consolidated) - (Explained)
13. *David Sejjaka Nalima v Rebecca Musike* Civil Appeal No 12 of 1985 - (Applied)
14. *Diani Business Welfare Association & others v County Government of Kwale* Petition 39, 45, 61 & 63 of 2014; [2015] eKLR (Consolidated) - (Explained)
15. *Dida, Mohammed Abduba v Debate Media Limited & Media Council of Kenya* Civil Appeal 238 of 2017; [2018] KECA 642 (KLR) - (Explained)
16. *Elle Kenya Limited & 9 others v Attorney & 3 others* Petitions 320, 3, 108, 110, 135, 182, 232, 311 & 523 of 2011; [2013] eKLR - (Applied)
17. *Engineers Boards of Kenya v Jesse Waweru Wabome & others & 5 others* Civil Appeal 240 of 2013; [2015] eKLR - (Explained)
18. *Gakuru, Robert N & others v Governor Kiambu County & 3 others* Petitions 532 of 2013 & 12, 35, 36, 42, & 72 of 2014 & Judicial Review Miscellaneous Application 61 of 2014; [2014] eKLR (Consolidated) - (Explained)
19. *Gichira, Peter Solomon v Independent Electoral and Boundaries Commission & another* Constitutional Petition 234 of 2017; [2017] eKLR - (Explained)
20. *Gichuru, Henry N v Minister for Health the Kenyatta National Hospital Board* Civil Miscellaneous Application 417 of 2002; [2002] eKLR - (Explained)
21. *Hamdia, Yaro Shk Nuri v Faith Tumaini Kombe & 2 others* Petition 38 of 2018; [2019] eKLR - (Explained)
22. *Havi, Nelson Andayi v Law Society of Kenya & 3 others* Petition 607 of 2017; [2018] eKLR - (Explained)
23. *In the Matter of Kenya National Commission on Human Rights* [2014] 2 KLR 352 - (Explained)
24. *In the Matter of the Interim Independent Electoral Commission* [2011] 2 KLR 32 - (Explained)
25. *In the Matter of the National Land Commission* Advisory Opinion Reference 2 of 2014; [2015] eKLR - (Explained)
26. *In the Matter of the Speaker of the Senate & another* Advisory Opinion Reference 2 of 2013; [2013] eKLR - (Explained)
27. *Institute of Social Accountability & another v National Assembly & 4 others* [2015] 1 KLR 483 - (Explained)
28. *Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties)* Civil Suit 55, 98 & 99 of 2020; [2020] eKLR (Consolidated) - (Explained)
29. *Joho & another v Shabbal & 2 others* [2014] 1 KLR 111 - (Explained)
30. *Kabage, Karanja v Joseph Kiuna Kariambegu Nganga & 2 others* Election Petition 12 of 2013; [2013] eKLR - (Explained)
31. *Kariuki, James Gacheru & 19 others v County Government of Mombasa & 56 others* Petition 56 of 2016; [2019] KEHC 7298 (KLR) - (Applied)



32. *Katiba Institute & 3 others v Attorney-General & 2 others* Constitutional Petition 548 of 2017; [2018] eKLR - (Explained)
33. *Kenya Bankers Association v Attorney General & another* Petition 353 of 2018; [2019] eKLR - (Explained)
34. *Kenya Commercial Bank Ltd v Muiri Cofee Estate Limited & another* Motion 42 & 43 of 2014; [2016] eKLR (Consolidated) - (Explained)
35. *Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others* [2013] 3 KLR 515 - (Explained)
36. *Keroche Industries Limited v Kenya Revenue Authority & 5 others* [2007] 2 KLR 240 - (Explained)
37. *Kitbeka, Simeon Kioko & 18 others v County Government of Machakos & 2 others* Petition 9 of 2018; [2018] eKLR - (Applied)
38. *Law Society of Kenya v Attorney General & 2 others* Petition 318 of 2012; [2013] eKLR - (Applied)
39. *Law Society of Kenya v Kenya Revenue Authority & another* Petition 39 of 2017; [2017] eKLR - (Explained)
40. *Maendeleo Chap chap Party & 2 others v Independent Electoral and Boundaries Commission & another* Petition 179 of 2017; [2017] eKLR - (Mentioned)
41. *MJ v NK & another* Civil Appeal 93 of 2014; [2017] eKLR - (Explained)
42. *Mumo v Trusted Society of Human Rights Alliance & 5 others* [2013] 3 KLR 36 - (Explained)
43. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others (Munya 2)* Petition 2B of 2014; [2014] eKLR - (Explained)
44. *Musankishay, Kalala Paulin v Director Criminal Investigations & 4 others* Constitutional Petition 301 of 2019; [2022] eKLR - (Explained)
45. *Mwadeghu, Thomas Ludindi v John Mruttu & another* Election Petition Appeal 8 of 2017; [2017] eKLR - (Explained)
46. *Mwau & 3 others v Attorney General & 2 others* [2012] 1 KLR 73 - (Explained)
47. *Mwau, John Harun v Independent Electoral & Boundaries Commission & Attorney General* Civil Appeal 112 of 2014; [2019] eKLR - (Explained)
48. *Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others* Petition 486 of 2013; [2013] eKLR - (Applied)
49. *Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others* Petition 486 of 2013; [2013] eKLR - (Explained)
50. *National Conservative Forum v Attorney General* [2013] 3 KLR 602 - (Explained)
51. *Ndegwa, Josphat Muriu (suing on his own behalf, in the public interest and on behalf of the other bar owners in Nyandarua County) v Nyandarua County Assembly & another* Petition E011 of 2021; [2021] KEHC 299 (KLR) - (Explained)
52. *Nyaga, John Njue v Attorney General & 6 others* Civil Appeal 46 of 2015; [2016] eKLR - (Explained)
53. *Obuya, Mark Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others* Petition 383 of 2013; [2014] eKLR - (Explained)
54. *Ochola, Wilson Ong'ele v Orange Democratic Movement & 3 others* Civil Appeal 271 of 2017; [2017] eKLR - (Explained)
55. *Odinga, Raila Amolo & another v Independent Electoral and Boundaries Commission & 2 others* Presidential Petition 1 of 2017; [2017] eKLR - (Explained)
56. *Okal, Peter Bodo v Philemon Juma Ojuok & 2 others* Election Petition (Application) 9 & 33 of 2019; [2020] eKLR (Consolidated) - (Explained)
57. *Okiya, Omtatah Okoiti v County Government of Kiambu* Constitutional Petition 48 of 2018; [2018] eKLR - (Explained)



58. *Okiyah, Omtatab Okoiti v National Assembly & others* Petition E062 of 2021; [2020] eKLR - (Explained)
59. *Okumu, Chadwick v Capital Markets Authority* Constitutional Petition 510 of 2016; [2018] KEHC 7281 (KLR) - (Followed)
60. *Osoro, Jacob Nyandega v Chief Justice of Kenya & Chief Registrar of the Judiciary* Constitutional Petition 115 of 2017; [2018] KEHC 4107 (KLR) - (Followed)
61. *Republic v Clerk of the National Assembly, National Assembly & Okiya Omtatab; Okoiti Eaa Company Limited (Ex Parte)* Judicial Review Application 104 of 2020; [2020] KEHC 5600 (KLR) - (Applied)
62. *Republic v County Government of Kiambu ex parte Robert Gakuru & another* Judicial Review Case 434 of 2015; [2016] eKLR - (Applied)
63. *Republic v County Government of Nyamira & 3 others; ex parte Kennedy Mongare Mogaka* Judicial Review 1 of 2020; [2021] eKLR - (Explained)
64. *Republic v Independent Electoral and Boundaries Commission & 2 ex parte Wavinya Ndeti* Judicial Review Miscellaneous Application 301 of 2017; [2017] eKLR - (Explained)
65. *Republic v Jubilee Party & another Ex parte Wanjiku Mubia & another* Miscellaneous Civil Application 308 of 2017; [2017] eKLR - (Explained)
66. *Sagini, George Ndemo v Attorney General & 3 others* Petition 176 of 2016; [2017] eKLR - (Explained)
67. *Wakiaga, Samuel Owino v Orange Democratic Movement Party & 2 others* Election Petition Appeal 16 of 2017; [2017] eKLR - (Explained)
68. *Wanderi, Martin & 19 others v Engineers Registration Board of Kenya & 5 others* Petition 248 of 2012; [2014] KEHC 1519 (KLR) - (Applied)
69. *Wanjiru, Gikonyo & 2 others vs National Assembly of Kenya & 4 others* Petition 453 of 2015; [2016] eKLR - (Explained)
70. *Wanyama, Rose Nafula v Nusra Nasambu Chibanga & another* Civil Appeal 104 of 2017; [2020] eKLR - (Explained)
71. *Waweru, Peter K v Republic* Miscellaneous Civil Application No 118 of 2004; [2006] eKLR - (Explained)

Uganda

Tinyefuza v Attorney-General Constitution Petition No 1 of 1996; [1997] UGCC 3 - (Explained)

South Africa

1. *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) - (Explained)
2. *Glenister v President of the Republic of South Africa and others* CCT 48/10 [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) - (Applied)
3. *Matatiele Municipality & others v President of South Africa & others (No 2)* (CCT 73/05 A [2006] ZACC 12 - (Explained)
4. *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* (CCT 7 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) - (Explained)
5. *Moutse Demarcation Forum and others v President of the Republic of South Africa and Others* CCT 40/08 [2011] ZACC 27; 2011 (11) BCLR 1158 (CC) - (Explained)
6. *Pharmaceutical Manufacturers Association of SA & another; In re ex parte President of the Republic of South Africa & Others* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) - (Explained)
7. *Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others* CCT 86/08 [2010] ZACC 5 - (Explained)
8. *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) - (Explained)

United Kingdom

1. *Ellen Street Estates Limited v Minister of Health* [1934] 1 KB 590 - (Applied)



2. *Thobum v Sunderland City Council* [2002] EWHC 195; [2003] QB 151; [2002] 3 WLR 247; [2002] 4 All ER 156 - (Applied)

India

1. *Hambardda Dawakhana v Union of India & others* [1960] AIR 554; 1960 SCR (2) 671 - (Explained)
2. *Reserve Bank of India v Peerless General Finance and Investment Co Ltd and others* [1987] AIR 1023; [1987] SCR (2) 1 - (Explained)

United States

United States v Butler 297 US 1 (1936) - (Applied)

Canada

1. *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 - (Explained)
2. *Osborne v Canada (Treasury Board)* [1991] 2 SCR 69 - (Applied)
3. *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 - (Explained)

Texts

1. Aragon, FM., et al (Eds) (2008), *Candidate Nomination Procedures and Political Selection: Evidence from Latin American Parties* London School of Economics
2. Bacchini, S (Ed) (2011), *Concise Oxford English Dictionary* New York: Oxford University Press 11th Edn
3. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota : West Publishers
4. Hogg, QM., (Lord Hailsham) et al (Eds) (1995), *Halsbury's Laws England* London: Butterworth 4th Edn Vol 44 (1) p 1300
5. Nwogu, GAI., (2015), *Democracy: Its Meaning and Dissenting Opinions of the Political Class in Nigeria: A Philosophical Approach* Journal of Education and Practice 1 Vol 6 No 4
6. Oyugi, WO., (2006), *Coalition Politics and Government in Africa since Independence*, Journal of Contemporary African Studies pp 53-79.
7. Philippe, CS., Terry, LK., (1991), *What Democracy is... and is Not* Journal of Democracy

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 7 - (Interpreted)
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya, 2010 Sub Leg) rule 10(2) - (Interpreted)
3. Constitution of Kenya, 2010 articles 1, 2(4); 4(2); 10(2)(a); 20(3)(4); 27(1)(2)(4)(5), 33; 36(1); 38(3)(c); 47; 50; 81; 82; 84; 85; 87; 88(4)(c)(d)(e); 90(2)(a); 91(1)(f)(2)(a); 92; 97; 98; 103(1)(e)(l); 106 (1); 118(1)(b); 156 (6); 159 (2)(c)(e) ; 163 (4); 165 (3)(d)(i); 177; 180; 229(4)(f)(7)(8); 259; 260; Chapter seven - (Interpreted)
4. Election Campaign Financing Act, 2013 (Act No 42 of 2013) In general - (Cited)
5. Election Offences Act, 2016 (Act No 37 of 2016) In general - (Cited)
6. Elections (General) Regulations, 2012 (Act No 24 of 2011 Sub Leg) regulations 12, 45 - (Interpreted)
7. Elections Act, 2011 (Act No 24 of 2011) sections 10, 13, 27(1)(2)(5); 28(1); 28A; 31(1)(a); 32; 105 - (Interpreted)
8. Elections Laws (Amendment) Act, 2017 section 10 - (Interpreted)
9. Independent Electoral and Boundaries Commission Act, 2011 (Act No 9 of 2011) section 4 - (Interpreted)
10. Political Parties (Amendment) Act, 2022 (Act No 2 of 2022) sections 2, 4 - 7, 10(1); 22; 24; 38G - (Interpreted)
11. Political Parties Act, 2011 (Act No 11 of 2011) sections 2, 4A; 6(2)(a); 7(6); 10; 14A(1)(2); 14B (2); 22; 23; 31(3)(4); 33; 34; 40(3); 41(2); Schedule second - (Interpreted)
12. Supreme Court Act, 2011 (Act No 7 of 2011) sections 15(1); 16 - (Interpreted)



Advocates

None mentioned

JUDGMENT

The Parties

1. The 1st petitioner is a male adult of sound mind, a citizen of the Republic of Kenya residing in Meru County bearing national identity card number xxxx and a member of Chama cha Kazi Party of Kenya desirous of vying for the position of Senate Member of Parliament, Meru County.
2. The 2nd petitioner, Katiba Institute, is a constitutional research, education, litigation, and advocacy institute established in 2011 to promote constitutionalism within the Republic of Kenya.
3. The 3rd petitioner, AFRICOG, is an independent, non-profit organisation providing cutting edge research and monitoring on governance and public ethics issues in both the public and private sectors. AFRICOG seeks to address the structural causes of the crisis of governance in East Africa and help establish an effective civil society response to governance and corruption problems in Kenya.
4. The 4th petitioner, ICJ-Kenya is a non-governmental, non-profit, and member-based organisation whose objectives include development, protection of the rule of law, democracy, governance, promotion of human rights, and safeguarding the independence of the Judiciary and the legal profession.
5. The 5th petitioner, KHRC, is a national non-governmental organisation whose core agenda is the campaign to entrench a human rights and democratic culture in Kenya.
6. The 6th petitioner, Usawa Kwa Wote Party is a national political party registered under the provisions of the [Political Parties Act, 2011](#) and certified as such by the Office of the Registrar of Political Parties and with a primary objective of promoting fairness, equity, political participation of the citizenry to the greatest extent possible and human rights as provided in the Constitution of Kenya.
7. The 1st respondent, Attorney General is the Principal legal officer to the National Government and holds the office established under article 156 (6) of the [Constitution](#).
8. The 2nd respondent, Speaker of the National Assembly (NA) is the head of the National Assembly House of Parliament an office established under article 106(1) of the [Constitution of Kenya](#).
9. The 3rd respondent, Speaker of the Senate, is the head of the Senate House an office established under article 106(1) of the [Constitution of Kenya](#).
10. The 1st interested party, Registrar of Political Parties, is an office established under section 33 of the [Political Parties Act](#) No 11 of 2011 and its functions spelt out under section 34 of the Act.
11. The 2nd interested party, IEBC, is a constitutional commission charged with the mandate to oversee the electoral processes in Kenya and established under article 88 of the [Constitution of Kenya](#).
12. The 3rd interested party, Azimio La Umoja, political party registered under the provisions of the [Political Parties Act, 2011](#).
13. The 4th interested party, Jubilee Party of Kenya, is a political party registered under the provisions of the [Political Parties Act, 2011](#).
14. The 5th interested party is a male adult of sound mind and a citizen of the Republic of Kenya.



The Legal Representatives

15. The 1st petitioner was represented by Mr E Mutuma instructed by the firm of Mutuma Gichuru & Associates. He was assisted by C Jerono.
16. The 2nd – 5th petitioners were represented by counsel for Katiba Institute, Christine Nkonge who was assisted by Ruth Nyaberi.
17. The 6th petitioner was represented by Mr Njenga under the instruction of the firm of Muchoki Kangata Njenga & Company Advocates.
18. The 1st respondent was represented by Solicitor General, Mr Kennedy Ogeto together with Mr Paul Nyamodi.
19. The 2nd respondent was represented by Mr Mbarak Awath and Miss S Akama.
20. The 3rd respondent was represented by Wangechi Thanji.
21. The 1st interested party was represented by the firm of JK Kibicho and Company Advocates through Mr Ramadhan Akubakar.
22. The 2nd interested party was represented by Mr Kamiru who was assisted by Mr Anthony Mwangi and Mr Kipkogei, instructed by the firm of G & A Advocates LLP.
23. The 3rd interested party was represented by the firm of Paul Mwangi & Company Advocates through Mr Ben Sihanya in conjunction with Mr Ochieng Oginga, Mr J Awele, Mr G Gilbert and Mrs Velma Maumo.
24. The 4th interested party was represented by Miss Muchiri instructed by the firm of Mbugwa, Atudo & Macharia Advocates.
25. The 5th interested party was represented by the firm of Kinyanjui Njuguna & Company Advocates through Mr Kevin Mwithi.

The Consolidated Petitions

The 1st Petitioner Case

26. The 1st petitioner, through his Petition No E043 of 2022 dated February 2, 2022
 - i. A declaration that the impugned Political Parties Act as amended vide The Political Parties (Amendment) Bill, 2021 is inconsistent with the Constitution to the extent that it violates article 10, 38, 91, 92 and 260 of the *Constitution*.
 - ii. A declaration that the amendment to section 34 of the Political Parties Act no 11 of 2011 vide the impugned Political Parties (Amendment) Bill 2021 to increase powers of the Registrar of Political Parties to include Regulation of political party nominations and to Train political party election agents amounts to usurpation of the role of the 2nd interested party (IEBC) under article 88(4)(d) and (c) of the *Constitution*.
 - iii. A declaration that the Political Parties Act as amended vide The Political Parties (Amendment) Bill 2021 as passed by The National Assembly on January 5, 2022 and the Senate on January 26, 2022 in its entirety is unconstitutional.



- iv. An order be and is hereby issued that the Political Parties (Amendment) Act, 2022 as assented to by the President on January 27, 2022 is unconstitutional thus invalid, illegal, null and void.
 - v. Costs of and incidental to this petition.
27. This petition bears its root in the Political Parties (Amendment) Act, 2022 that was assented to on January 27, 2022 by the President of Kenya. The crux of the petition revolves around the assertion that Parliament failed to consider the stakeholders objections and concerns before passing the Bill into law.
 28. The petitioner in view of the foregoing challenges the constitutionality of various sections of the impugned Act. To begin with, section 2 of the Act that provides a new definition of a political party and introduces a statement of ideologies. Section 7 that adds sub-section 6 and 7 which exempt Coalition Political Parties from the registration requirements of political parties. Section 14A which provides for 'Deemed Resignations', where a member promotes the ideology of another political party. Section 14B which provides for expulsion of a member from a political party if that person contravenes the provisions of the constitution of the political party. Section 24 and 31 of the Act that gives the Registrar of Political Parties broad powers which usurps the powers of the IEBC. It is his case that the impugned Act bears conspicuous inconsistencies with the Constitution.
 29. The petition as supported by the petitioner's affidavit of even date is that the legislative process concerning this Act was done in haste with no invitation by the National Assembly for public participation. He notes that when the Senate received the Bill from the National Assembly, the Senate called for public participation on January 11, 2022.
 30. Speaking to the inconsistencies, he asserts that the definition of political party includes a coalition political party which provides an expansive definition contrary to that under article 260 of the Constitution. He is apprehensive that his political right and that of others under article 38 of the Constitution will be violated with the expansion of a political party to include a coalition. This is since it will take away the individual's right to be part of a party of their choice without inclusion of other parties through a coalition. Further that the statement of ideologies under section 2 stated to be a requirement under section 6(2) contravenes article 91(2) of the Constitution.
 31. In the same way, he states that section 7 in exempting the coalition political party from compliance with requirements of registration is preferential thus violating article 27 of the Constitution. As such he argues that there is no guideline for the registrar to determine whether the coalition agreement is appropriate.
 32. Moving on to section 14A on deemed resignations, he asserts that this violates a member's right to fair administrative action and fair hearing under article 47 and 50 of the Constitution. He in addition challenges the superfluous powers of the registrar under section 34 to regulate party primaries and training which is a preserve of the IEBC.
 33. The petitioner in like manner confronts the dispute resolution process under section 40 of the impugned Act. It provides that a coalition agreement shall provide for internal dispute resolution mechanisms while a political party's disputes are to be resolved by the political parties' tribunal. He says this differentiation in resolution of disputes is discriminative. Similarly, he takes issue with section 41 of the Act which provides that the Court of Appeal will be the last stage of an appeal. He says this limit infringes on an individual's right to explore appellate options in the judicial process.
 34. From the foregoing, the 1st petitioner contends that the respondents violated the Constitution by enacting amendments that are inconsistent with the Constitution. Lastly that the principles of public participation were compromised in the process of enacting the Act.



The 2nd to 5th Petitioners' Case

35. Through Petition No E057 of 2022 dated February 8, 2022 the 2nd to 5th petitioners seek the following orders:
- i. A declaration that the *Political Parties (Amendment) Act, 2022* is void because Parliament violated the constitutional and statutory requirements for meaningful public participation contrary to article 10 of the *Constitution*;
 - ii. A declaration that the Senate's refusal to accept written comments in any format other than electronic delivery through email constituted an unjustifiable limit to the right to meaningful public participation, a violation of the national values and principles of good governance, a violation of the right to equality and freedom from discrimination, and a violation of the right to freedom of expression located in article 10, 27 and 33 of the *Constitution*;
 - iii. A declaration that section 2 and 10(1) of the *Political Parties (Amendment) Act, 2022* are void because they violate or are inconsistent with article 10 of the *Constitution* on the requirement of legal certainty, for being imprecise and overbroad;
 - iv. A declaration that section 22 of the *Political Parties (Amendment) Act 2022* that removes the obligation by the Auditor-General to audit accounts of political parties is contrary to articles 229(4)(f), 229(7) and 229(8);
 - v. A declaration that section 4 of the *Political Parties (Amendment) Act, 2022* in so far as it makes it discretionary for political parties to promote gender parity and promote representation in Parliament of youth, persons with disabilities, ethnic and other marginalised communities is contrary to articles 91(1)(f) of the *Constitution*;
 - vi. A declaration that section 24 of the *Political Parties (Amendment) Act 2022* in so far as it does not require participation of registered party members in selection of delegates for purposes of indirect nominations is a violation of articles 10 and 38 of the *Constitution*;
 - vii. A declaration that the implementation of significant changes to the structure of political parties at this stage in the election process undermines the reliability and credibility of the election process contrary to article 81 of the *Constitution*; and
 - viii. In any Case, an order enjoining the Registrar of Political Parties and the Independent Electoral and Boundaries Commissions from implementing the *Political Parties (Amendment) Act* for the 2022 general election.
36. The 2nd to 5th petitioners' Case is premised on the same facts as those of the 1st petitioner and supported by Jill Cottrell Ghai's affidavit in which she avers that the *Political Parties (Amendment) Act* critically alters some sections of the Principal Act that introduces significant changes to the formation, operation, and regulation of political parties less than 7 months before the August 2022 elections.
37. Regarding the core areas purported to have been altered by the impugned Act, the petitioners start with the creation of the coalition political parties which they note that by departing from the constitutional definition and the definition adopted by the Elections Act, the Amendment Act creates conflict between the two Acts. Moreover, that while the Principal Act provided that political parties could form coalitions, the Amendment Act turns this alliance of parties into a separate and distinct political party under section 2 without the need for registration which was a key requirement under article 91(1) of the *Constitution* and section 6 of the Principal Act. It is noted that a coalition political party need only submit a coalition agreement with the Registrar of Political Parties to be fully registered.



38. Further, they aver that the impugned Act amends section 10 of the Principal Act by allowing both political parties and coalition political parties to form coalitions. As such they argue that the amendments are far from being clear since section 10 uses the terms ‘political party’, ‘coalition political party’, and ‘coalition’ in ways that make the section nearly impossible to construe while allowing for unchecked formation of coalition political parties.
39. Likewise the petitioners argue that the inclusion of coalition political parties at this stage undermines a citizen’s ability to make informed and meaningful choices under article 38 of the Constitution. This is because if a citizen knew that the political party it joined could become a part of a separate and distinct coalition political party, it would likely affect the person’s decision on whether to join a political party, whether to form a political party and how to structure that party.
40. Moving on to the second area, in respect to establishment of indirect party nominations, the petitioners aver that under section 38G of the Amendment Act a political party is required to select delegates then nominate candidates on behalf of the party without a vote and democratic process. The petitioners argue that a political party may entirely exclude registered party members from direct participation in who will then be the party’s candidates. Further they note that citizen members of a political party may have no say in who gets chosen as a delegate, and, in turn, a delegate need not be accountable to the citizen members, violating their right under article 38 of the Constitution. In addition, they aver that application of the indirect and direct party nomination processes to the upcoming general elections would throw the election process into turmoil. They contend that this would create an irreconcilable conflict with section 27 of the Elections Act, which requires a party to submit its nomination rules to the IEBC at least six months before the nomination of its candidates’ which considering the nomination deadline set for 30th April, is long past.
41. On the third area the petitioners aver that section 4A(c) of the Amendment Act purports to absolve political parties of their constitutional mandatory requirement for diversity and inclusivity due to its wording ‘may’. It is their case therefore that relegation of gender equity and representation of persons with disabilities, youth, ethnic, and other minorities to a discretionary matter violates articles 10, 91(1) (f) and 91(2)(a) the Constitution, which makes inclusivity mandatory.
42. Regarding audit of political parties’ accounts, the petitioners aver that the Amendment Act under section 22 deletes section 31(3) of the Principal Act that required accounts of every political party to be audited annually by the Auditor-General and submitted to the registrar. This in effect they aver prevents the registrar of Political Parties and Parliament from overseeing political party accounts even though these political parties may be the recipients of public funds.
43. Finally, the petitioners aver there was no sufficient public participation. This is since the National Assembly failed to provide a meaningful opportunity for the public to participate and that although the Senate allowed for an opportunity to submit written comments, it gave the public one week to do so and limited the opportunity to email submissions.

The 6th Petitioner’s Case

44. Through Petition No E109 of 2022 dated March 17, 2022 the 6th petitioner seeks the following orders:
 - i. That this Honourable court be pleased to declare that sections 28(1) and 28A of the Elections Act, 2011, are unconstitutional to the extent pleaded hereinabove and to the extent that they discriminate against candidates seeking to join other political parties even after the conduct of the party primaries of their previous parties or generally seeking to join political parties and participate in the general elections scheduled for the 9 August 2022 and thereby denies the



right to equal protection and benefit of the law and further abrogates their right not to be discriminated on any ground as provided at article 27(1)(2)(4) & (5) of the [Constitution of Kenya](#);

- ii. That this honourable court be pleased to declare that sections 28(1) and 28A of the [Elections Act, 2011](#), are unconstitutional to the extent pleaded hereinabove and to the extent that they institute an unfair restriction and limitation in law to candidates seeking to join other political parties even after the conduct of the party primaries of their previous parties or generally seeking to join political parties and participate in the general elections scheduled for the August 9, 2022 and which is an abrogation to enjoyment to the full extent possible of their political rights provided at article 38(3)(c) of the [Constitution of Kenya](#);
 - iii. That this honourable court be pleased to declare that all candidates seeking political office and are desirous to participate in the general elections of August 9, 2022, can lawfully join another political party of their choice without any restriction in law even after the submission of party membership lists to the 2nd respondent and to the Office of the Registrar of Political Parties as required under the provisions of sections 28(1) and 28A of the [Elections Act, 2011](#);
 - iv. That this honorable court be pleased to grant such other orders and directions that it deems fit in the circumstances.
 - v. That costs be provided.
45. The premise of this petition, as supported by the averments in the affidavit of James Mwangi Macharia of even date is that section 28(1) and 28(A) of the [Elections Act, 2011](#), are unconstitutional.
46. The 6th petitioner avers that the 2nd interested party issued Gazette Notices Nos.430 to 435 on January 20, 2022 giving timelines for compliance with the legal requirements applicable to all candidates desirous of participating in the general elections. The relevant one is that all political parties are to submit the party membership lists to the 2nd interested party before April 9, 2022. It follows thus that any person intending to participate in the general elections, must be a member of a political party before March 26, 2022, being the date by when all political parties must have submitted their party membership lists to the Office of the Registrar of Political Parties for certification before submission of the same to the 2nd interested party before April 9, 2022.
47. In view of the stated deadlines, it follows that any person intending to participate in the general elections through nomination by a political party must be a member of a political party. Consequently if such a person fails in the party primaries they will not have a chance of joining another political party. He notes that the party primaries ought to be concluded and finalized before April 22, 2022. On the contrary, he avers that article 85(a) of the [Constitution](#) allows independent candidates to participate in the general elections without the need of being members of any registered political party.
48. It is his contention accordingly that section 28A of the [Elections Act](#), in issuing the time deadlines is unconstitutional. He contends that it is discriminatory against persons hopeful of joining other political parties with the intention of participating in the general elections. This is because it restricts them from joining another political party even if they lost in the party primaries while it allows such persons to still contest in the elections as independent candidates. According to him, the status of an independent candidate is equal to that of a nominated candidate and so there should be equality in time and opportunity in law for all to participate in the general elections.



The Respondents

The 1st Respondent's Case

49. The 1st respondent filed a replying affidavit by Kennedy Ogeto CBS, sworn on February 15, 2022. He deposed that the petition is deficient and falls outside this honourable court's jurisdiction under article 165 (3)(d)(i) of the Constitution for the reasons that; it does not challenge the constitutionality of the impugned provisions of the Political Parties Act as amended by the Political Parties (Amendment) Act 2022 (the impugned Act) but seeks an alternative interpretation of articles 38, 91, 92 and 260 of the Constitution; it does not provide any particulars to demonstrate the manner in which the impugned provisions of the Political Parties Act as amended by the impugned Act are inconsistent with or contravene any provisions of the Constitution; it does not demonstrate with sufficient particularity how the purpose and the effect of the impugned provisions of the Political Parties Act as amended by the impugned Act violate and/ or are inconsistent with any provision of the Constitution; and, it does not disclose with sufficient particularity the rights or freedoms under the Bill of Rights that have been violated or are threatened with violation by the impugned provisions of the Political Parties Act as amended by the impugned Act.
50. He avers that the impugned Act was enacted in strict compliance with the Constitution and all relevant legislation and that the amendments to the Political Parties Act by the impugned Act were intended to give full effect to articles 91 and 92 of the Constitution.
51. According to him, section 2 of the Political Parties Act as amended by the impugned Act gives formal recognition to political coalitions formed by like-minded political parties making them registrable by the Registrar of the Political Parties. Further, article 260 of the Constitution provides a sufficient road definition of a political party so as to include political parties such as those envisaged by the amendment to section 2 of the Political Parties Act.
52. He deposes that the petition does not demonstrate the manner in which a coalition political party contravenes the provisions of part 3 of chapter seven of the Constitution. In any event, he reckons, a coalition political party meets the basic requirements of a political party contemplated in the said provisions as it is formed by an amalgamation of duly registered political parties who have already complied with the provisions of the Political Parties Act.
53. Contrary to the petitioner's claim that the formation of a coalition party will take away the right of individual citizens to form a political party, he deposes that individual citizens are granted the right under article 38 of the Constitution to form political parties which said right is not affected by the ability of political parties to form a coalition political party.
54. Regarding the assertion that section 7 of the Political Parties Act as amended by section 7 of the impugned Act discriminates against stand alone political parties by exempting coalition political parties from sections 5 & 6 of the Political Parties Act, he states that a coalition political party is a coalition of duly registered political parties that have been subjected to full compliance of Political Parties Act including sections 5 and 6 of the said Act. Hence it is unnecessary to subject them to a second round of compliance.
55. He further avers that section 14A of the Political Parties Act as amended by section 11 of the impugned Act does not, infringe on article 47 and 50 of the Constitution. He notifies that section 14A(2) of the impugned act provides that members who contravene section 14A(1) are given notice of their deemed registration. In addition, an opportunity to be heard by their party in accordance with its constitution.



56. He asserted that the purpose of section 40(3) of the *Political Parties Act* as amended by section 27 of the impugned Act is to ensure that coalition political parties handle their disputes internally before being referred to the Political Parties Dispute Tribunal.
57. The 1st respondent filed grounds of opposition dated March 23, 2022 and replying affidavit by Jackline Kiramana sworn on March 23, 2022 in response to Petition E 109 of 2022 however the same was consolidated with the petition E 043 of 2022 and 057 of 2022 hence the content therein was overtaken by events.

The 2nd Respondent's Case

58. The 2nd respondent filed its response through Michael Sialai CBS on February 15, 2022. He deposed that the issues raised challenge the constitutionality of the impugned Act and sections 2, 10(1), 22 and 24 therein.
59. He deposed that the impugned Act which originated from the National Assembly as Political Parties (Amendment) Bill (National Assembly Bill No. 56 of 2021) (the Bill), underwent first reading on December 2, 2021 and was committed to the National Assembly departmental committee of Justice and Legal Affairs (JLAC) for review and report pursuant to standing order 127 (1).
60. The Bill sought to amend the *Political Parties Act, 2011* to, address the overlapping mandate between the Office of the Registrar of the political Parties, and the Independent Electoral and Boundaries Commission; enhance effective management of political parties and to define the role of the 1st interested party regarding independent candidates; implement the *Constitution of Kenya* including articles 82, 90, 91, 92, 93, 103 and 194; address the gaps identified in execution of the 1st interested party's mandate from lessons learnt and past experiences; address the needs of Kenyans as drawn for stakeholder engagements; and, address domestic and international jurisprudence.
61. He averred that JLAC facilitated public participation through an advertisement in the local daily newspaper of December 7, 2021 as required under article 118 of the Constitution of Kenya and National Assembly Standing Order 127(3) but did not receive a single memorandum from any member of the public including the petitioners. It also held consultations with key stakeholders including, the 3rd respondent, the 1st interested party, the Political Parties Dispute Tribunal among others.
62. JLAC held a meeting with the 1st interested party (the registrar of political Parties), the Chairperson of the Political Parties Disputes Tribunal, and a representative from the 1st respondent who made joint submissions in support of the Bill and proposed some amendments.
63. In the said meeting the 1st respondent and 1st interested party commenced their joint submissions by tracing the origin of the 1st interested party. The 1st interested party further indicated that its amendments through the Bill were informed by views collected from stakeholder engagements as hereunder;
- i. Technical Caucus Consultative Meeting on the Review of the Political Parties Act held at Sarova Woodlands Nakuru on February 10, 2020;
 - ii. Political Parties Consultative Meeting held for 1st to March 3, 2020 at Sarova Woodlands Nakuru;
 - iii. State actors and Civil Society Organizations workshop held from 5th to October 9, 2020;



- iv. State Actors in electoral processes workshop held from 13th to 16th June at Great Rift Valley Lodge in Nakuru;
 - v. Drafters Retreat comprised of state actors in electoral processes held from 4th to July 7, 2021 in Naivasha;
 - vi. Political Parties' Secretaries- General Meeting Held from 27th to July 30, 2021 at Sarova Woodlands, Nakuru County of Draft Political Parties (Amendment) Bill, 2021;
 - vii. Political Parties Liason Committee Meeting held on 3rd August 2021 at Tamarind Tree Hotel in Nairobi on the Draft Political Parties (Amendment) Bill, 2021.
 - viii. Further engagement with the 1st respondent and 2nd interested party on 27th July 2021;
 - ix. The council of governors;
 - x. National Development Implementation Technical Committee (NDITC) –Legal Sub-Committee meeting held on August 31, 2021; and
 - xi. Meeting with the 1st respondent on September 10, 2021.
64. The 1st interested party intimated that the deliberate and extensive public participation and consultations expressed the need for the following changes to the Act; The definition of a political party to include a coalition political party; the definition of party nominations to differentiate the same from registration of candidates for elections; roles of political parties as required under article 92 (d) of the *Constitution of Kenya*; registration of coalitions and submission of pre-election coalition agreements at least 6 months before elections; that a political party can only be in one coalition; the timeline for reservation of name/symbol/colour and lifespan of provisional registration; streamlining the resignation, expulsion of party members, and deeming of resignation including the organ that does the deeming; the disbursement of funds by the Registrar to a coalition party according to a coalition agreement; regulation and monitoring of nominations, role of independent candidates in terms of party membership status and symbols, and of training party election agents; the introduction of ideologies of political parties; deletion of unconstitutional provisions from the Act including section 22(3);introduction of alternative forms of publications; alignment of timelines in the Act with timelines under the Elections Act, 2011; the original jurisdiction for party primaries disputes to be the party Internal Dispute Resolution Mechanism (IDRM); and, disputes between members of a coalition political party subjected to IDRM, High Court, and Court of Appeal.
65. He deposed that to remedy the issues raised by political parties during stakeholder engagements on the Political Parties Fund (PPF), the Bill proposed a new distribution criterion of the PPF.
66. JLAC noted the 1st Interested party's proposal and made observations that, on proposed amendments by the registrar of political parties, clause 8 that the proposal was reasonable and the period should be amended to 3 months; For clauses 15, 18, 19, 21, 22, 23, 25 and sections 39, 40(2) the proposals were accepted; clause 20(c)(fc) to return the proposal in the Bill as the concern; and, section 41(2) that Appeals should terminate at the Court of Appeal. JLAC also noted that the proposals by the Political Parties Tribunal to the Bill were also accepted.
67. JLAC considered the views from the public and stakeholders and tabled its report before the NA on December 22, 2021. In its report it made recommendations for amendment of clauses 8 (b), 15(c), 18, 19, 21, 22, 23 and 25 of the Bill. It also recommended the insertion of new clauses 22A and 23A to the Bill. He thus deposed that it was evident that JLAC agreed with and incorporated only some of the proposals from key stakeholders and the public.



68. He deposed that the report was considered and debated by the House during special sittings convened on 22nd and December 29, 2021 and January 5, 2022. Pursuant to National Assembly Standing Order 131, the Hon Deputy Speaker of the National Assembly directed JLAC to subject proposed amendments received from MPS to a winnowing process. This was to harmonize the proposed amendments before they could be considered by the Committee of the whole House. He informs that public participation is not required during the winnowing process nonetheless they still engaged various stakeholders due to the public interest of the matter.
69. JLAC tabled its addendum Report before the National Assembly on December 29, 2021
70. He noted the objectives, purpose & effects of sections 2, 4, 10(1), 22 and 24 of the impugned Act are as summarized below;
- i. Section 2, amended the Act by replacing the definition of political party with a new definition which avoids cross reference to article 91 and 260 of the Constitution.
 - ii. Section 10(1) amended the Act by inserting sections 14A and 14 B.
 - iii. Section 14A(1) is like the former section 14(5) of the Act which dealt with when a member of a political party is deemed to have resigned.
 - iv. Sub section 2 provides that a political party shall before deeming a member to have resigned, notify, and afford such a member a fair opportunity to be heard.
 - v. Sub section 3 is similar to the former section 14(5A), the only difference being the absence of a time limit to notify the Registrar of a political party of the deemed resignations in a party. In addition, it provides that a political party will request the Registrar to remove the name of a person from the party's register.
 - vi. Subsection 4 provides that if the Registrar is satisfied that the correct procedure was used to remove such a member shall remove the name from the register within seven days of the notification and notify the member in writing.
 - vii. Subsection 5 provides that if the registrar is not satisfied with the procedure of removing a member, the registrar shall refer the matter back to the political party.
 - viii. Sub section 6 is like the former section 14(6) which exempted the provisions of subsections (1) (c), (d) and (e) a member of a political party which enters or proposes to enter into a merger or coalition with another political party.
 - ix. Section 14B is like the former section 14(7), which dealt with the expulsion of a member from a political party.
 - x. Section 22 was amended by deleting subsection 3 because the requirements set out under the repealed sub-section are already spelt out in the Constitution.
 - xi. Section 24 was amended by the act by providing a new and comprehensive Part IVA consisting of new sections on political party nominations. It provides for the methods of conducting nominations which are either direct party nominations or indirect party nominations.
71. He deposed that contrary to the petitioner's allegations, the objective, purpose and effect of the provisions of coalition political parties are to provide a legal framework for establishing coalitions and to ensure the rights of the parties forming coalitions are protected by statutes; the impugned Act does not abolish or violate the principles of multi-party democracy as contended by the petitioners



as coalition political parties are only one of the mediums of registration of political parties; the implementation of the impugned Act will not violate the principles of fair elections protected under the Constitution; and, the process leading to the enactment of the impugned Act was long, deliberative and consultative.

72. He deposed that, a law enacted by parliament is presumed to be constitutional unless declared unconstitutional by the courts and the petitioners have failed to discharge the burden of proof; to test the constitutionality of a statute, the court has to first determine the object and purpose of the impugned statute; the petitioners have not demonstrated how each of the impugned provisions of the impugned Act is unconstitutional; and, they have failed to meet the test for issuance of conservatory orders.
73. Lastly he asserted that pursuant to JLAC's report, the 2nd respondent facilitated public participation during enactment of the impugned Act.

The 3rd Respondent's Case

74. The 3rd respondent filed grounds of opposition dated February 15, 2022 to the application and replying affidavit by Jeremiah Nyegenye, CBS sworn on even date to the petition. He admitted that the Political Parties (Amendment Bill) National Assembly Bill No 56 of 2021 was published on November 26, 2021. Vide a message dated January 3, 2022 from the Speaker of the National Assembly to the Speaker of the Senate, the Political Parties (Amendment) Bill, 2021 (the Bill) was transmitted to the Senate.
75. Subsequently, the Speaker of the Senate convened a special sitting of the Senate on January 11, 2022 *vide* Kenya Gazette Notice No 63 of January 7, 2022. On the said dated, the Senate convened for a special sitting and the Bill was read for the first time. It was then referred to the committee on Justice, Legal affairs and human rights which published advertisements in the Daily Nation and the Standard of 12th January 2022 inviting members of the public to submit written memoranda on the Bill and to appear before the committee during the public hearings on the Bill.
76. The said Committee held public hearings on 20th and January 21, 2022 and in total received written and oral submissions from twenty- eight stakeholders, including the IEBC, the Council of County Governors, the County Assemblies Forum, the Attorney General, the Registrar of Political Parties, the Judiciary Committee on Elections, the Political Parties Liason Committee, and the Kenya Law Reform Commission.
77. He deposed that the committee sent invitations to various stakeholders to appear and submit their presentations on the Bill. It also received submissions from independent commissions, civil society organizations, special interest groups, workers, human rights organizations, and members of the public and met with various stakeholders who appeared for the public hearings. It further received memoranda from, Election Management Body and related entities, constitutional commissions, independent offices, human rights and related organizations, political parties and organizations representing political parties, civil society, religious organizations and special interested groups, and individual submissions.
78. Subsequently, the committee extensively considered the provisions of the Bill and the submissions received thereon and based on its deliberations, its final recommendation was that the Senate proceeds to consider and pass the Bill through its report tabled on January 25, 2022. Further it affirmed that pursuant to the report of the committee the submissions from Katiba Institute were considered during the committee's deliberations on the Bill and it is also not true that the Senate declined to receive hard copies. The Bill was debated and considered on 26th and January 27, 2022 wherein the bill was passed without amendments and remitted to the NA.



79. He deponed that article 38 of the Constitution guarantees political rights, article 92 provides for legislation on political parties and that in determining the constitutionality of an Act of Parliament, the court should look at the purpose and effect of the impugned statute and if the purpose and or the effect of the statute do not infringe on a right guaranteed by the Constitution, the statute is not unconstitutional.
80. He further deponed that the amendment to the definition of a political party in the Political Parties (Amendment) Act, 2022 does not limit political party to mean a coalition but merely permits a coalition to be recognized as a political party and that the petitioner has not demonstrated the manner in which the amendment violates the Constitution. The Amendment Act has also not changed the definition of a political party as set out in article 260 of the Constitution.
81. He deponed that the Political Parties (Amendment) Act 2022 has not limited the right of citizens under article 38(1)(a) of the Constitution to form, or participate in forming a political party. Article 36 of the Constitution guarantees every person the freedom of association and therefore the members of a political party may opt to enter into coalition agreements with other political parties and any member who is disfranchised by the decision of the party to form coalitions may resign from the party if the decision by the majority is unacceptable to them.
82. He deponed that the nomination process in the Political Parties (Amendment) Act 2022 allowing for direct and indirect nomination does not violate the Constitution and it is incumbent upon the members of a political party to elect either the direct or indirect mode of nomination for their party of choice.
83. He denied that it is unconstitutional for political parties to be required to have a statement of ideology setting out the doctrine, ethical, ideas and principles of a party and in setting out such a statement of ideology, political parties must comply with article 91 of the Constitution.
84. He deponed that the amendment to section 31 of the Political Parties Act on the mandate of the Auditor- General does not nullify article 229(4) (f) of the Constitution as a statute cannot limit a constitutional obligation. Further, the provision to have the Court of Appeal as the final court to determine disputes that commence at the Political Parties Disputes Tribunal does not curtail access to justice as the proposal does not nullify article 163(4) of the Constitution on appeals from the Court of Appeal to the Supreme Court.
85. He averred that the petitioner has not demonstrated the manner in which the impugned Act has curtailed the constitutional functions of the 2nd interested party. He also averred that section 14B(2) of the Political Parties Act as amended by the impugned Act accords a member of a political party the right to be heard before expulsion from the membership of a political party hence no violation of the constitutional right to fair administrative action.
86. He deponed that prior to the Senate conducting public participation, the National Assembly had also undertaken extensive public participation; the combined public participation by both Houses of Parliament met the threshold of public participation required by article 118 of the Constitution of Kenya.



The Interested Parties

1st Interested Party's case

1st Interested Party's Response to Petition E043 of 2022

87. The 1st interested party filed its response through Ann Nderitu MBS' replying affidavit sworn on February 15, 2022. She deposed that the process of the enactment of the impugned Act started immediately after the 2017 general elections and was achieved through consultation with key stakeholders.
88. She deposed that the amendment of section 2 to include a coalition political party does not irregularly expand the definition but makes it clear on what a political party is and it is further within the description contemplated under part 3 of chapter seven of the Constitution.
89. She averred that coalitions have been in existence since 2002 general elections. Further, that the amendment solves the problem by allowing a coalition political party's name to be on the ballot paper and candidates to freely pick proposed deputies from constituent parties in the respective coalition political party and makes it easier for their regulation and supervisions as they will be obligated to abide by article 91 of the Constitution.
90. She deposed that mergers and coalitions were recognized even before these particular amendments under section 10 and 11 of the Act. Further, that before any party enters into a coalition the party Constitution will provide for any such process and the amendments do not call for delegation of any political rights under article 38.
91. According to her, party ideology existed under sections 14 and 27 of the 2011 Act and the new amendments brings clarity to what ideology would mean under the Act as the same was not previously defined. That the petitioner has also failed to show any contravention of article 91(2) of the Constitution by having the inclusion of what a statement of ideology is.
92. She averred that the petitioner fails to appreciate that before a coalition political party is registered the applicant party, must first be registered as a political party therefore, to make coalition political parties go through the process again would be unreasonable and unjustified. Further, the petitioner may have to raise the issue of the coalition process with his respective coalition party as it does not control how parties enter into coalitions.
93. She deposed that the third schedule of the Act and the petitioner's respective party Constitution ought to address any divergent views of members and the issue raised is an internal dispute raised in the wrong forum. She averred that the petitioners fail to appreciate the import of section 7 of the impugned Act, the third schedule of the Act and any other relevant regulations.
94. Speaking to the amendments in light of the public, she deposed that the relevant parties who will be affected when it comes to entering into coalitions are the registered members of the party not the public. She went on to state that section 40 of the Act provides an elaborate process of challenging the decisions of the 1st interested party. Accordingly a party aggrieved by the registration of a coalition political party can invoke this provision. In this context she asserts that the petitioner has failed to show specifically how article 47 of the Constitution will be violated as alleged.
95. She further deposed that the Petitioner fails to appreciate the import of section 14A (2) of the impugned Act where the political party must conduct a hearing on an allegation of deemed resignation. She deposed that the 1st interested party is not usurping the powers of the 2nd interested party as the



two are distinct but conjoined and enjoy a symbiotic relationship; That under section 38 of the Act the 2nd interested party is a member of the political party's Liaison Committee and under section 105 of the *Election Act* the office of the 1st interested party has the duty to cooperate and collaborate with the 2nd interested party.

96. She averred that the regulation of political parties falls under the ambit of the office of the 1st interested party pursuant to article 92 and it has also been collaborating with the 2nd interested party in offering trainings to party agents. She further averred that section 38 E of the Political Parties Act is a necessary amendment as it ensures proper supervision of political parties during the nomination process. She denied that the amendment of section 40 of the Act is discriminative as the law also provides for each political party to have an internal dispute resolution mechanism and it is also in line with article 159(2) (c) of the *Constitution of Kenya*.
97. On the amendment of section 41 of the Act on appeals from the tribunal being final at the court of appeal, these she says are informed by the need for electoral processes to be short and that there has to be an end to litigation. Further that amendment of sections 27 and 28 of the *Elections Act* are essential as the 1st interested party is the custodian of the registered members of any political party. She averred that there was public participation as the office of the 1st interested party held meetings to sensitize the public on the proposed amendments. Further some of the proposals came from the public, key stakeholders, and government agencies. She cited the dates of such meetings as those mentioned by the 2nd respondent.
98. She deposed that the 3rd respondent through the office of the clerk of the Senate, invited the public to submit representations that they may have on the bill on email, and also conducted public hearings on 20th and January 21, 2022 at the senate chamber. The Political Parties Liaison Committee, the national gender and equality commissions, its office and the 2nd interested party presented their proposals and memorandum of the Act to the Senate.
99. She averred that the petitioners have not pleaded with specificity and have failed to show the unconstitutionality of the amendments to the Act thus the legislations are presumed to be constitutional.
100. In its supplementary affidavit sworn by the same deponent on March 11, 2022, she deposed that the Bill was disseminated online from November 26, 2021 before the 1st reading at the National Assembly on December 2, 2021
101. She deposed that the petitioners had failed to show how the Constitution was violated in the process of the amendment and how the definition of the word political party has violated the Constitution. Further that the petitioners failed to appreciate that before the formation of a coalition political party, the association of citizens must exist under the law hence subjecting them to the same rigorous process is unjustified. She averred that under section 10, a coalition may choose to be registered as a coalition political party or remain as a coalition. In each case she notes that the provisions of the Act will apply accordingly. Further, that coalitions do not threaten multipartism and there is justification to prohibit a member of one coalition from being a member of another coalition as coalition political parties are distinct and unless they come under one political umbrella they should be treated as such.
102. On direct and indirect nominations, she deposed that each political party is distinct with its own political processes hence the process of selection of a candidate will be determined by the party, upon consideration of several factors and if members preferred choice of candidate is denied, the parties have a process to challenge a nomination. The said process also existed, and the legislature saw it fit to have a law to provide for the same. She averred that the 1st interested party is mandated to review a coalition



agreement and the registered members also approve the same in their respective National delegation conferences or otherwise.

103. She deposed that the inclusion of section 4A is great progress as the same was never there. Further that for a political party to be registered it must meet the conditions in section 7 of the Act which include ethnic diversity, gender balance, and representation of minorities and marginalized groups.
104. She averred that the deletion of section 31(3) of the Act is justified as section 31(2) still maintains that political parties must submit their accounts to the Auditor General within three months after the end of each financial year. Further article 227(4)(f) is clear that the Auditor General still has power to audit accounts.

1st Interested Party's Response to Petition No.E057 of 2022

105. The 1st interested party filed grounds of opposition dated February 15, 2022 to the said Petition. The grounds are that;
 - i. The petition would be rendered nugatory if the conservatory orders are not issued.
 - ii. The petitioners have failed to plead with specificity, the violations, if any, of the constitution and failed to show the unconstitutionality of the amended provisions.
 - iii. Allowing the application in the interim would greatly curtail the operations of the office of the 1st interested party.
 - iv. The legislations are presumed to be constitutional and that at this interim stage, the issue of constitutionality cannot be established without a full hearing.
 - v. The petitioners have failed to show what prejudice they will suffer if the conservatory orders are not issued.

1st Interested Party's Response to Petition No.E109 of 2022

106. The 1st interested party filed grounds of opposition dated March 28, 2022 in response to Petition E 109 of 2022 and replying affidavit by Joy Onyango sworn on March 23, 2022. The grounds are that;
 - i. The petition is incompetent, bad in law and an abuse of the court process.
 - ii. The petition is *res judicata* as competent courts with the same level jurisdiction have fully settled and rendered decisions on the legal issues raised in the petition herein. See [*Maendeleo Chap chap Party & 2 others v Independent Electoral and Boundaries Commission & another* \[2017\] eKLR](#) and also [*Council of County Governors v Attorney General & another* \[2017\] eKLR](#)
 - iii. The petitioners have failed to show the unconstitutionality of the amended provisions.
107. In its replying affidavit, she deposed that the 1st interested party is established under section 33 of the [*Political Parties Act, 2011*](#) and one of its functions is to regulate political party nominations. That its functions are germane to the conduct of elections hence must be conducted and be performed within certain legal timelines to protect all Kenyans. She deposed that its role to verify party membership lists and issue political parties with respective certified party membership registers is as a result of the [*Political Party's Amendment Act 2022*](#). Further, that section 28 A of the [*Elections Act 2011*](#) is a product of lessons learnt in the run up to 2017 general elections and stakeholder consultations that called for it to certify party membership registers within a particular timeline before the same are submitted to the 2nd interested party.



108. She deponed that, the challenge on section 28A of the [Elections Act 2011](#) is framed in general terms woven in allegation such as there is an assumption that article 85 should not exist in the Constitution; there are no particulars to demonstrate how section 28 A of the [Election Act, 2011](#) is inconsistent with the provisions of the Constitution; and, there are no particulars to demonstrate with sufficient specificity how the purpose and effect of section 28 A of the [Elections Act 2011](#) violates or are inconsistent with any provision of the Constitution.

The 2nd Interested Party's Case

109. The 2nd interested party in response to Petition No E043 of 2022 and Petition No E057 of 2022 filed its sworn replying affidavit by Chrispine Owiye, the director Legal and Public Affairs dated March 17, 2022. He avers that with respect to the amendments to the Political Parties Act, the NA and the Senate undertook public participation which the 2nd interested party participated in during the development of the Bill and submitted a memorandum to the Senate following its call for comments on the Bill.

110. The 2nd interested party's memorandum highlighted the aspects of the potential conflict in timelines between the activities envisaged in the Bill and those in the Elections Act. Secondly, the latent usurpation of its constitutional mandate by vesting it in the 1st interested party. Lastly, expressed the need to align the amendments with the provisions of the Elections Act and its regulations by making corresponding amendments to the later. Taking this into consideration he concludes by averring that the Senate did not consider any of the suggestions submitted as the Bill was enacted as it had been published. He nevertheless notes that Parliament is not bound to adopt the proposals.

111. In the same way, the 2nd interested party filed its response to Petition No E109 of 2022 vide its sworn replying affidavit by Chrispine Owiye, the Director Legal and Public Affairs dated March 24, 2022 who fervently begins by observing that the petition is incurably defective, incompetent, misconceived and without merit. This is because it does not disclose any reasonable grounds to warrant the prayers sought by the 6th petitioner as it is based on pure conjecture aimed at occasioning delay.

112. He avers that the petition as framed does not disclose any constitutional issues within the principles set in the case of [Anarita Karimi Njeru v Republic](#) [1979] eKLR and further that this Court lacks jurisdiction to entertain the matter by virtue of the *res judicata* doctrine. He avers that the impugned Sections were dealt with and determined in the case of [Council of County Governors v Attorney General & another](#) [2017] eKLR.

113. Contrary to the 6th petitioner's averment with regards to Gazette No 430 dated January 20, 2022 he notes that the stated provisions of the Constitution and the Elections Act are not in dispute in as far as they relate to the conduct of elections in Kenya which is the 2nd interested party's obligations and in line with the constitutional timelines. He further depones that the petition seeks to interfere with the election calendar by extending the statutory timelines provided for by law which are determined by the date of the general election which is August 9, 2022. He therefore depones that grant of the prayers sought would injure public interest and defeat the essence of the electoral processes and the will of the people under article 38 of the [Constitution](#).

The 3rd Interested Party's Case

3rd Interested Party's Grounds of Opposition to Petition E109 of 2022

114. The 3rd interested party filed grounds of opposition dated March 27, 2022 opposing the Petition E109 of 2022 and urging for their dismissal on the grounds that;



- i. The petition is an abuse of the court process and offends section 7 of the Civil Procedure Act on the principle of *res judicata* and the doctrine of issue estoppel.
- ii. The issues raised pertaining to the constitutionality or otherwise of the provisions of section 28 of the [Elections Act, 2011](#) have been heard and determined by the court in [Council of County Governors vs Attorney General & another](#); Petition No 56 of 2017, [2017] eKLR and [Maendeleo Chap Chap Party & 2 others v IEBC & another](#), Petition No 179 of 2017, [2017] eKLR hence this court is devoid of jurisdiction.

3rd Interested Party's Response to Petition E043 of 2022

115. In response to the 1st petitioner's petition, the 3rd interested party filed replying affidavit by Junet Mohammed sworn on March 11, 2022. He deposed that the petition is devoid of merit as the petitioner has not met the threshold for grant of any declaratory order under article 22 and 23 of the [Constitution](#), and neither has he demonstrated any harm he has suffered or stands to suffer to warrant the orders sought.
116. On the contrary, granting the orders will be prejudicial as the court will be halting and interfering with processes in the election cycle from the forthcoming general elections. Various political parties and members of the public have aligned their various affairs, political activities, nomination preparations and schedules in accordance with the statutory timelines and guidelines as advised by the IEBC and as per the impugned amendments as introduced vide the impugned Act and for Public interest.
117. He deposed that the impugned Act has created legal mechanisms to enable political parties register as coalition and participate in elections as such and hence providing an exclusive non –discriminatory regime for all to exercise their political rights guaranteed under article 36 and 38 of the Constitution. The said Act also promotes equality and the recognition of coalition of political parties as fundamental vehicles in any general elections and offers a clear avenue on their participation and involvement in any such elections.
118. On public participation he averred that a reasonable opportunity was afforded in the circumstances of the impugned legislation herein and various interested parties participated by submitting and giving their views on the bill. Further, that the Petitioners apprehension is misapprehended and merely speculative and without any evidence nor pleaded with specificity.
119. He deposed that the formation of coalitions is left to the discretion of political parties and who would decide on their rules of engagement and any such coalition agreements to guide the relationship including, membership, nominations and any such coalition activities and decisions. He also denied that the definition of a political party to encompass a coalition takes away the petitioner's right under article 38 of the [Constitution](#).
120. He further deposed that the statement of ideologies under section 2 merely supplement law and infuses discipline, and clarity of ideologies, ethics and principle as one of the cultures of political parties. Further, contrary to the petitioner's assertion, the requirement of statement of ideologies does not limit a person's right to form, join and participate in the affairs of any political party. Further any person who forms a political party is bound by the provisions of article 91 of the [Constitution](#) thus he court cannot make a blanket finding of unconstitutionality when such issue has not arisen.
121. He deposed that there is no contradiction or ambiguity in the introduction of statement of ideologies neither does it seek to coerce parties to subscribe to certain aspirations while contradicting the Second Schedule of the [Political Parties Act](#). Further that section 7 of the [Political Parties Act \(Amendments\)](#) is discriminatory against any political parties or individuals.



122. He averred that the petitioners' apprehensions are unfounded as political parties are governed by their individual constitutions. Rules and elaborate dispute resolution mechanisms and procedures governing the making of various decisions, including nominations, entering into coalitions and dissolution of coalitions are in place. The impugned amendments do not in any way derogate any of these channels.
123. He deposed that the impugned amendments are not adequate to guide the Registrar of political parties in the exercise of her powers and the existing laws as read with the relevant political party's constitutions and rules would at all times be guided the relevant political parties whenever they desire to enter into any such coalitions. Further, the impugned amendments do not do away with political parties constitutions and rules hence petitioners averments are premised on misapprehension that political parties would enter into coalitions in a vacuum without following their respective political party's Constitution and rules to the exclusion of their members.
124. He stated that various political parties have their own dispute resolution mechanisms. The petitioner therefore misinterprets and applies the impugned amendments herein in a vacuum with the deliberate intention of painting the said amendments illegal and contrary to articles 27 and 38 and 47 of the [Constitution of Kenya](#).
125. He deposed that the amendments under section 34 broaden the functions and mandate of the Registrar of political parties and supplements on the existing functions and does not usurp the power of the IEBC. Further, that the provisions of the impugned Act are already in force and being implemented hence the order if granted would be prejudicial; Judiciary through Judicial Service Commission has conducted interviews for appointment of Adhoc Members of the Political parties dispute tribunal pursuant to section 39A of the impugned Act.

Response to the 2nd Petitioner's Petition

126. In its response to this petition sworn by the same deponent, he reiterated the contents of his replying affidavit to the 1st petitioner's petition and maintained that the introduction of a new definition of a political party is not in any way unconstitutional and does not create any conflict between the Elections Act and the Political Parties Act.
127. He averred that Parliament retains the power to legislate on laws and achieve its intentions through legislation hence it not within the mandate of this court to substitute the views and intentions of Parliament with its own. Further, that the petitioner did not bother to present their views or engage in public participation exercises and hence they bypassed the same and using this court to second guess the intentions of the legislature.
128. He maintained that every political party has its own Constitution and rules governing its nominations, either directly or indirectly as it determines, and subsequently, every political party has its own dispute resolution mechanisms for the resolution of all such disputes, including nomination disputes. It is speculative to allege indirect nominations is unconstitutional and the same is not ripe for interrogation and determination.
129. He deposed that the formation of coalitions is the discretion of political parties which are guided by their constitution and rules and sanctions by their members in their respective delegates conferences, as such, their court cannot speculate and pre-empt any such decisions and contents of such coalition agreements based on hypothetical scenarios. Hence it is premature for the petitioners to allege there is no process for reviewing the coalition agreements or determining whether they satisfy the requirements set forth under the Third Schedule of the Political Parties Act.



130. Regarding section 4a(c) of the impugned act, he deposed that it does not in any way contravene article 91(1)(f) of the Constitution and basic and does not take away the political parties obligations to adhere to the provisions of article 91 of the Constitution. The Amendments do not undermine the reliability and credibility of elections.

The 4th Interested Party's Case

131. The 4th interested party in response to Petition No. E043 of 2022 and Petition No.E057 of 2022 filed its sworn replying affidavit by Wambui Gichuru, the executive director (undated).
132. She avers that there was adequate public participation in the amendment of the Political Parties Act noting that the National Assembly gazetted the Political Parties Amendment Bill 2021 on November 26, 2021. Further, pursuant to the provisions of article 118 of the Constitution and Standing Order 140(5) of the Senate Standing Orders, the Committee invited interested members of the public, to submit any representations that they had on the Bill by way of written memoranda. In addition the Committee informed the parties concerned and would hold public hearings on the Bill specifying the date, time and venue of the said hearings. Among the people who responded were the 2nd to 5th petitioners.
133. It is stated in opposition to the assertion by the petitioners otherwise that the term coalition political party did not introduce anything new since the issue of coalition of political parties and mergers is provided under section 2 of the *Political Parties Act, 2011* which defines coalition as an alliance of two or more political parties formed for the purpose of pursuing a common goal. It is further governed by a written agreement deposited with the Registrar, and coalition political party as coalition that is registered by the Registrar as a political party.
134. Likewise she avers that the impugned Act also includes association of citizens in the definition of political party under section 2 in promoting the spirit of article 36 of the constitution. Drawing a comparison with the *Political Parties Act 2011*, she avers that this Act allowed mergers and coalitions, and it cannot be said to be in violation of the Constitution, as the same must be read together with articles 36 and 38 of the *Constitution* which give every person the right to make political choices including the right to participate in forming a political party. She notes in fact that the 4th interested party is a product of 11 or so parties after merging with numerous registered political parties.
135. On the assertion that indirect and direct party nominations limits the role of citizens in political party process, she observes that not only was this conducted under the *Political Parties Act, 2011* that all these processes are governed by the nomination rules of a political party. As such every candidate has freedom under the Constitution to join any political party of his choice, and to be bound by the party's rules and the rules of the governing body responsible for administering the affairs of that particular political party. In any case she argues that it is a constitutional principle that all the internal decisions of a party are to be made through a party referendum.
136. She avers finally that insertion of section 4 of the amendment act cannot be said to contravene article 91(1)(f) of the *Constitution* since the said insertion cannot stand on its own to mean otherwise. It must be read together with articles 27 and 91(1)(f) of the *Constitution* and section 26(1)(a) of the *Political Parties Act 2011*. It is her case therefore that the impugned Act has good intentions since it promotes democracy and should not be discarded because of short-term political interests.



The 5th interested party's case

137. The 5th interested party in support of Petition No E043 of 2022 and Petition No E057 of 2022 filed his sworn replying affidavit dated March 11, 2022.
138. He avers that the manner in which the *Political Parties (Amendment) Act, 2022* was passed violated the provisions of article 10 of the *Constitution* on public participation. In effect this had an impact on his right as a citizen to make political choices as espoused under article 38 of the Constitution.
139. He avers that for public participation to suffice the government should provide meaningful opportunities for the public to participate in the law-making process. Further to take measures to ensure that people have the ability to take advantage of these opportunities. He depones that this was not adhered to. This is because the 7 days timeline given by the Senate to issue comments was not sufficient being that it involved political rights. He further depones that Senate limited the public on how to submit their comments by email only without disclosing the email that the comments were to be sent to.
140. He says that once the Bill was assented into law, it altered the substratum of the right to form a political party notwithstanding the Act defines a political party as an association of citizens and a coalition political party is not an association of citizens. Moreover he depones that a coalition political party is not required to adhere to the strict requirements for registration of political parties. He avers that a coalition political party is essentially given full registration upon presentation of a coalition agreement. To add on to this he notes that the coalition agreement submitted at least 120 days before a general election. He argues this will disenfranchise a party's existing members their right to be in their party and subject them to a coalition party against their will. He says this will create confusion.
141. Moving on, he avers that the impugned Act has gone further and introduced amendments to the Elections Act, 2011 a clear indication that public participation was not sufficiently done to conceal such amendments. Likewise, the fact that the 1st interested party is required to certify the nomination rules for political parties will make the state a key player in the affairs of political parties and this will in turn not be in accordance with the ideologies of the citizens forming such political party. He is apprehensive that this will deprive political parties their autonomy to run their affairs without interference from outside forces.
142. Finally, he avers that joining and cessation of membership to political parties is a continuous process. Besides he notes that the process of resigning and joining another party is extremely rigorous requiring usage of a smart phone or computer an option not available to most Kenyans. As such he argues that the requirement of a party list will mean that many Kenyans will be marginalized from joining and participating in political parties.

Submissions

1st petitioner's submissions

143. The firm of Mutuma Gichuru & Associates on behalf of the 1st petitioner filed written submissions dated March 23, 2022 and raises the following issues for determination:
- i. Whether the definition of a political party as introduced by the Political Parties (Amendment) Act, 2021 is consistent with articles 260 as read together with article 91 and 92 of the *Constitution*.



- ii. Whether the amendment to section 34 of the *Political Parties Act* No 11 of 2011 increases powers of the Registrar of Political Parties to usurp the role of IEBC as envisaged under article 88 (4) of the Constitution.
 - iii. Whether the exemption of coalition political parties to compliance with party registration requirements and audit issue (section 22 PPA) under section 7 contravenes article 27 of the *Constitution* and is therefore void.
 - iv. Whether the principles of public participation were ignored, compromised and or neglected in the process of enactment of the impugned law.
144. On the first issue, counsel submits that a plain reading of article 260 as read with articles 91 and 92 of the *Constitution* indicates that the Political Parties Amendment Act, 2022 is in contravention of the Constitution with keen focus on article 2(4) of the *Constitution*. This is since the Act deletes the constitutional definition of the term ‘Political Party’ and replaces it with a new definition as seen in section 2 of the Act. Counsel argues that the authority to make law by Parliament is subject to constitutional restraint since all public power must be obtained from the law.
145. In support reliance is placed on the Supreme Court case of *Hassan Ali Joho & another vs Suleiman Said Shabbal & 2 others*, (Supreme Court Petition No 10 of 2013) where the court upheld the supremacy of the Constitution under article 2(4) over the impugned provisions of the Elections Act. Additional reliance was placed on the case of *Pharmaceutical Manufacturers Association of SA & another; In re Ex Parte President of the Republic of South Africa & others* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).
146. Moving on to the second issue, counsel submits that the amendments to section 34(f) of the impugned Act add the functions of regulation of political party nominations and training of political party election agents to the 1st interested party. This he contends contravenes article 88(4)(d) and (e), article 90(2)(a) of the *Constitution* and section 4 of the *IEBC Act* No 9 of 2011. This is since it usurps the roles and powers of the 2nd interested party.
147. On the third issue counsel states that the registration process and requirements for the registration of a political party are laid down under sections 6 and 7 of the *Political Parties Act, 2011*. In addition section 10 of the said Act provides the requirements for the formation of a coalition. Owing to these sections, it is submitted that coalitions can only be formed from fully registered political parties that have adhered to the requirements. On the contrary, the impugned Act seeks to change these provisions by providing that a coalition political party need not comply with the provisions of sections 5 and 6 of the Act and only need to issue a coalition agreement.
148. Due to this it is submitted that these changes discriminate against single political parties while favoring coalition political parties contrary to the provisions of article 27 of the *Constitution*. Furthermore this affects the country’s democratic nature contrary to article 4 (2) of the *Constitution*. He argues that a distinction whether intentional or otherwise imposes disadvantages which withhold access to advantages available to other members of society as held in the case of *Andrews v Law Society of British Columbia* [1989] 1 SCR 321.
149. On the fourth issue counsel submits that article 10(2)(a) and article 118(1) of the *Constitution* provides for public participation, which ought to be real not illusory. It ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates as held in the case of *Robert N Gakuru & others v Governor Kiambu County & 3 others* [2014] eKLR.



150. To emphasize the importance of public participation further reliance was placed on *Doctors for Life International v The Speaker of the National Assembly & others* 2006 (12) BCLR 1399 (CC) and *Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others* CCT 86/08 [2010] ZACC 5. Counsel in essence submits that the amendments to the impugned Act should be found unconstitutional for the reason of want of public participation which ought not only be a quantitative but also a qualitative exercise with meaningful contribution by the public.

2nd to 5th petitioners' submissions

151. Counsel for the 2nd to 5th petitioner, Christine Nkonge, filed written submissions dated March 16, 2022. She begins by noting that the requirement that statutes be specific and precise in their language is an important pillar of the rule of law as envisaged under article 10 of the *Constitution*. One of the ingredients of the rule of law she submits, is certainty of law as held in the case of *Keroche Industries Limited v Kenya Revenue Authority and 5 others* Nairobi HCMA No 743 of 2006 [2007] 2 KLR 240. It is for this reason she notes that the courts have observed that where the terms of a statute are vague, overbroad, or contradictory, they violate the Constitution and must be voided as seen in the case of *Katiba Institute & 3 others v Attorney-General & 2 others* [2018] eKLR. To buttress this point further reliance was placed on the cases of *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR and *Kenya Bankers Association v Attorney General & another* [2019] eKLR.
152. Bearing this in mind counsel submits that the courts have established several principles for determining whether a statute should be voided for its ambiguity or vagueness. One of this principle focuses on the perspective of judicial officers and decision-makers and so from that perspective, a statute is unconstitutionally vague when the language is so imprecise or ill-defined that its meaning is left to 'the subjective interpretation of the judicial officer' as observed in *Geoffrey Andare v Attorney-General & 2 others* [2016] eKLR.
153. The second principle focuses on the perspective of the individual or organisation that must comply with the law. In that light, a provision will be said to be void where the provision is capable of eliciting different interpretations and different results as appreciated in *Katiba Institute (supra)*. In consequence she submits that if judicially trained minds can reach different conclusions while going through the same content how then is it possible for the public to decide as to what is the correct interpretation as opined in *Law Society of Kenya (supra)*.
154. Counsel thus contends that the rule of law principle requires clarity of law which the impugned Act does not contain. This she says is because the Act establishes that a 'coalition party' is distinct from and yet incorporated into the term 'political party'. She adds that the addition of 'coalition political party', on the face of the Act, makes the Political Parties Act confusing and renders the Act incoherent.
155. Turning over to the other issue, counsel observes that the amendments to the impugned Act threaten Kenya's status as a multi-party democracy if its effect were to result in Kenya becoming a one-party State. It is her argument that the amended section 10 seems to allow for the unchecked formation of coalition political parties as it authorizes two or more political parties to form coalition political parties. It is her view that in considering this, thought must be had to the transformative nature of the Constitution and the requirement for a rational explication of what the Constitution must be taken to mean. This is in light of its history, the issues in dispute and the prevailing circumstances as appreciated by the Supreme Court in the cases of *In the Matter of the Speaker of the Senate & another*, Reference 2 of 2013, [2013] eKLR and *In the matter of the Kenya National Commission on Human Rights* [2014] eKLR. She argues thus that the court ought to interrogate the possible unintended unconstitutional consequences the impugned Act will occasion.



156. Besides arguing that coalition political parties are internationally unprecedented and unnecessary to accomplish Parliament's intended objectives, counsel submits that the amended section 10 fundamentally impacts the 2022 election process if applied during this election cycle. This is since section 27(1) of the *Elections Act* provides that, 'a political party shall submit its nomination rules to the Commission at least six months before the nomination of its candidates' while the impugned Act allows coalition political parties to be formed at least 120 days before the elections creating a contradictory scenario.
157. After taking all this into consideration she submits that elections are not events but processes and so the right to free and fair elections does not just apply on the voting day but throughout the election process. In a nutshell she argues that a constitutional, statutory, or regulatory violation occurring at any point during the process would affect the validity of the election. These observations were expressed in the cited cases in support of *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR and *Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 others* [2013] eKLR.
158. On indirect party nominations counsel submits that these nominations fail all of the basic requirements described in *Council of County Governors v Attorney-General & another* [2017] eKLR. Further that, they do not represent an expression of the will of the people under article 38 of the Constitution essentially being inconsistent with it.
159. On the issue of public participation, counsel submits that the 2nd respondent violated articles 10 and 118(1) of the *Constitution* for its failure to provide a meaningful opportunity for the public to participate while the 3rd respondent only granted one week for the public to submit its views electronically. In support counsel cited the case of *In the Matter of the National Land Commission* (2015)eKLR where public participation was described as a major pillar and bedrock of Kenya's democracy and good governance. Additional reliance was placed on *Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others* [2013] eKLR, *Matatiele Municipality & others v The President of South Africa & others (2)* (CCT 73/05 A [2006] ZACC 12; 2007 (1) BCLR 47 (CC); *Robert N Gakuru (supra)* and *Moutse Demarcation Forum and others v President of the Republic of South Africa and others* CCT 40/08 [2011] ZACC 27, 2011 (11) BCLR 1158 (CC).
160. Counsel therefore submits that there was no reasonable opportunity afforded to members of the public to understand the issues and give informed opinions. This is because Parliament rushed through the legislative process and within two months passed the impugned Act.

6th petitioner's submissions

161. The firm of Muchoki Kangata Njenga and Company Advocates appearing for the 6th petitioner filed written submissions dated March 28, 2022. In answering the question of res judicata, counsel submits that the court should be guided by the principles set out in the cases of *Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties)* [2020] eKLR.
162. With reference to this doctrine it is submitted that the 6th petitioner's case is distinguishable from that of *Council of Governors -vs-Attorney General* [2017] eKLR which the respondents relied on in their argument for res judicata. This is because the 6th petitioner was first, not a party to the said petition. Secondly the said petition was specific to the question of the constitutional validity of section 28(1) of the Elections Act, 2011 on the basis of the alleged violation of article 38 of the Constitution while the subject of the present petition is section 28A and 28(1) of the *Elections Act, 2011*, on the basis of their violation of article 27(1) and (2) and article 38(3)(c) of the Constitution. Lastly that in the Council



of Governors case the court did not pronounce itself on the constitutionality of section 28A of the Elections Act, 2011 with reference to article 27(1) and (2) of the Constitution.

163. Counsel further submits that articles 84 and 85 of the *Constitution* provide for two avenues by which a person can be a candidate for elective office under the *Elections Act, 2011*. One is through nomination by a registered political party or two, as an independent candidate. In light of this, it is submitted that all candidates for political office should be treated equally in the electoral process. That as such the law should not present any advantage of some candidates over others in seeking the public office through elections.
164. From the foregoing counsel submits that sections 28(1), 28A of the *Election Act* and the electoral timelines set out by the 2nd interested party in Gazette Notices No 430 to 435 of January 20, 2022, are discriminatory in their import for the reason that they restrict the time within which aspiring candidates can be nominated by political parties to run in the general elections. On the other hand aspirants who intend to vie as independent candidates are disproportionately allowed more time and chance to register and participate in the said general elections.
165. In support he relied on the Court of Appeal decision in *CKC & another v ANC* [2019] eKLR which appreciated that the Constitution through article 27 guarantees both men and women the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Further reliance was placed on the cases of *Peter K Waweru v Republic* [2006] eKLR, *Andrews v Law Society of British Columbia* (1989) 1 SCR 321 and *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) (Hugo).
166. Counsel submits in a nutshell that the impugned provisions provide for a discriminatory regime that affords more time, space, choice and opportunity to persons who seek elective office as independent candidates as compared to those who elect to vie through nomination by a political party. He contends that in view of section 13 of the *Elections Act* all candidates, ought to have been given the same period of time up to the May 2, 2022 being three months (90 days) before the general elections, to decide the platform under which they would seek to participate in the elections. Instead, the nominated candidate must have been members of a political party before March 26, 2022 and so have no option to change thereafter.

1st respondent's submissions

167. On behalf of the 1st respondent Mr Kennedy Ogeto the Solicitor General filed written submissions dated March 28, 2022 and raised the issues as hereunder;
- i. Whether the consolidated petitions violate the principle in *Anarita Karimi Njeru* case which requires that constitutional petitions be pleaded with reasonable precision.
 - ii. Whether sections 2, 4A, 6(2) (a), 7(6), 14A, 34, 31, 40(3), 41(2), of the *Political Parties Act* as amended by *Political Parties (Amendment) Act 2022* and section 28(1) and 28A of the *Elections Act 2011* are unconstitutional.
 - iii. Whether there was a violation of constitutional and statutory requirements for public participation in the passage and enactment of the *Political Parties (Amendment) Act, 2022*.
168. Relying on *Anarita Karimi Njeru v Republic* [1979] eKLR, *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR [2013] eKLR and rule 10(2) of *Mutunga Rules*, counsel argues that two petitions are vague and ambiguous as they do not demonstrate, how the wording of the impugned provisions of the Political Parties Act as amended is inconsistent with or in contravention of any provisions of the Constitution; how the purpose and the effect of the impugned



- provisions of the Political Parties Act as amended violates or are inconsistent with the provisions of the Constitution; or, the rights or freedoms under the Bill of Rights that have been limited, violated or threatened to be limited or violated by the impugned provisions of the Political Parties Act as amended.
169. Counsel submitted that what the petitioners are doing is to seek to adduce their legislative preferences and to articulate their interpretation of various provisions of the Political Parties Act, the Elections Act and articles 10, 81, 27, 33, 38, 91, 229 and 260 of the *Constitution*.
 170. Relying on *Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi acting for or on behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others* [2014] eKLR and *Bidco Oil Refineries Ltd v Attorney General & 3 others* [2013] eKLR, he argued that the court cannot be called to question the wisdom of legislation or its policy object or interfere with statute merely because the legislature could have adopted better or different statutory provisions. Counsel argued that contrary to the 2nd to 5th petitioners assertion that the definition of a political party to include coalition political parties renders the impugned Act unconstitutional, vague and unenforceable, there is no vagueness or incoherence in the definition as there is no justification for petitioners premise that political parties cannot come together on account of shared ideology. It does not share the Petitioner's view that a legal meaning cannot have more than one component.
 171. Although admitting that the processes for forming coalitions and coalition political parties are largely the same, the 1st respondent denies that there is no fundamental distinction between the two formations. The reason being that in the case of a coalition political party, parties intent on establishing a coalition political party must expressly indicate such intentions as required in the sections of the impugned Act. Further, a coalition party is a political party and can field candidates for election in its name and partake in the share of the political parties funds as a political party which the coalition lacks. Relying on *Engineers Boards of Kenya v Jesse Waweru Wabome & 5 others* [2015] eKLR, counsel argued that in cases where incoherence exists, the same would be resolved by applying the long established rules of statutory interpretation.
 172. Counsel further submitted that contrary to the 2nd to the 5th petitioners assertion, there is no contradiction in the definition of political party in the impugned Act and the Elections Act. On the allegation of contradiction in the section 27 Elections Act and section 10 of the impugned Act, he refuted that the petitioner had demonstrated how the same is unconstitutional given that there are established canons of statutory interpretation to deal with conflicts between statutes. He relied on *Martin Wanderi & 19 others v Engineers Registration Board of Kenya & 5 others (supra)*. Relying on *MJ v NK & another* [2017] eKLR, Counsel argued that in relation to the subject matter of a statute, the principle of *lex specialis derogat legi generali* recognizes that the law governing specific subject matter overrides a law which only governs general matters hence the issue of contradiction does not arise.
 173. It is submitted that contrary to the 2nd to 5th petitioners assertion that the concept of coalition political parties is internationally unprecedented, there cannot be any unconstitutionality arising from the fact that a concept is internationally unprecedented. That averment is factually incorrect as section 2 of the now repealed Political Parties Act, 2007 in its definition of a political party.
 174. Counsel argued that the petitioners' view that the amendment does not meet its intended objectives does not render the said amendment unconstitutional. He relied on *Mark Obuya* case (*supra*) and *Bidco oil Refineries* case (*supra*). He further argued that the amendment seeks to protect the rights of political parties in coalition arrangements by ensuring that they are able to leverage in the coalition framework to field candidates and share in the Political Parties Fund in the name of the coalition party.
 175. On Constitutionality of a coalition political party and exemption from provisional registration requirements, counsel submitted that there is no basis for the petitioners to contend that the definition



- of political party is in contravention of article 260 of the Constitution or in contradiction of the definition in the Elections Act. He submitted that article 260 prescribes the elements to be satisfied for an entity to be registered as a political party and there would be no contravention of article 260 of the Constitution as long as the concerned entity meets the requirements envisaged under article 260 of the Constitution and in particular part 3 of chapter seven of the Constitution.
176. He maintains that the petitioners have not demonstrated how a coalition political party contravenes the provisions of part 3 of chapter seven of the Constitution. That in any event, a coalition political party meets the basic requirements for a political party under the said provisions as it is formed by the amalgamation of duly registered political parties who have already complied with the provisions of the Political Parties Act. He submitted that a coalition political party does not take away the right of individuals citizens to form a political party as the individual citizens are guaranteed this right under article 38 of the Constitution and are fully enjoyable in the amended Political Parties Act. Further, a coalition political party is a coalition of duly registered political parties that have been subjected to full compliance of the Political Parties Act including sections 5 and 6 of the Act hence unnecessary to subject them to have them subjected to a second tier compliance.
177. Regarding multiparty democracy, counsel submitted that the same is not necessarily assured by the proliferation of political parties; the impugned Act does not compel political parties to constitute themselves into a coalition of political parties; the formation of coalition political parties will enhance multi-party democracy by ensuring that political parties are able to harness the benefits of cooperation with likeminded political parties without losing their independent existence; and, the alleged threat of a single party state as perceived by the petitioners cannot be limited to the concept of coalition political parties.
178. On indirect party nominations, he submitted that contrary to the petitioners' assertion that this undermines the right under article 38 to make meaningful political choices, the method of nominating a political party's candidate would find expression in a party's constitution and nomination rules, in line with the second schedule of the Political Parties Act. Hence whatever method of nomination a party's constitution provides for would have been determined by the members of the party in the first place. Counsel maintained that section 38(a) of the Political Parties Act binds a political party to promote inclusiveness, democracy and participation of the people in the formulation of its policies and in the nominations of candidates for elections. Consequently, any violations of this requirement would be actionable as such once it occurs.
179. Relying on John Harun Mwau & 3 others v Attorney General & 2 others [2012] eKLR and National Conservative Forum v Attorney General [2013] eKLR counsel argued that the jurisdiction of the High Court to deal with questions of constitutional interpretation is not to be exercised for academic purposes in speculative and hypothetical circumstances. He further contends that the petitioners' apprehension that the amendment introducing direct and indirect nominations will throw the 2022 election process into turmoil has no basis. The reason is that Political Parties Act as amended does not indicate that it shall apply retrospectively. In any event he argues that it is a precinct of the IEBC to apply the law on the admission of nomination rules and this court's jurisdiction will only be invoked if it did not apply the law. He relied on Titus Alila & 2 others (Suing on their own Behalf and as the Registered Officials of the Sumawe Youth Group) v Attorney General & another [2019] eKLR, to support this argument.
180. On section 4A(c) on the roles and functions of a political party, counsel submitted that the petitioners' contention that the use of the word may relegates the constitutional imperative for diversity and gender inclusivity, would not result in the proper canons of statutory interpretation as stated in *Engineers*



- Board* case (*supra*). A holistic reading reflects that the Political Parties Act imposes clear and mandatory diversity and gender inclusivity requirements by dint of section 7(2).
181. On the statement of ideology, it submitted that the 1st petitioner has misapprehended the import of article 91(2) of the Constitution, which recognizes that political parties may be founded on ideologies. It however prohibits any foundational ideology that is religious, linguistic, racial, ethnic, gender or regional basis or political parties seeking to engage in advocacy of hatred in or on such basis.
 182. On section 14 A of *Political Parties Act* on deeming Resignation, counsel argued that the section as amended is in line with article 103(1)(e)(l) of the *Constitution* and there are laid out procedures to be followed by a political party before it deems a member who has contravened section 14A(1) of the *Political Parties Act* to have resigned from the said Party. Further, pursuant to section 14A(2) such members must be given notice to be heard by the political party before the Registrar is notified of their deemed resignation. Hence no infraction of articles 47 and 50 of the *Constitution*.
 183. On the functions of the of registrar of Political Parties, counsel submitted that contrary to the assertion that power given to that office violates articles 82 and 88 of the *Constitution*, the Political Parties Act gives effect to article 92 of the *Constitution*. Section 34 is not only concerned with the general regulation of political parties and political party nominations, but also with such regulation as is necessary to ensure compliance with the Political Parties Act.
 184. On audit of political parties' accounts, counsel submits that contrary to the petitioners' assertion the mandate of the Auditor General under article 229(4) of the *Constitution* cannot be taken away by an Act of Parliament. Further, the Auditor General is mandated under article 229(4)(f) of the *Constitution* to submit to Parliament audit reports, including those on political parties funded from public funds. Hence the amendment of section 31 of the *Political Parties Act* by section 21 of the impugned Act does not prevent Parliament from overseeing the accounts of political parties funded from public funds.
 185. Accordingly, the impugned Act ensures conformity with the Constitution as previously the Auditor General could audit funds from private and public yet its mandate is limited to public Funds. Further, section 31(4) of the *Political Parties Act* allows the Registrar of Political Parties to request the Auditor General at any time to carry out an audit of the accounts of a political party.
 186. On internal disputes resolution, it submitted that section 40(3) of the impugned Act does not exempt a coalition political party from the jurisdiction of the Political Parties Dispute Tribunal. The purpose is to ensure that they handle disputes internally before subjecting them to the said tribunal. Also, under section 40 of the *Political Parties Act* its mandatory for political parties including a coalition Political Party to exhaust internal dispute resolution before the dispute is referred to the Tribunal.
 187. On the limitation of appeal, it submitted that section 41 of the Political Parties Act as amended has basis in article 87 of the Constitution which requires Parliament to enact legislation for the timely settlement of electoral disputes which would include limiting the jurisdiction on appeals. It relied on *Hamdia Yaroib Shek Nuri v Faith Tumaini Kombe, Amani National Congress & Independent Electoral and Boundaries Commission* [2019] eKLR. Also, the case of *Wilson Ong'ele Ochola v Orange Democratic Movement & 3 others* Civil Appeal No 271 of 2017 (unreported) decided on the tenability of the positions of section 41(2) of the Political Parties Act. Relying on *Wilson Ongere Ochola (supra)* he argued that an Act of Parliament cannot effectively amend the Constitution to confer upon the Supreme Court, extra constitutional jurisdiction.
 188. On the constitutionality of sections 28(1) and 28 A of the *Elections Act, 2011*, counsel submitted that contrary to the 3rd petitioner's assertion that the said provisions contravene articles 27 and 38 of the *Constitution*, the right of every citizen to be a candidate for a public office within a political party



of which the citizen is a member is not absolute as evidenced by article 38(3)(c) ; such restriction is justified on the basis of the need to ensure an efficient management of the electoral process, including nominations by political parties. It relied on *Council of County Governors v Attorney General & another* [2017] eKLR for that argument where the court considered the justification of timelines for submitting party membership lists prior to party primaries and pursuant to section 28 of the Elections Act.

189. Counsel argues that the restriction on changing political parties after party primaries and contesting as an independent candidate are justified because party nomination processes are sacrosanct processes that affect the public at large; it ensures that they are orderly and democratic and that they are concluded timeously. Further, the submission of party membership lists prior to party primaries ensures that only the members of the concerned political party can participate in the party primaries and the conclusion of party primaries within particular timelines is to ensure there is adequate time for resolute of disputes arising from primaries and to allow sufficient time for preparation of elections on the part of the candidates, the political party and the IEBC.
190. He argued that the registration of independent candidates does not involve such elaborate processes because it is not a competitive process as would be in the case indirect political party nomination/primaries. The differentiation it argued, is rationally justified and not arbitrary hence not discriminatory. It relied on *Mohammed Abduba Dida v Debate Media Limited & another* [2018] eKLR.
191. On violation of the public participation requirement, counsel affirmed that there was extensive public participation in the development of the impugned Act prior to the submission of the same in Parliament. There is also no template for public participation and the nature and duration of public participation depend on the circumstances of each case. Relied on is *George Ndemo Sagini v Attorney General & 3 others* [2017] eKLR. Counsel therefore submitted that petitioners have not demonstrated how the timelines were inadequate or how the issue of emails curtailed.

The 2nd Respondent's submissions

192. The 2nd respondent filed submissions dated March 28, 2022 through learned counsel Mr Mbarak Ahmed substantively reiterating the contents of its replying affidavits and raising issues as hereunder;
 - i. Whether there was a meaningful public participation during the enactment of the Political Parties (amendment) Act in Parliament.
 - ii. Whether the creation of "coalition political parties" threatens to undermine the constitutional definition of Kenya as a multiparty state and render Political Parties Act vague and contradictory.
 - iii. Whether by creating indirect party nominations, the impugned Act is unconstitutional as it undermines the citizen roles in the political party process.
 - iv. Whether section 24 of the impugned Act in so far as it does not require participation of registered party members in selection of delegates for purposes of indirect nominations is a violation of articles 10 and 38 of the *Constitution*.
 - v. Whether section 4 of the impugned Act in so far as it makes it discretionary for political parties to promote gender parity and promote representation in Parliament of youth, persons with disabilities, ethnic and other marginalized communities is contrary to articles 91(1)(f) of the *Constitution*



- vi. Whether the implementation of significant changes to the structure of political parties at this stage in the election process undermines the reliability and credibility of the election process contrary to article 81 of the Constitution.
 - vii. Whether the definition of a political party as introduced by impugned Act is inconsistent with articles 260 as read together with article 91 and 92 of the of the Constitution.
193. On public participation by the National Assembly, counsel submitted that the 2nd respondent adduced evidence to demonstrate that it facilitated reasonable and meaningful public participation during the enactment of the impugned Act. To wit, there were advertisements for public participation in the local newspapers; there was sufficient opportunity for the public to present their views which were considered and some adopted; and, the petitioners failed to present their views to JLAC. Counsel relied on British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Alliance & another (Interested Parties) [2019] eKLR and Okinyah Omtatab Okoiti v The National Assembly & others [2020] eKLR.
194. Counsel submitted that as evidenced in its replying affidavit, the 1st interested party's amendments through the Bill were informed by views collected from stakeholder's engagements. Counsel reiterated the contents of the 2nd respondent's replying affidavit on the views of the Attorney General and the Registrar of political parties, JLAC's recommendations after public participation, consideration of JLAC's report to the House, on the objectives, purpose of sections 2, 4, 10(1), 22 and 24 of the impugned Act and on the Coalition Political Party.
195. Counsel contented that a law enacted by Parliament is presumed to be constitutional by the courts and the burden of proof is on the person alleging otherwise which the petitioners failed to discharge. It relied on Institute of social Accountability & another vs National Assembly & 4 others High Court Petition No 71 of 2014 [2015] eKLR and Council of Governors and 3 others v The Senate & 53 others [2015] eKLR on the test for establishing the constitutionality of a statute.
196. Relying on Gatirau Peter Munya v Dickson Mwenda Kithinji [2014] eKLR he argued that the petitioners had failed to prove their case and urged for the dismissal of the petitions.

3rd respondent's submissions

197. The 3rd respondent through learned counsel Wangechi Thanji filed written submissions dated March 28, 2022 wherein the 3rd respondent substantively reiterated the contents of its replying affidavits. On public participation, counsel relied on Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR where the judge held that short notice does not deny an opportunity for public participation. He relied on Merafong Demarcation Forum and others v President of the Republic of South Africa and others (CCT 7 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) for the proposition that the issue of who and to what extent the issue of public participation ought to be determined.
198. He submitted further that Lenaola, J (as he then was) in Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County Government of Nairobi & 3 others [2013] eKLR considered the issue of public participation and held that the mere fact that particular views have not been incorporated in the enactment does not justify the court in invalidating the enactment in question. Further, As Ngcobo, J rightly appreciated in Doctors for Life International v Speaker of the National Assembly and others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) the courts should be slow to interfere with Parliament's procedures.



199. Relying on *Commission for Implementation of the Constitution – Parliament of Kenya & another*; High Court Petition No 454 of 2012 and *Law Society of Kenya vs Attorney General & 2 others* [2013] eKLR counsel argued that every legislation is presumed to be constitutional and to justify nullification there must be a clear and unequivocal breach of the Constitution. The petitioner has not in any way shown how the enactment of the impugned Act has breached the Constitution to warrant its nullification.

The 1st interested party's submissions

200. The 1st Interested party filed submissions dated March 28, 2022 through the firm of JK Kibicho and Company Advocates. Counsel submitted that the functions of the 1st interested party are provided for under section 34 of the *Political Parties Act, 2011* and that the petitioners have an issue with amendments fa, fb, fc, fd and fe and that their inclusion is against the dictates of article 88(d) and (e) of the *Constitution*. Reiterating the contents of the replying affidavits, Counsel argued that the 2nd interested party's involvement in the process is to regulate the process of nomination while the 1st interested party is to supervise the process of this nomination as mandated by the Constitution and the Principal Act by dint of article 88(4)(d) of the *Constitution*, and sections 2 and 13 of the *Elections Act*.
201. Counsel affirmed that the need to separate the two entities was because of the extent distinct but interdependent functions. Counsel noted that by dint of regulations 12 and 45 of the *Elections (General) Regulations, 2012*, the roles existed prior to the amendment but was not included amongst the functions under section 34.
202. He contended that contrary to the petitioners' assertion, the mandate of the 2nd interested party under article 88(4)(e) of the *Constitution* and section 74 of the *Elections Act* to hear disputes arising during nomination processes still remains. He submitted that the petitioners attack on the definition of political party under the impugned Act to include a coalition political party on the basis of unconstitutionality lacks specificity and clarity as envisaged by the *Anarita Karimi Njeru v Republic* [1979] eKLR.
203. It submitted that the petitioners failed to appreciate that pursuant to article 92 of the *Constitution*, Parliament is mandated to make legislation on political parties. Further that article 260 of the Constitution has to be read with article 92 of the Constitution. Counsel relied on *Tinyefunza v the Attorney General*, Constitutional Appeal No 1 of (1997) UGCC3. Thus the amendment makes it elaborately clear on what a political party is and is further within the description contemplated under part 3 of chapter 7 of the *Constitution*. Counsel further relied on Professor Walter O Oyugi "*Coalition Politics and Government in Africa since Independence*," in Journal of Contemporary African Studies, 24, 1, Jan 2006, pp 53-79.
204. Counsel argued that the exemption of coalition political parties from compliance with section 5 & 6 of the *Amendment Act* is justified as before a coalition political party is registered the applicant party must first be registered as a political party. They have also not shown how the definition of a political party is unconstitutional. He submitted that by the amendment of section 10 of the *Political Parties Act*, a coalition may choose to be considered as a coalition political party or remain as a coalition and if so the provisions of the Act will apply as is applicable. Relying on *Reserve Bank of India v Peerless General Finance and Investment Co Ltd and others* [1987] 1SCC 424 Counsel argued that the petitioners failed to contextualize the amendments.
205. On coalition and multipartism, Counsel submitted that the right to form, participate in forming and joining a political party is still alive under article 38 of the *Constitution*. Entering a coalition is an act of democracy and is protected under article 36 of the *Constitution*. Counsel relied on Publication



- presented by Dr. Patrick O. Asingo before the Midwest Political Science Association Conference in Chicago on April 13, 2012, in support.
206. On public participation counsel maintained that there was comprehensive process of public participation before the enactment of the impugned Act. That the amendment of the impugned Act was a product of a long and winding process. Counsel relied on *Doctor for life international vs Speaker of the National Assembly and others* (CCT12/05)[2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006) to buttress that argument.
 207. On direct and indirect nomination, counsel argued that a political party selecting either a direct and indirect nomination process does not violate the constitution. Further, each political party is distinct with its own political processes hence the process of selecting a candidate is determined by the party. In any event, any aggrieved party can challenge the nomination as was the case before the amendment. Further, the process of selection of delegates to be involved in the indirect nomination process shall be provided for under the nomination rules which are required to be fair, just and democratic.
 208. On Audit of political parties' accounts, counsel argued that deletion of section 31(3) of the Act is justified because by dint of article 22(4)(f) of the *Constitution* the Auditor General still has power to audit accounts under section 31(2) of the Act. Political parties must submit their accounts to the Auditor General within 3 months after the end of each financial year. There is no role of the Registrar in the constitutional process under article 229(4)(f) and 229(8) hence maintaining section 31(3) would have been unconstitutional.
 209. In response to Petition No.E109 of 2022, counsel relied on the replying affidavit by Joy Onyango and grounds of opposition dated March 28, 2022. Counsel argued that the challenge of section 28 (1) and section 28 (A) of the *Elections Act* is res judicata and was determined in *Maendeleo Chap Chap* case (*supra*) and the *Council of County Governors* (*supra*). He submitted that section 28(1)(a) and article 36 of the *Constitution* does not stop the petitioners from joining a political party. It has only limited the time when one cannot join another political party during the critical period towards a general election or by elections. Also, the limitation is also provided for under article 103(1)(a) of the *Constitution*, for orderliness and it allows both political parties and the 1st respondent complete the nomination process and meet the timelines set for an election.
 210. Accordingly, section 28 of the *Elections Act* and article 103(1)(e) are meant to instil discipline and a democratic political culture and promotes good governance under articles 259, 91 and 92 to regulate the management of Political Parties at various stages. It also allows the 1st respondent to undertake its constitutional mandate to the fullest extent including the mandate under article 88(4)(k) to monitor compliance by political parties of election laws enacted under article 88(1)(b) relating to nomination of candidates.

2nd Interested Party's submissions

211. The firm of G & A Advocates LLP on behalf of the 2nd interested party filed written submissions with reference to Petition No E043 of 2022 and Petition No E057 of 2022 dated 28th March 2022 and submits that the only issue for determination is:

Whether there was public participation in enacting the *Political Parties (Amendment) Act, 2022*.

212. Counsel commences by stating that the 2nd interested party's mandate as established under article 88 of the *Constitution* includes conducting or supervising referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament.



- This mandate is replicated under section 4 of the [Independent Electoral and Boundaries Commission Act, 2011](#). In addition, electoral laws such as the Elections Act, the [Election Campaign Financing Act](#), the [Election Offences Act](#) and the Political Parties Act also assign mandates to other state agencies such as the 1st interested party. Accordingly Parliament empowered by article 92 of the [Constitution](#) exercises caution to avoid overlap and conflict of mandates among these agencies. In essence counsel submits that there is a general presumption that statutes enacted by Parliament are constitutional, until the contrary is proved as held in the case of [Hambardda Dawakhana v Union of India](#) [1960] AIR 554.
213. He submits that the public's opportunity to participate in the legislative process is a right under article 10(2)(a) and article 118(1)(b) of the [Constitution](#). Taking this into consideration, it is submitted that the 2nd and 3rd respondents undertook public participation as required by the Constitution. In fact as noted in their replying affidavit, the 2nd interested party participated in the exercise by issuing its memorandum to the 3rd respondent.
214. Counsel emphasizes that even though the 2nd and 3rd respondents are required to consider the comments and memorandum received during public participation, they are not bound to accept all the comments and memoranda as received. He submits that being involved does not mean that one's views must necessarily prevail. This is since there is no authority for the proposition that the views expressed by the public are binding on the legislature even if they are in direct conflict with the policies of Government. This was held in the case of [Merafong Demarcation Forum and others v President of the Republic of South Africa and others](#) (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) which was cited in support.
215. In the same way he contends that the forms of facilitating an appropriate degree of public participation is on a case to case basis and the discretion left to the Parliament as noted in the case of [Commission for The Implementation of the Constitution v Parliament of Kenya & another & 2 others & 2 others](#) [2013] eKLR. Additional reliance was placed on the case of [Nairobi Metropolitan Psv Saccos Union Limited & 25; others v County Of Nairobi Government & 3 others](#) [2013] eKLR and [Okiya Omtatab Okoiti v County Government of Kiambu](#) [2018] eKLR.
216. Counsel in essence submits that the process of enacting the impugned Act was highly public as there were public forums, meetings with stakeholders, media reports, lobbying and even an opportunity to make written representations through written memoranda. It is submitted therefore that a reasonable opportunity was given by the respondents to the public to make responses.
217. In the same way, the firm of Ashitiva Advocates LLP on behalf of the 2nd interested party filed written submissions with reference to Petition No E109 of 2022 dated March 28, 2022 and submits that the issues for determination are:
- i. Whether the petitioner's petition is *res judicata*, and if not;
 - ii. Whether section 28 and 28(a) of the [Elections Act](#) violates articles 27 and 38 of the [Constitution of Kenya, 2010](#); and
 - iii. Whether the petitioner is entitled to the orders sought.
218. On the first issue counsel while relying on the principles set out in section 7 of the [Civil Procedure Act](#), submits that in the case of [Council of County Governors v Attorney General & another](#) [2017] eKLR the petitioner challenged the provision of section 10 of the [Elections Laws \(Amendment\) Act, 2017](#) (now section 28 of the [Elections Act, 2011](#)). The claim alleged that the said section limited the freedom of making political choices under article 38 and freedom of association under article 36(1) of the [Constitution](#). This petition was in the end dismissed.



219. Counsel considering this, submits that the 6th petitioner has filed the instant petition with similar concerns like those of the petitioners in the Council of County Governors case. Further that the court in the said case considered whether section 28 of the [Elections Act, 2011](#) was inconsistent with the rights and fundamental freedoms under the Constitution, particularly article 36 and 38 of the Constitution. From the foregoing it is submitted that there is commonality of the petitioner in this petition and in the case of Council of County Governors, since the issues raised in this petition are similar and a court of competent jurisdiction heard the matter. This he says renders this matter *res judicata*. It is submitted that the object of this doctrine is to bar multiplicity of suits and guarantee finality to litigation as held in the case of [John Njue Nyaga v Attorney General & 6 others](#) [2016] eKLR. Additional reliance was placed on the case of [Musankishay Kalala Paulin v Director Criminal Investigations & 4 others](#) [2022] eKLR.
220. Moving on to the second issue, Counsel submits that the principles that guide the court in interpretation of the Constitution are articles 15(2)(e) and 259 of the [Constitution](#). Likewise, there is a general presumption that every Act of Parliament is constitutional. The burden of proof lies on the person who alleges otherwise. As such the obligation of the court in statutory interpretation, is to reveal the veneer of statutory text in order to provide its meaning as observed in the case of [Nelson Andayi Havi v Law Society of Kenya & 3 others](#) [2018] eKLR. Further reliance was placed on the case of [Reserve Bank of India v Peerless General Finance and Investment Co Ltd and others](#) (1987) 1 SCC 424.
221. Counsel submits that the mandate of the 2nd Interested Party is provided for under article 88(4) of the [Constitution](#). To ensure that the electoral processes run efficiently it is submitted that there are various statutory timelines including the timelines contained in the impugned sections for the effective administration of elections. It is on this premise that the 2nd interested party published Gazette Notices 430-435 on January 20, 2022. In effect counsel making reference to the reasons cited by the 1st interested party on the historical need for timelines regulating political parties, submits that a law seeking to promote proper and effective management of the electoral systems cannot thus be said to be unconstitutional. This is despite the people's personal interests to party hop which is a mischief the existing electoral laws seeks to cure and the reason for the existing statutory timelines.
222. Counsel in the same way submits that articles 27 and 38 of the [Constitution](#) fall within the provisions of article 24 of the [Constitution](#) that allow limitation on reasonable grounds. Moreover it is noted that the Court should determine the standard by which the constitutional validity of the challenged provisions by examining the rationality and the proportionality tests as set out in the case of [Nelson Andayi Havi v Law Society of Kenya & 3 others](#) [2018] eKLR.
223. To that end counsel submits that section 28 and 28A of the [Elections Act](#) are intended to manage and administer the numerous electoral processes up until the general elections scheduled for August 9, 2022. This is to safeguard the management of a free, fair and credible electoral process while creating certainty in the electoral cycle.

The 3rd interested party's submissions

224. The firm of Paul Mwangi and Company Advocates on behalf of the 3rd interested party filed written submissions dated March 27, 2022. On whether there was meaningful public participation prior to the enactment of the impugned Act, it was their case that it is undisputed that there was public participation prior to the enactment of the amendments and some of the petitioners participated in the process and they concede that there was public participation at both levels of Parliament. It was therefore incumbent upon them to demonstrate that the opportunity to present views and participate in the open sessions was taken away.



225. Relying on *Diani Business Welfare Association and others v County Government of Kwale* Petition No 39 of 2014, consolidated with Petitions Nos 45, 61 and 63 of 2014 , [2015] eKLR; *Metropolitan PSC Sacco Union Limited & 25 others v County of Nairobi Government & 3 others*, Petition 486 of 2013; *Republic v County Government of Kiambu ex parte Robert Gakuru & another* [2016] eKLR; and, *Ndegwa (suing on his own behalf, in the public interest and on behalf of the other bar owners in Nyandarua County) v Nyandarua County Assembly & another* (Petition E011 of 2021) [221] KEHC 299 (KLR) (16 November 2021, counsel argued that public participation will depend on each and every circumstance, and what matters is a reasonable opportunity being given to the members and the interested parties. Further, not each and every member concerned must give their oral view.
226. It was submitted that the legislature has discretion on how they conduct public participation. Reliance was placed on *Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others* [2013] eKLR and counsel argued that simple acts of say conducting random public forums posting programmes, on popular radio stations and publishing the bill in the dailies with wide circulation would suffice. Further it was submitted that as evidenced in the 3rd respondent’s annexures and pleadings by the 1st interested party, 2nd & 3rd respondents and 2nd interested party, various stakeholders got an opportunity to present their views orally and electronically and members of public were invited to open sessions. There was a call for submissions of written memoranda, an address of the clerk was provided and the physical location of Senate and National Assembly are known; the submissions by email was not the only one accepted; the Petitioners are beneficiaries of the process; and, the advertisement gave a public hearing as such any person could attend and present their oral submissions.
227. On the unconstitutionality of sections 2, 4, 22, 24, 34 of the impugned Act, counsel while relying on *Wanjiru Gikonyo & 2 others vs National Assembly of Kenya & 4 others* , Petition No 453 of 2015 , [2016] eKLR; *Bwana Mohammed Bwana vs Sivano Buko Bunaya & 2 others* [2014] eKLR; and, *Rose Nafula Wanyama v Nusra Nasambu Chibanga & another* [2020] eKLR, argued that the court cannot hear and determine matters based on hypothetical scenarios such as those herein.
228. Counsel submitted that the interpretation given by the Petitioners ignores the architecture and design of the Political Parties Act which creates various Political Parties with their respective constitutions and regulations which govern various aspects including the nomination of persons for various positions; joining and formation of political parties; decision making by the political parties respective organs and the dispute resolution mechanisms for the various political parties. By suspending the enactment and provisions of the impugned Act the court would be acting against the principle on the presumption of constitutionality of legislation. Counsel relied on *Council of County Governors v Attorney General (supra)* to support this argument.
229. It was submitted that the principles with regard to statutory interpretation are now well settled. Therefore in examining the constitutionality of a statute, it must be assumed that the legislature understands the needs of the people and the laws as enacted are directed to problems experienced and there is a rebuttable presumption of constitutionality of the statute. Counsel relied on *Hamdard Dawabhkana vs Union of India* AIR [1960] 554; *US v Butler*, 297 US [1936]; *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 for that argument.
230. On Petition 043 of 2022, counsel submitted that the petitioner’s basis for conflicts is speculative and moot and based on his scenarios. On presumption of constitutionality of a legislation, it would be irregular to suspend the implementation of what is deemed in law to be constitutional, noting that the petitioners have the burden of proving its unconstitutionality.



231. On whether section 2 is void because it is inconsistent with article 10 of the *Constitution* and overbroad. Counsel submitted that the inclusion of the new definition of a political party vide the impugned Act warrants the invocation of the doctrine of implied appeal. He cited the following cases in support *James Gacheru Kariuki & 19 others v County Government of Mombasa & 56 others*; Petition 56 of 2016, [2019] eKLR; *Street Estates Limited s Minister of Health* [1934] 1 KB; *David Sejjaka Nalima vs Rebecca Musike* Civil Appeal No 12 of 1985; *Martin Wanderi & 19 others v Engineers Registration Board of Kenya & 5 others* [2014] eKLR ; *Steve Thobum v Sunderland City Council* 2002 EWHC 195; and *Elle Kenya Limited & others v The Attorney and others*.
232. Counsel argues that the courts do not construe a later Act as repealing the earlier one unless impossible to make the two Acts stand together. In the event of a contradiction and conflict between the impugned Act and the Elections Act, the former will take precedence. He relied on *MJ vs NK & another*, Civil Appeal No 93 of 2014, [2017] eKLR; Volume 44(1) of the 4th ed of *Halsbury's Laws of England* at pg 1300 in support.
233. Counsel further argued that the petitioners have not demonstrated how the broadening definition of a political party is unconstitutional as the same provides for inclusivity and averts discrimination effect of a limited definition of the said phrase. Further that article 260 of the *Constitution* defines a political party as an association contemplated in part 3 of chapter seven of the *Constitution*. Also, article 92 of the *Constitution* grants parliament the power to enact any such legislation to provide for various aspects of political parties hence with the discretion of the legislature to enact any such laws it deems proper and necessary for the management of political parties.
234. It was submitted that the petitioners prefer to adopt a narrow distinguishing feature of a political party and limit it to the aspect of an association of citizens with an identifiable ideology of programme without reading of article 91 of the Constitution. That they further overlook the fact that the formation of coalition or coalition political parties have one common denominator (comprise individual political parties) as established in the Act. Pursuant to section 10 of the *Political Parties Act, 2011* both must deposit their coalition agreement with the Registrar Political parties. The new definition does not take away the initial requirements for individual political parties to be registered and to comply with all registration requirements before invoking section 10 of the above Act which requires the deposit of a coalition agreement to the Office of the Registrar of Political Parties.
235. On the issue of multi-party democracy, counsel argued that the new amendments do not inhibit or outlaw the formation of individual political parties. Before Amendment of section 10 of the *Political Parties Act, 2011* it granted political parties the unlimited right to enter into coalitions either before or after the general elections and section 11 also granted them power to merge with other political parties. Hence the petitioners' arguments impose restrictions on the rights of political parties and coalitions to exercise and enjoy their right to freedom of association under article 36 and 38 of the Constitution.
236. Relying on an article titled '*Democracy: Its Meaning and Dissenting Opinions of the Political Class in Nigeria: A Philosophical Approach*' published in Journal of Education and Practice 1 Vol 6 No 4, (2015) by author Nwogu, he argued that the court cannot therefore dictate to the electorate on what decisions to make or to political parties on what coalitions to either form or reject in the electoral process. This he notes underscores the nature of democracy as captured by Nwogu. Counsel also relied on Philippe C and Terry Lynn Article titled '*What Democracy is... and is Not*' published in Journal of Democracy (1991).
237. Counsel for the 3rd interested party dismissed the apprehension of the petitioners in Petition No E057 of 2022 on single party democracy and asserted that the Constitution has its own systems of checks and balances against any such arm of government and it is up to the electorate to determine the question



- of election and composition of parliament and formation of coalitions. Further, that by dint of article 20 of the Constitution the freedom of political party is not interfered with, and instead a new way of enjoyment of political rights is created that is within the intentions of the said Act.
238. On the statement of ideologies, it was submitted that this is bound under article 91 of the Constitution. The said provisions do not limit a person's rights to form or join any political parties and the law adequately protects any person aggrieved by the decision of the Registrar of political parties in the event that she refuses to register any such political party or in the event that any such party's ideologies are contrary to article 91. Such requirements have also been adopted in Malawi under section 18 of their Political Parties (Amendment) Act. He therefore submits that section 4 of the impugned Act, does not contravene article 91(1)(f) of the Constitution but rather supplements it.
239. On whether the amendment of section 31 of the Act is contrary to section 31 of the Act is contrary to article 229(4)(f), 229(7) and 229(8), it was submitted that it does not prevent Auditor General from auditing the accounts of political parties that are in coalitions. The obligation to report and submit audited accounts rests upon political parties and the same is not in any way taken away by the impugned Act.
240. Regarding clause 24 of the Amendment Act on indirect nominations being a violation of article 10 of the Constitution, it was argued that each political party has its own Constitution and rules governing its nomination, either directly or indirectly and also its own dispute resolution of all such disputes, including nomination disputes. Further, that direct nominations is not unconstitutional and it is outside the purview of this court to interfere. Reliance was placed on Fernando M Aragon in his Article titled, 'Candidate Nomination Procedures and Political Selection: Evidence from Latin American Parties' Published by the London School of Economics; European Commission Parliament Pilet Jean-Benoit; Van Haute Emillie; and Kelbel Camille in their Article titled "Candidates Selection Procedures for the European Elections"; 'On the Method of Nomination of Candidates within Political Parties', Report by the European Commission for democratic through Law (Venice Commission); Samuel Owino Wakiaga v Orange Democratic Movement Party & 2 others, Nairobi Election Petition Appeal No 16 of 2017, [2017] eKLR; Thomas Ludindi Mwadeghu v John Mruttu & another, Election Petition Appeal No 8 of 2017, [2017] eKLR ; Republic v Jubilee Party & another exparte Wanjiku Mubiu & another, Misc Civil Application No 308 of 2017, [2017] eKLR and article 1 of the Constitution.
241. On whether by dint of section 34 the Registrar of Political Parties usurps the role of the 2nd interested party, counsel contends that the amendments do not invade the independence of the IEBC nor create an office holder in the Registrar of Political Parties with untamed power. That office is bound by the Constitution and there are checks and balances including challenging decisions to the Political Parties Dispute Tribunal pursuant to section 40 of the Act.
242. On whether the implementation of changes undermines the reliability and credibility of the election process contrary to article 81 of the Constitution, he submitted that there is no evidence to prove so and if the court determines otherwise the doctrine of implies repeal takes precedent and the new enactment prevails. Further on whether the court ought to grant the order barring the Registrar of political parties and the IEBC from implementing the impugned Act in the general elections, he submitted that there is no justification for that assertion. The petitioners ignored that the Act is not limited only to the players but to various other players such as political parties; members of political parties; Political Parties tribunal and the Judicial Service Commission among others. In addition even players have taken actions emanating from the new amendments like the Judicial Service Commission appointing Ad hoc committee. Hence suspending it would be prejudicial.



243. On dispute resolution, it was argued that the coalition's internal dispute mechanisms do not limit the powers of the Political Parties Dispute Tribunal to hear and determine disputes emanating from coalition parties. It is not unconstitutional to limit on the level of appeal and its common for various legislations to limit the level of appeal on various disputes as this is in line with timely settlement of electoral disputes under article 87 of the *Constitution*. Counsel relied on *Peter Bodo Okal v Philemon Juma Ojuok and others*, Supreme Court Election Petition Application No 9 of 2019; *Hamdia Yaroj Shek Nuri v Tumaini Kombe & 2 others* Petition No 38 of 2018 in support.
244. On whether section 28(1) and 28 (A) of the *Elections Act* are unconstitutional and contrary to article 27(1)(2)(5) and 38(3)(c) of the *Constitution*, he contended that the same are not and the issue has already been determined in *Council of Governors v Attorney General & another* Petition No 56 of 2017, [2017] eKLR and *Maendeleo Chap Chap* case (*supra*) hence the court lacks jurisdiction to determine the issue. Counsel cited the case of *Republic v IEBC & 2 exparte Wavinya Ndeti*, Nairobi High Court Judicial Review Application No 301 of 2017, [2017] eKLR and *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another*, Supreme Court Application No 42 of 2013, [2016] eKLR on applicability of judgment in rem on *res judicata*.

4th interested party's submissions

245. The firm of Mbugwa, Atudo & Macharia Co Advocates on behalf of the 4th interested party filed written submissions with reference to Petition No E043 of 2022 and Petition No E057 of 2022 dated March 28, 2022 and submits the issues for determination as follows:
- i. Whether there was adequate public participation in the amendment of the Political Parties Act;
 - ii. Whether the redefinition of political parties to include party coalitions contradicts the constitution;
 - iii. Whether creating indirect and direct party nominations limits the role of citizens in the political party process; and
 - iv. Whether the insertion of section 4A of the amendment act contravenes article 91(1)(f) of the *Constitution*.
246. On the first issue, counsel while relying on the contents of the replying affidavit sworn by Wambui Gichuru submits that the *Political Parties (Amendment) Act, 2022* followed the due process, including public participation as espoused in the said affidavit. In view of that he observed that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say as opined in the case of *Republic v County Government of Nyamira & 3 others; exparte Kennedy Mongare Mogaka* [2021] eKLR.
247. Further reliance was placed on the public participation guidelines issued by the Supreme Court in the case of *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR. It is counsel's argument that the public was accorded adequate opportunity to participate in the making of the Bill.
248. Moving on to the second issue, counsel submits that the modification of the definition of a political party did not in any way introduce anything new regarding the coalition of parties as the issue of coalition of political parties and mergers is provided under section 2 of the *Political Parties Act, 2011*.



In fact it is noted that the issue has been the subject of determination in court in the case of *John Harun Mwau v Independent Electoral & Boundaries Commission & Attorney General* [2019] eKLR where the court observed that ‘It is good practice for Political Parties to merge or form coalitions to attain political strength and dominance and as long as no law prohibits the practice.’ In light of the above, counsel submits that the modification of the definition of political party to include coalitions does not contravene the Constitution, as the same promotes principle of good governance.

249. On the third issue, counsel submits that nomination processes are governed by the nomination rules of a political party and so allowing indirect nominations means that selected delegates can nominate candidates on behalf of the political party. This in essence he argues is good political hygiene as it creates a mechanism of order and predictability on what to expect as a candidate.
250. Lastly, counsel submits that section 4 of the impugned Act emphasizes the provisions of article 91(1) (f) of the *Constitution* by promoting equality and protection of rights and opportunities to everyone gender notwithstanding. In addition, counsel submits that the word ‘shall’ is a mere directive to be considered in different circumstances. This argument he states was confirmed in the case of *Henry N Gichuru vs the Minister for Health the Kenyatta National Hospital Board* [2002] eKLR where the court held that “the use of the word shall does not always mean that an act is obligatory or mandatory: it depends upon the context in which the word occurs and any other circumstances.”
251. In a nutshell counsel submits that the Political Parties (Amendment) Act, 2022 was enacted in a transparent, participatory and procedurally process with a view to safeguard the interests of the political parties and public at large.

5th interested party’s submissions

252. The firm of Kinyanjui Njuguna & Co Advocates on behalf of the 5th interested party filed written submissions with reference to Petition No E043 of 2022 and Petition No E057 of 2022 dated 21st March 2022 and submitted that the issues for determination are:
- i. Whether there was adequate Public Participation prior to passing of the Political Parties (Amendment) Bill, 2021.
 - ii. Whether the Amendments by the Political Parties (Amendment) Act, 2022 to the Elections Act are constitutional.
253. Counsel on the first issue submits that the respondents failed to uphold the principles of article 10 of the *Constitution* as they did not have adequate public participation. This is since the legislative process was rushed yet should not be done in a capricious manner. First, the 3rd respondent called for the public’s participation on January 12, 2022 with a deadline for January 19, 2022. Secondly, the invitation stated that the comments were to be received on or before 19 January, 2022 at 5.00 pm by email. Thirdly, the notice further stipulated that the 3rd respondent would hold public hearings on the Bill on January 20, 2022 and January 21, 2022 only. With this in mind counsel submits that the period provided by the 3rd respondent to the public was not sufficient.
254. In light of this, counsel submits that the duty to facilitate public involvement is twofold. First, the duty to provide meaningful opportunities for public participation in the law-making process. Secondly, the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. Reiterating the words of Ngcobo, J on public participation in the case of *Doctor’s for life International v The Speaker National Assembly and others* (CCT12/05) [2006] ZACC 11 Counsel observes that the purpose of public participation in the law-making process is to guard against unconstitutional legislation. This also ensures that the rights of the public are protected in the



entire process. If Parliament and the President allow an unconstitutional law to pass through, they run the risk of having the law set aside and the law-making process commence afresh at a great cost. Additional reliance was placed on the cases of *Matatiele Municipality and others v President of the Republic of South Africa and others (2)* (CCT 73/05A) [2006] ZACC 12; 2007 (1) BCLR 47(CC), *Glenister v President of the Republic of South Africa and others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) and *Robert N Gakuru & others v Governor Kiambu County & 3 others* [2014] eKLR.

255. It is his view as such that political rights are individualistic in nature and therefore the respondents ought to have granted sufficient information on the Bill. Further discourse on the same ought to have been conducted countrywide before passing the Bill. It is his submission in essence that, the Political Parties (Amendment) Act 2022 was not accorded proper public participation as envisaged in the Constitution.
256. Counsel noted that in determining the constitutionality of a statute, an examination of the object and purpose of the impugned statute is important. It helps to discern the intention expressed in the Act as held in the case of *Council of County Governors v Attorney General & another* [2017] eKLR. Additional reliance was placed on the case of *R v Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295
257. It is submitted that the amendments introduced by the impugned Act to the Elections Act, 2011 that is empowering the 1st interested party to be involved in Parties' affairs ought to be declared unconstitutional. Further that this is a clear indication that public participation was not sufficiently done hence concealing these amendments. He argues that if the Parliament intended to amend the Elections Act, 2011 then these changes ought to have been provided for in the Elections (Amendment) Bill 2021. Moreover he notes that the requirement of a political party to submit its membership list for certification by the 1st interested party before submission to the 2nd interested party will deprive political parties of their autonomy to run their affairs without interference from outside forces. In the same way he argues that the creation of a party list will disenfranchise majority of the people from joining and participating in political parties of their choice and their activities. To buttress this argument reliance was placed on the case of *Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another* [2017] eKLR.
258. Counsel submits in conclusion that by declaring the impugned Act unconstitutional, certainty will be rendered in the way political parties conduct their functions and the attempts to have the 1st interested party influence the way political parties carry out their functions ought not be entertained.

Analysis and Determination

259. Having considered the pleadings, written and oral submissions of learned counsel for the parties, cited cases and the law we find the issues falling for determination to be as follows:
- i. The constitutionality of the following sections; 2, 4A, 6(2)(a), 7(6), 14A, 22, 31, 34, 38A, 40(3), 41(2) of the *Political Parties (Amendment) Act, 2022* and the proposed amendments to sections 28(1) and 28A of the *Elections Act No 24 of 2011*.
 - ii. Whether there was public participation prior to the enactment of the impugned amendments.
 - iii. Whether the Political Parties (Amendment) Act, 2022 is ambiguous, uncertain, imprecise and overbroad.
 - iv. Whether the petitioners' are entitled to the orders sought.
 - v. Who shall bear the costs of the petitions.



The Constitutionality of the following sections; 2, 4A, 6(2) (A), 7(6), 14(A), 22, 31, 34, 38E, 40(3), 41(2) of the Political Parties (amendment) Act, 2022 and sections 28 of the Elections Act

i. Section 2 of the Political Parties Act

260. Counsel for the petitioners and the 5th interested party raised three issues concerning this section namely:
- a. Definition of the word political party to include identifiable ideology and introduction of a coalition political party.
 - b. Introduction of indirect party nominations.
261. On the introduction of political party to the definition learned counsel for the 1st and 2nd to 5th petitioners submitted that the definition of political party to include coalition political party offends the provisions of articles 91 and 260 of the *Constitution*. It is also the 1st petitioner's case that expansion of a political party will take away his right to be part of a party of their choice without inclusion of other parties through a coalition. On the other hand learned counsel for the respondents argued that the petitioners did not demonstrate how the new definition contravenes the Constitution and that in any case the old section 2 provided for coalitions.
262. Learned counsel for the 2nd to 5th and 6th petitioners further submitted that formation of coalition parties threatens the promotion of democracy in Kenya and it contravenes article 4(2) of the Constitution which declares that the Republic of Kenya shall be a multiparty democratic state. Relying on the cases of *In the Matter Speaker of the Senate & another* Reference No 2 of 2013 (2013) eKLR and *In the Matter of the Kenya National Commission on Human Rights*(2014)eKLR, counsel argued that this court ought to interrogate the possible unintended unconstitutional consequences the impugned Act will occasion.
263. On their part learned counsel for the respondents and the 1st to 4th interested parties submitted that the creation of coalition political parties would enhance democracy and political discipline.
264. On the issue of indirect nominations counsel for the 2nd to 5th petitioners submitted that indirect nominations take away the right of party members to nominate candidates in contravention of their political rights enshrined in article 38 of the Constitution. Further that the amendment is silent on how the delegates who shall nominate the candidates shall be nominated.
265. Counsel for the respondents and the 1st to 4th interested parties argued that the issue of nomination of delegates is a matter for each political party to handle, given that political parties are required to have rules and regulations in their respective constitutions. They relied on several cases. See *Samuel Owino Wakiaga v ODM & 2 others* (2017) eKLR; *Thomas Ludindi Mwadeghu v John Murutu & another*(2017)eKLR *inter alia*.
266. On the issue of ideology raised by the 1st petitioner, he argues that the inclusion of the concept of ideology in the definition of a political party and the requirement for the deposit of the ideology statement with the Registrar of Political Parties is unconstitutional. Counsel for the respondents submitted that ideology is not a new concept as it exists under article 91 of the Constitution and that it does not limit the rights of any person to join any political party. It's their contention that such requirements have been adopted in other countries such as Malawi.



267. Previously the Political Parties Act defined a political party as:

“political party” has the meaning assigned to it in article 260 of the Constitution.

268. The [Political Parties \(Amendment\) Act, 2022](#) defines it as:

“political party” —

- (a) means an association of citizens with an identifiable ideology or programme that is constituted for the purpose of influencing public policy of nominating candidates to contest elections; and
- (b) includes a coalition political party.

269. Article 260 of the Constitution merely states that:

“political party” means an association contemplated in part 3 of chapter seven of the Constitution.

270. This means we have to look at article 91 for the definition, of a political party. Article 91 of the [Constitution](#) provides as follows:

1. Every political party shall--
 - a) have a national character as prescribed by an Act of Parliament;
 - b) have a democratically elected governing body;
 - c) promote and uphold national unity;
 - d) abide by the democratic principles of good governance, promote and practise democracy through regular, fair and free elections within the party;
 - e) respect the right of all persons to participate in the political process, including minorities and marginalised groups;
 - f) respect and promote human rights and fundamental freedoms, and gender equality and equity;
 - g) promote the objects and principles of this Constitution and the rule of law; and
 - h) subscribe to and observe the code of conduct for political parties.
2. A political party shall not--
 - a) be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis;
 - b) engage in or encourage violence by, or intimidation of, its members, supporters, opponents or any other person;
 - c) establish or maintain a paramilitary force, militia or similar organisation;
 - d) engage in bribery or other forms of corruption; or
 - e) except as is provided under this chapter or by an Act of Parliament, accept or use public resources to promote its interests or its candidates in elections.



271. When it comes to interpretation of the Constitution, the court is guided by the provisions of articles 20(3) & (4) and 259 of the *Constitution*. See also the Supreme Court cases *In Re Interim Independent Election Commission* [2011]eKLR; *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR; *Centre Human Rights and Awareness v John Harun Mwau & 6 others* (2012) eKLR and the Uganda case, *Uganda- Tinyefuza v Attorney-General* Const Pet No 1 of 1996 (1997 UGCC 3).
272. We have considered the rival submissions in light of the above constitutional principles and cases cited and we find that article 260 of the Constitution does not give a definition of a political party as such. Instead it makes reference to chapter 7 Part 3 of the Constitution. Under the said Chapter, article 91 which deals with political parties only directs on what a political party should be or not be. It does not give a direct definition of what a political party is.
273. The Political Parties Act was enacted to give effect to article 92 of the Constitution as can be seen from the preamble of the Act. The said Act did not provide a definition of a political party and instead it referred to article 260 of the Constitution. Parliament must have noted the lacuna in both the Constitution and the Political Parties Act 2011, and so it gave the definition in the amended Act.
274. The definition assigned to the political party in section 2 of the *Political Parties (Amendment) Act*, resonates with the ordinary and general meaning of a political party. For instance; Wikipedia defines it as:
- ‘a political party is an organization that coordinates candidates to compete in a particular country’s elections. It is common for the members of a party to hold similar ideas about politics and parties may promote specific ideological or policy goals.’
- The *Black’s Law Dictionary* 9th Edition defines political party as:
- ‘An organization of voters formed to influence the government’s conduct policies by nominating and electing candidates to public office. The United States has traditionally maintained a two party system which today comprises the Democratic and Republican parties-often shortened to party.’
275. After considering all the above we have not found any inconsistency in the definition of political party as stated in section 2 of the Political Parties(Amendment)Act and articles 260 of the Constitution.
276. On the inclusion of the concept of ideology, the word ideology is defined in the *Concise Oxford English Dictionary* 11th Edition, Revised to mean:
- “System of ideas and ideals forming the basis of an economic or political theory – set of beliefs characteristic of a social group or individual.”
277. Article 259 of the *Constitution* requires this court to interpret the Constitution 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.



278. In our view the general and ordinary meaning of a political party would require that it has an ideology, which in simple terms means the principles and policies that it stands for or advocates. Accordingly it's our finding that although articles 91(1) and 260 do not make mention of the word ideology, this court is bound by article 10(1)(a) and article 259 to interpret the Constitution in a manner that promotes its purposes, values, rule of law and permits the development of the law and contributes to good governance. In our view the requirement for parties to have an ideology would enhance our democracy. In any event nothing in our Constitution prohibits a political party from having an ideology as long as such ideology is not founded on the following, as provided in article 91(2)(a) of the Constitution:

(2) A political party shall not--

(a) be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis.

279. As for coalitions, the same have always existed in the law as they are provided for in section 10 of the Political Parties Act 2011. For all practical purposes we have had coalition political parties in Kenya. One example is the Jubilee Political Party which comprised parties like TNA, URP among others. The only difference is that at that time the constituent parties would be dissolved, but in the new definition the constituent parties will retain their individual identities. Therefore all that the amendment has done is to formalize these practices through legislation. We find that the creation of a coalition political party, does not curtail the enjoyment of the citizens' political rights under article 38 of Constitution because each constituent political party remains in existence with its operational constitution, its rights and status. Members of the parties retain their right to participate in the activities of their respective parties.

280. We find that counsel's submission that the amendment would kill the spirit of multipartism which is entrenched in our Constitution is based on conjecture, hypothesis and speculation. We therefore find nothing unconstitutional on this amendment.

281. With regard to indirect nomination under section 38A(b), we find that the same is not unconstitutional for reasons that each political party shall have its own delegate system entrenched in its own constitution as required in schedule II of the Political Parties Act. It is expected that it is members of political parties who shall select the delegates. In this way they will have exercised their political rights under article 38 of the Constitution. It is our view that the amendment will develop the law more so section 31(1)(a) of the Elections Act which provides for selection of party candidates. The section states:

(1) 1) A person qualifies to be nominated by a political party for presidential, parliamentary and county elections for the purposes of articles 97, 98, 137, 177 and 180 of the Constitution if that person—

(a) is selected in the manner provided for in the constitution or rules of the political party concerned relating to members of that party who wish to contest presidential, parliamentary and county elections.

ii) Section 4A of the Political Parties Act

282. Counsel for the 2nd to 5th petitioners submitted that the use of the word "may" as opposed to "shall" in section 4a of the Political Parties (Amendment) Act is in violation of article 27 of the Constitution. Her argument is that operation of this section will lead to discrimination, more so in regard to gender parity.



283. Counsel for the 4th interested party countered this argument by relying on the case of *Henry N Gichuru v the Minister for Health the Kenyatta National Hospital Board* (2002)eKLR. She submitted that the word “shall” is a mere directive to be considered in different circumstances. In the said case Justice Kuloba held that the word “shall” does not always mean that an act is obligatory or mandatory.

284. This issue has been determined in several cases. Jurisprudence from our courts shows that the word “shall”, maybe construed to mean “may” and vice versa, depending on the circumstances.

i. In *Jacob Nyandega Osoro v Chief Justice of Kenya & another* (2018)eKLR, Chacha Mwita J. held that the word “may” in article 22(3)(c) of the Constitution must be construed to mean “shall”.

ii. Similarly in the case of *Chadwick Okumu v Capital Markets Authority (2018)eKLR* Mativo J observed:

“36. The principle laid down in the above case has been followed consistently by courts whenever it has been contended that the word “may” carries with it the obligation to exercise a power in a particular manner or direction. In such a case, it is always the purpose of the power which has to be examined in order to determine the scope of the discretion conferred upon the donee of the power. If the conditions in which the power is to be exercised in particular cases are also specified by a statute then, on the fulfillment of those conditions, the power conferred becomes annexed with a duty to exercise it in that manner.

37. Considerable attention has been given to the way in which the word “may” should be interpreted. The Constitutional Court of South Africa indicated that the use of the word “may” clearly showed an intention to grant a discretion. The majority in the Supreme Court of Appeal of South Africa, however, pointed out that the word “may” could simply signify an authorisation to exercise a power coupled with a duty to use it if the requisite circumstances were present. Therefore, the word “may” may be construed in one of two ways:-either to give a complete discretion, or simply to give authorisation together with the duty to act where the circumstances permit.

38. It is also important to bear in mind the contextual scene. Since grammar and dictionary meanings are merely principal (initial) tools rather than determinative tyrants, we should also examine the context in which the word “may” is used...”

In so finding Mativo J placed reliance of the Indian Supreme Court case of *India Official Liquidator v Dhanti Dhan(P)*(1977) 2SCC166. We agree with the findings by Mativo and Mwita Chacha JJ.

See also *Engineers Board of Kenya v Jesse Waweru Wahome & 5 others* (2015)eKLR.

285. One of the canons of statutory interpretation is that the words of the statute must be interpreted within the legal context in which the words are used. In this case the legal context is to be derived from our national values and principles and articles 27 and 91 of the Constitution, which all give a mandatory direction. Accordingly we find that the use of the word “may” must be interpreted to conform to articles 27 and 91 of the Constitution. Political parties are bound by the national values and principles of the Constitution as well as the Constitution itself. It is also instructive that section 7(2) of the Act which was not affected by the amendment requires a political party to comply with gender parity before being registered. We do not therefore find the mere use of the word “may” to be good reason for striking out the amendment.



iii) Section 6(2)(a) of the Political Parties Act

286. It was further submitted by the petitioners that section 6(2)(a) of the amended Act is unconstitutional in as far as it requires political parties to deposit a statement of ideology with the Registrar of Political Parties. This argument was opposed by the respondents and the 1st to 4th interested parties. The office of the Registrar of Political Parties is a creation of the Political Parties Act. Under section 34 the functions of the Registrar include:

- (a) Register, regulate, monitor, investigate and supervise political parties to ensure compliance with this Act.....
- (e) Ensure and verify that no person is a member of more than one political party and notify the Commission of his findings....

287. The Registrar is the custodian of all the documents of political parties. The ideology statement being one of the documents to be submitted under section 6(2) of the Act must be received by the Registrar for safe custody. We find nothing unconstitutional about the requirement.

iv) Section 7(6) of the Political Parties Act

288. The petitioners and the 5th interested party submitted that section 7(6) of the Amendment Act is discriminatory and unconstitutional. They argued that the exemption of the coalition political party from complying with sections 5 and 6 of the principal act is discriminatory as it contravenes article 27 on equality and freedom from discrimination. They relied on the case of *Andrews v Law Society of British Columbia* (1989)1SCR 321.

289. The respondents countered this and stated that it was not necessary for the coalition to go through the process under the said sections since the individual political parties will have already been registered under the same Rules.

290. Sections 5 and 6 of the Principal Act state as follows:

Section 5

- (1) An association of persons or organisation applying to be registered as a political party may apply to the Registrar for provisional registration.
- (2) Upon application for registration under subsection (1), the Registrar shall, within thirty days of the association or organization fulfilling the conditions prescribed in section 6, issue that association or organisation with a certificate of provisional registration.
- (3) A political party that has been provisionally registered under subsection (2) shall, not later than one hundred and eighty days from the date of provisional registration, apply to the Registrar for full registration.
- (4) The Registrar shall, within seven days of receipt of an application under subsection (3), publish a notice in the Gazette and in at least two newspapers having nationwide circulation, inviting objections from any person or any other political party concerning the registration of the name, symbol or colour of the party or any other issue relating to the registration of the political party.
- (5) The provisional registration of a political party which has not applied for full registration shall lapse at the expiry of one hundred and eighty days from the date of issue of the certificate of the provisional registration.



- (6) The provisional registration of a political party which has applied for full registration shall be valid until the political party is issued with a certificate of full registration, or until the application of the political party to be registered has been rejected.
- (7) A political party that has been provisionally registered under subsection (2) shall not be entitled to participate in an election.

Section 6.

- (1) An application for the provisional registration of a proposed political party shall be in writing and be signed by the applicant.
- (2) An application for provisional registration shall—
 - (a) include signed minutes of the first meeting of the founding members of the political party;
 - (b) set out the name of the political party;
 - (c) if the political party wishes to use an abbreviation of its name for the purposes of this Act, set out that abbreviation;
 - (d) be accompanied by a copy of the constitution of the proposed political party which shall comply with the provisions of section 9;
 - (e) include an undertaking to be bound by this Act and the Code of Conduct set out in the First Schedule; and
 - (f) be accompanied by the prescribed fee.
- (3) An application for provisional registration shall include a request for the registration of the symbol of the political party.

291. We have considered the above sections and parallel arguments. There is no dispute to the fact that all political parties must comply and be duly registered under the above sections. A coalition political party is made up of political parties who will have already been registered. The effect of this is that the coalition political party does not have a list of individual members. The list it has is of political parties to make up its membership. To our minds the coalition political party is a sui generis organ. This being the case the rules of formation of ordinary political parties cannot apply to it. It is for this reason that we do not find any discrimination in the amended section.

v) Section 14A of the Political Parties Act

292. The 1st petitioner raised issue with section 14A on the deemed resignations claiming that the same violated the members right to fair administrative action and fair hearing under articles 47 and 50 of the Constitution. Counsel for the 1st petitioner did not however submit on this issue and we assume that he abandoned it. The Solicitor General for the 1st respondent submitted that Section 14A as amended is in line with article 103(1)(e)(i) of the *Constitution*. He referred to the procedures set out in the said amendment. Despite the issue having been abandoned by the 1st petitioner we have considered it.

293. A clear reading of section 14A(1) – (6) confirms that any party allegedly deemed to have resigned is given an opportunity to be heard on the issue. The deeming resignation is therefore not automatic. Even where the political party notifies the Registrar of the resignation and the Registrar is not satisfied that section 14A(2) has been complied with, he/she will refer it back to the party for reconsideration. This is not cast in stone. We find no unconstitutionality in section 14A.



vi) Sections 22 and 31 of the Political Parties Act

294. Counsel for the 2nd to 5th petitioners sought to have section 22 exempting coalition parties from the requirements of audit declared unconstitutional. However the provision requiring auditing of accounts by the Auditor General is under section 31 of the act, 2011 which was amended by deleting section 31(3).
295. Counsel for the 1st respondent submitted that the deletion of section 31(3) of the Act was to align the section with article 229(4)(f) of the Constitution considering the fact that it is only political parties who receive public funds who should be audited. We find this not to be entirely correct because with the new amendment the constitutional obligation of the Auditor General to audit the accounts of political parties funded through public funds is now lost. The Section ought to have been amended to align it to article 229 of the Constitution.
296. We therefore find that the deletion of section 31(3) of the Act is in conflict with article 229 of the Constitution and is therefore unconstitutional.

vii) Section 34 of the Political Parties Act

297. Counsel for the 1st petitioner submitted that section 34 of the impugned Political Parties Act increased powers of the Registrar of Political Parties namely: regulating political party nominations and training of political party election agents which is the mandate of the Independent Electoral and Boundaries Commission (2nd interested party). This he submits contravenes article 88(4) of the Constitution.
298. Counsel for the 1st respondent argued that the amendment to Section 34 complies with article 92 of the Constitution and is complementary and is not in contradiction to the functions of the 2nd interested party.
299. In its replying affidavit sworn by Chrispine Owiye at paragraph 10 the 2nd interested party alluded to usurpation of its power by the 1st interested party. The deponent averred as follows:

“I have been advised by the 2nd interested party’s advocates on record that though the Senate was bound to consider the memorandum, it was not bound to adopt any of the suggestions contained therein. The 2nd interested party’s memorandum highlighted certain aspects of the Bill which it had hoped would be addressed including:

- a) A potential conflict in timelines between the activities envisaged in the Bill and those in the Elections Act;
- b) A latent usurpation of the constitutional mandate of the 2nd interested party and vesting the same in the 1st interested party; and
- c) The need to align the amendments with the provisions of the Elections Act and the regulations made thereunder by making corresponding amendments to the later.”

300. Counsel for the 2nd interested party did not pursue this line of argument in his written submissions but only stated that Parliament was not bound to adopt all its submissions. We therefore take it that the argument was abandoned by the 2nd interested party.
301. The functions of the Independent Electoral and Boundaries Commission in the conduct of elections are set out under article 88(4) which states:



- (a) the continuous registration of citizens as voters;
- (b) the regular revision of the voters' roll;
- (c) the delimitation of constituencies and wards;
- (d) the regulation of the process by which parties nominate candidates for elections;
- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
- (f) the registration of candidates for election;
- (g) voter education;
- (h) the facilitation of the observation, monitoring and evaluation of elections;
- i. the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
- (j) the development of a code of conduct for candidates and parties contesting elections; and
- (k) the monitoring of compliance with the legislation required by article 82(1)(b) relating to nomination of candidates by parties.

302. The amendment to section 34 of the *Political Parties Act* which the petitioners take issue with reads as follows:

- (c) by inserting the following new paragraphs immediately after paragraph (f)—
 - (fa) certify that an independent candidate in an election is not a member of any registered political party;
 - (fb) certify that the symbol intended to be used by an independent candidate in an election does not resemble the symbol of a registered political party;
 - (fc) certify that the names appearing in a party list are the names of members of the political party presenting the party list;
 - (fd) regulate political party nominations in accordance with this Act; and
 - (fe) train political party election agents upon the request and financing by the political party .

303. Counsel for the 1st petitioner contended that the requirement for an independent candidate to submit his/her symbol to the Registrar of Political Parties is a usurpation of the role of Independent Electoral and Boundaries Commission. In regard to the issue of the symbol section 32 of the *Elections Act* provides as follows:

- (1) An independent candidate shall submit the symbol the candidate intends to use during an election to the Commission at least twenty one days before nomination day.
- (2) The Commission shall, upon receipt of the symbol submitted to it under subsection (1) approve or reject the symbol.
- (3) The Commission may refuse to approve the symbol of an independent candidate if the symbol —



- a) is obscene or offensive;
- b) is the symbol of another candidate or of a political party; or
- c) so nearly resembles the symbol of another candidate or political party or any other legal entity registered under any other written law.

304. We have carefully considered the submissions, the Constitution, the Elections Act, the principal Political Parties Act and the Political Parties (Amendment) Act as cited above. On the issue of symbols we do not find any conflict between the roles of the Independent Electoral and Boundaries Commission and the Registrar of Political Parties. In the Amendment the role of the Registrar is limited to only certifying whether the symbol of the independent candidate resembles that of any other political party. The Independent Electoral and Boundaries Commission still retains the power and duty to accept or reject the symbol as set out in section 32 of the Elections Act as the same was not amended. Therefore we do not find any usurpation of the power of Independent Electoral and Boundaries Commission as far as section 34(fb) of the *Political Parties Act* is concerned. We make a similar finding in regard to amendments in respect to section 34(da), (fa), (fc), and (fe).
305. We however find that section 34(fd) of the *Political Parties (Amendment) Act* is in contravention of article 88(4)(d) and (k) of the Constitution, which vests the power to regulate political party nominations in the Independent Electoral and Boundaries Commission. Statute cannot purport to bestow the same powers in the Registrar of the Political Parties. That would amount to usurpation of Independent Electoral and Boundaries Commission’s constitutional mandate. We declare it unconstitutional.

viii) Section 38E of the Political Parties Act

306. Section 38E provides:

- (1) A political party shall, not less than ten days before the date of party nominations, notify the Registrar in writing of –
 - (a) the method it intends to use in conducting party nominations, which method shall be in accordance with the nomination rules of the political party;
 - (b) the date of the party nominations;
 - (c) the venue or venues for the party nominations; and
 - (d) the list of members of the party who wish to be nominated by the party .
- (2) At least seven days before the date of the nominations, the—
 - (a) political party shall publish in the official website of the political party the dates and venues of the nominations; and
 - (b) Registrar shall publish in the Registrar’s website the dates and venues of the political party’s nominations.

307. We have considered section 38E of the Act and do not find any usurpation of the Independent Electoral and Boundaries Commission’s powers by the Registrar of the Political Parties. In this new section all that a political party is required to do is to notify the Registrar in writing of all the requirements under the said section. The Section does not give the Registrar any power to make any decisions in regard to that information. Following receipt of the notification the Registrar only publishes it in its website the required information. (See section 38E (2)(b) of the Act.)Furthermore section 27 of



the Elections Act provides that nomination rules are submitted to the Independent Electoral and Boundaries Commission, and not the Registrar. It provides:

- (1) A political party shall submit its nomination rules to the Commission at least three months before the nomination of its candidates.
- (2) A political party which has submitted its nomination rules to the Commission pursuant to subsection (1) may amend the rules and submit the rules as amended to the Commission, at least seven day before nomination of candidates for elections.

308. This confirms that the powers of the Independent Electoral and Boundaries Commission have not been affected and have therefore not been usurped by the Registrar of Political Parties.

ix) Section 40(3) of the Political Parties Act

309. It was the petitioners' submissions that the above impugned section is discriminatory in as much as the coalition political party is not subject to the Political Parties Disputes Tribunal. In their argument, they referred to the impugned section 40(3) of the *Political Parties Act* which reads as follows:

“A coalition agreement shall provide for internal dispute resolution mechanism”

310. It is our finding that nowhere in the impugned amendment does the Act exempt a coalition political party from the jurisdiction of the Political Parties Disputes Tribunal. A political party is defined to include a coalition political party, hence a dispute between a political party and a coalition political party is deemed to be a dispute between political parties under section 40(1)(c) of the Act. It is therefore deemed to be a dispute subject to trial by the Tribunal. We therefore find that the plea by the petitioners in respect of that amendment cannot stand.

x) Section 41(2) of the Political Parties Act

311. The 1st and 2nd to 5th petitioners raised issue with the above section. They claim that the amendment to section 41 of the Act is unconstitutional as it denies disputants the right of appeal to the Supreme Court. We do not agree with them on this because the right of appeal to the Supreme Court is not automatic as can be seen from the provisions of article 163(4) of the *Constitution* which provides:

- (4) Appeals shall lie from the Court of Appeal to the Supreme Court--
 - a) as of right in any case involving the interpretation or application of this Constitution; and
 - b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).

(See also section 15(1) and 16 of the *Supreme Court of Kenya Act*.)

312. The Supreme Court has pronounced itself in the case *Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another* [2016] eKLR by stating thus:

“[45] It is now trite law that in an application for certification and grant of leave to appeal to the Supreme Court, the decisive factor is not whether the appellate court decision is perceived as right or wrong by any of the parties, but rather, whether the intended appeal raises “a matter of general public importance”.



This position was first signalled by the Court of Appeal in *Hermanus Philipus Styne v Giovanni Gneccchi-Ruscone*, CA No Sup 4 of 2012, when it stated:

“The test for granting certification to appeal to the Supreme Court as a Court of last resort is different from the test of granting leave to appeal to an intermediate court—for example from the High Court to the Court of Appeal. In such cases, the primary purpose of the appeal is correcting injustices and errors of fact or law and the general test is whether the appeal has realistic chances of succeeding. If that test is met, leave to appeal will be given as a matter of course... In contrast, the requirement for certification by both the Court of Appeal and the Supreme Court is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court.”

We therefore find nothing unconstitutional about the above section since the jurisdiction of the Supreme Court of Kenya in hearing appeals is clearly set out in the Constitution and Supreme Court of Kenya Act. Appeals to the Supreme Court must be certified by the Court of Appeal or the Supreme Court to be matters of general public importance, as provided for by the law. The same applies to matters related to disputes arising from party primaries.

(xi) Discrimination of Political Parties candidates in view of Sections 28(1) and 28A of the Elections Act as amended

313. Counsel for the 2nd and 3rd interested parties argued that this court has dealt with a similar issue in the case of *Council of Governors v Attorney General* (2017)eKLR which is a judgement in Rem and the issue cannot be litigated before us. However counsel for the 6th petitioner submitted that the doctrine of *res judicata* is not applicable as the 6th petitioner was not a party in the previous case.
314. We have looked at the *Elections Act* section 28(1) states that:
28. (1) A political party that nominates a person for an election under this Act shall submit to the Commission a membership list of the party —
- (a) in the case of a general election, at least one hundred and twenty days before the date of the election; and
 - (b) in the case of a by-election, forty-five days before the date of the by-election.
- (2) The Commission shall publicize the membership lists as received from political parties.
- (See *Election Laws (Amendment) Act 2017*).
315. We have also looked at the newly introduced section 28A and find that it does not affect the timelines in the principal Act.
316. In our understanding counsel for the 6th petitioner seems to say that the timelines in section 28(1) of the *Elections Act* should be aligned to those given to independent candidates in article 85(1) of the *Constitution* so as to give political party candidates more time to hop from one party to another in



the event that they lose in the party primaries. This issue was dealt with in the case of Council of Governors(*supra*) by Mativo J and we entirely agree with him when he states that:

“The provision in question advances a compelling state interest to manage the electoral process efficiently as opposed to the individual interests of petitioners who seem to be interested in looking for an opportunity to shift party allegiance after losing nominations. A law aimed at promoting the legitimate state interest in fair, honest, and orderly elections is in my view consistent with the provisions of the constitution that require elections to be credible.[24] The provisions of the constitution must be read and interpreted in a wholesome manner. The rights to freedom of association must be read and appreciated with the constitutional rights that guarantee a free, fair, credible and transparent elections and the provisions that mandate the IEBC to manage elections in accordance with the constitution and best practices possible. Thus, the time frames for presenting party lists ought to be construed as part of the IEBC's constitutional mandate to prepare for the electoral process sufficiently in time which is absolutely necessary.”

(See also *Maendeleo Chap Chap (supra)*).

317. For the aforesaid reasons we find it impractical for the political party candidates to enjoy the same timelines as independent candidates for the following reasons:
- i. Unlike independent candidates, the party nominations elicit disputes and reasonable time must be allocated for the disputes to be resolved.
 - ii. There must be discipline in political parties activities, hence need for compliance with the timelines.
 - iii. IEBC has a timetable which enables them to work on their activities such as preparation of registers, printing ballot papers, undertaking trainings for the agents and other officials.

Accordingly we find no element of unfair discrimination in the provisions of sections 28(1) and 28A of the *Elections Act* as alleged by the 6th petitioner.

Whether The Constitutional Requirements For Public Participation Were Observed Prior To The Enactment Of The Impugned Enactments

318. The 1st, 2nd to 5th petitioners and the 5th interested party raised the issue of lack of public participation before the amendments were enacted. Their argument was based on two fronts. First that the timelines were too short and secondly that Parliament confined submissions of their memoranda to email mode only. That they refused to accept written submissions. They therefore urge this court to nullify the amendments on that ground. Learned counsel cited the following decisions in support of their arguments:
- i. *Robert N Gakuru & others v Governor Kiambu County & 3 others* [2014] eKLR.
 - ii. *Doctors for Life International v The Speaker of the National Assembly & others* 2006 (12) BCLR 1399 (CC).
 - iii. *In the Matter of the National Land Commission* (2015)eKLR, among others.
319. Counsel for the respondents and the 1st to 4th interested parties refuted this claim arguing that there was sufficient public participation. They relied on the following decisions in support:
- i. *George Ndemo Sagini v Attorney General & 3 others* [2017] eKLR.



- ii. *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Alliance & another (Interested Parties)* [2019] eKLR, among others.
320. Public participation is enshrined in articles 10(2)(a) and 232(1)(d) of the Constitution as one of the values and principles of governance. Article 259(1)(a) enjoins this court to interpret the Constitution in a manner that promotes its values, principles and purposes.
321. We have considered the submissions and read the decisions cited by counsel for the parties. The principles of what would constitute meaningful public participation were settled by the Supreme Court of Kenya in the case of *British American Tobacco Kenya, PLC v Cabinet Secretary For The Ministry Of Health & others* (2019) eKLR, where the court stated as follows:

“(96) From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while courts have pronounced themselves on this issue, in line with this court’s mandate under section 3 of the Supreme Court Act, we would like to delimit the following framework for public participation:

Guiding Principles for public participation

- i. As a constitutional principle under article 10(2) of the Constitution, public participation applies to all aspects of governance.
- ii. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- iv. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- v. Public participation is not an abstract notion; it must be purposive and meaningful.
- vi. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- vii. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- viii. Allegation of lack of public participation does not automatically vitiate the process. the allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- ix. Components of meaningful public participation include the following:
 - a. clarity of the subject matter for the public to understand;



- b. structures and processes (medium of engagement) of participation that are clear and simple;
- c. opportunity for balanced influence from the public in general;
- d. commitment to the process;
- e. inclusive and effective representation;
- f. integrity and transparency of the process;
- g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.”(Emphasis ours).

322. It is upon the above parameters that we shall determine whether any steps were taken before enactment of the impugned amendments and if so whether the same satisfied the above guidelines.

323. In the replying affidavit of Ann Nderitu, the Registrar of Political Parties sworn on February 15, 2022, she gives a full chronology of consultative meetings and stakeholder engagements which took place in regard to the Election Laws. It is clear from the chronology given that the process began way back in 2017 after the general elections of that year. to her affidavit is annexed the recommendations and reports of the consultative meetings and stakeholder engagements that took place. We see from her annexures (ANN 1) that the process began with the formation of a taskforce comprising of government agencies and departments which play a key role in the electoral process. It is also evident that the task force held several consultative meetings with members of the public and civil societies and organized groups from whom they collected views. Photographs of the meetings can be seen at page 48 - 54 of her affidavit.

324. At the end of the exercise the task force prepared its report dated November 14, 2019 and the report indicates that some of the issues discussed were:

- a) Changes to electoral laws.
- b) Supervision of party primaries.
- c) Enforcement of Electoral laws and Regulations.
- d) Party governance structures.
- e) Administration of nomination polls.
- f) Issuance of nomination certificates and drafting of party lists.
- g) Funding of political parties primaries.
- h) Conduct of party primaries.
- i) Conduct of political party primaries.
- j) Membership of political parties.
- k) Conflicting roles of the IEBC and ORPP.
- l) Timelines.
- m) Independent candidates.
- n) Nominations.
- o) Political parties Disputes Tribunal.



325. After the report further engagements were held on various dates namely:

- a) February 10, 2020
- b) 2nd – 3rd March 2020
- c) September 29, 2020
- d) 5th – 9th October 2020
- e) 13th – 16th June 2021
- f) 27th – 30th July 2021
- g) 27th – 30th July 2021
- h) August 3, 2021

See (Annexures – ANN8 – 14)

326. Annexure AN9 reveals that the Secretary Generals of various political parties attended various consultative meetings between 27th – 30th July 2021 where the following resolutions among others were made:

- i. A political party shall submit their memorandum to the Amendment Bill by August 9, 2021.
- ii. That the Office of the Registrar of Political Parties shall consider the memoranda under paragraph 1 and proposals made during the meeting of the Draft Bills subject to the Constitution attendant laws, domestic jurisprudence and international best practices for purposes of enhancing the Draft Bills.
- iii. That a meeting shall be held between the Office of the Registrar of Political Parties, Independent Electoral and Boundaries Commission and political parties to deliberate on emerging concerns in regards to the 2022 general elections.
- iv. That political parties shall sensitize parties members and Kenyans on the significance of joining and forming political parties.
- v. That political parties shall adopt the legal and operational timelines issued by the Office of the Registrar of Political Parties and the Independent Electoral and Boundaries Commission to enhance timely and effective planning of party activities towards the 2022 general elections.

327. Some of the annexures of the 1st interested party reveal that some of the petitioners were invited to the meetings eg:

- i. A letter dated 28th September 2020 inviting the 2nd petitioner for a meeting on electoral laws discussion to be held on 5th – 9th October 2020. The 2nd petitioner received and acknowledged receipt of the invitation on 30th September 2020 at 3:50pm.
- ii. A reminder was sent to the 2nd petitioner by the 1st interested party, requesting them to send the name of the person who would come for the meeting.

328. There is evidence of active involvement of the Political Parties Liason Committee who even sent a memorandum (ANN 16). There are many other parties who were invited for these meetings but only some attended.



329. The stakeholder engagement and consultative meetings gave rise to a Bill known as Political Parties (Amendment) Bill No 56/2021(See paragraph 11 of the replying affidavit of Michael Sialai).
330. After the 1st reading in the National Assembly on 2nd December 2021 the Bill was placed before JLAC who placed an advert in the local daily newspaper of 7th December 2021 inviting members of the public for their views on or before 21st December 2021 (14 days) (MS – 1). Mr Michael Sialai corroborates the dates of the consultative meetings and the areas of discussion as stated by the 1st interested party.
331. After the expiry of the 14 days JLAC considered the views from the public and stakeholders and tabled its report before the National Assembly on 22nd December 2021.The National Assembly discussed the Bill which was passed on 5th January 2022 and transmitted it to the Senate on 6th January 2022.
332. Thereafter the JLAC of Senate placed an advert in the local daily newspapers on 12th January 2022(JN3). Members of the public were invited to make their presentation on the Bill on or before 19th January 2022.They were invited for a public hearing and presentations. Pursuant to the advertisement the Committee received 28 memoranda/submissions. In total therefore the number of days within which submissions were to be presented was 21 days.
333. The issue before this court is whether from the above facts there was any meaningful public participation before the enactment of the impugned amendments.
334. Guided by the guidelines set by the Supreme Court of Kenya in the *British American* case (*supra*) our answer is in the affirmative.
335. From the above analysis a number of points have been made very clear namely:
- i. The chronology of meetings and consultations as narrated by the 1st interested party have not been challenged. Consultative meetings were held since 2017 after the general elections to January 2022.
 - ii. The 1st interested party invited a good number of participants in good time and even facilitated their attendance.
 - iii. There was clarity of the matters under discussion and resolutions were made.
 - iv. The lists of the invitees and attendants confirm there was inclusivity.
336. On the manner of submissions of memoranda we note that the National Assembly invited both written and electronic memoranda. On the other hand the Senate only invited electronic memoranda and called for two days (20th and 21st January 2022) for public hearing. It's within public knowledge that this was during the Covid -19 pandemic and the Ministry of Health in its protocols had prohibited receipt of hard copies of documents. We take judicial notice of this because even the Judiciary was not receiving hard copies of submissions and pleadings which had to be sent electronically or through email.
337. In our conclusion we find that there was meaningful public participation prior to the enactment of the impugned amendment Act. We have also demonstrated that the process of public participation took over four years and not the seven (7) days alleged by counsel for the petitioners. We find therefore that the ground of lack of public participation has not been demonstrated.



Whether The Political Parties (amendment) Act, 2022 Is Ambiguous, Uncertain, Imprecise And Overboard To Warrant The Striking Out Of The Act In Its Entirety

338. Learned counsel for the 2nd to 5th petitioners submitted that the introduction of a “coalition political party” into the Political Parties Act has created vagueness, confusion and ambiguity in the Statute. That this has rendered the Act incoherent and unworkable, requiring unpacking of the language. She contends that this makes the Act unconstitutional. To support her argument she relied on the following cases:
- i. *Law Society of Kenya v Kenya Revenue Authority & anor* (2017)eKLR.
 - ii. *Keroche Industries ltd v Kenya Revenue Authority & 5 others* (2007)2 KLR 240.
 - iii. *Katiba Institute & 3 others v Attorney General & 2 others* (2018)eKLR.
339. In response the 1st respondent submitted that contrary to the 2nd to 5th petitioners assertion there is no vagueness or incoherence in the said definition. Counsel submitted that there is no justification for the petitioners assumption that political parties cannot come together on account of a shared ideology.
340. The word vagueness was defined in the case of *Osborne v Canada(Treasury Board)*(1991)2 SCR 69,1991 cited with approval in the case of *Katiba Institute & another v Attorney General and another*(2017)eKLR where the Supreme Court stated that:
- “Vagueness can have constitutional significance and one such significance is that a law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools.”
341. As we understand it, it is the contention of counsel for the 2nd to 5th petitioners that the amendment of the definition makes the meaning of a political party under the parent Act ambiguous, uncertain, imprecise and prone to different interpretations.
342. As already observed above the impugned amendment and creation of the coalition political party does not affect the meaning of political party as stipulated under article 260 as read with article 91 of the Constitution. To that extent we have not found any ambiguity, confusion or uncertainty as claimed by the said petitioners.
343. Our position is based on the fact that there is a clear distinction between a political party and a coalition political party in both their formation and operation. The amendment clearly shows what the mind of Parliament was on the formation of a political party, a coalition and coalition political party. There is no doubt on what Parliament intended.
344. It was further submitted by counsel for the 2nd to 5th petitioners that it was improper to make the amendments less than 6 months before the general elections. She urged that the Kreigler report recommended inter alia that no amendments should be made 6 months prior to the date of the general elections.
345. There was no specific response to this by counsel for the respondents and interested parties save for the counsel for the 3rd interested party who submitted that there was no evidence to prove any unreliability and incredibility of the election process as claimed.
346. Upon considering the above submissions we make the following observations:



- i. Whereas there is no law in Kenya that bars amendment of the electoral laws within a particular time and considering the recommendations in the Kreigler report we must consider the context and the period it took to come up with the recommendations leading to the amendments.
- ii. The Kreigler recommendation on this issue considered the fact that people needed time to participate in the entire process, to raise any objections, interact with the changes inter alia. The changes herein were made slightly more than six(6) months to the general election which resonates well with the Kreigler recommendation.
- iii. It has not been demonstrated how the amendments on timelines will affect the elections. In any event these timelines are meant to enable the political parties, candidates and the Independent Electoral Boundaries Commission manage their timetables so as not to affect the election date.
- iv. We also observe that the interest of an individual (s) cannot outweigh or override public interest. It is within the public domain that parts of the principal [Political Parties Act](#), [Political Parties \(Amendment\) Act](#) and the [Elections Act](#) in relation to the August 9, 2022 general elections have been implemented eg gazettelement and swearing of members of the Adhoc Political Parties Dispute Tribunal. Many parties have done their primaries and nominations.
- v. Counsel for the 2nd to 5th petitioners is calling on this Court to strike out the amendments based on conjecture, hypothesis and speculation.

347. Our finding therefore is that the 2nd to 5th petitioners have failed to prove any vagueness or uncertainty in the impugned amendments, which are very clear on their intent. We find nothing to make us strike out the Political Parties (Amendment) Act, 2022 on this ground.

Whether The Petitioners Are Entitled To The Orders Sought

348. We think we have said enough in respect of the prayers sought by the petitioners. Our findings are as follows:

- i. There is no unconstitutionality in the amended sections 2, 4A, 6(2)(a), 7(6), 14A, 22, 34(da) (fa) (fb),(fc),(fe),40(3),41(2) of the [Political Parties\(Amendment\)Act 2022](#).
- ii. There is no unconstitutionality in sections 28(1) and 28A of the [Elections Act](#).
- iii. The deletion of section 31(3) of the principal [Political Parties Act](#) is unconstitutional.
- iv. Section 34(fd) is unconstitutional as regulation of political party nominations is the mandate of Independent Electoral and Boundaries Commission and not the Registrar of Political Parties.
- v. We find that the public participation that took place before the enactment of the impugned amendments was consultative, meaningful and reasonable. The Amendments cannot therefore be nullified on this ground.
- vi. The impugned amendments do not render the principal Political Parties Act ambiguous, uncertain or vague.
- vii. Save for what we have found in respect of sections 31(3) and 34(fd) of the [Political Parties \(Amendment\) Act, 2022](#) the petitions fail and are dismissed.



Costs

349. We have considered the issue of costs. Costs generally follow the event and are in the discretion of the court. However in the circumstances of this case, we find the order which commends itself to us is that each party shall bear its own cost.

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 20TH DAY OF APRIL, 2022 IN OPEN COURT AT MILIMANI NAIROBI

H.I. ONG'UDI

JUDGE

E.MAINA

JUDGE

D. OGEMBO

JUDGE

