



Chege v Independent Electoral & Boundaries Commission (Constitutional Petition E073 of 2022) [2022] KEHC 239 (KLR) (Constitutional and Human Rights) (4 April 2022) (Judgment)

Sabina Wanjiru Chege v Independent Electoral and Boundaries Commission [2022] eKLR

Neutral citation: [2022] KEHC 239 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E073 OF 2022**

AC MRIMA, J

APRIL 4, 2022

BETWEEN

SABINA WANJIRU CHEGE PETITIONER

AND

**INDEPENDENT ELECTORAL & BOUNDARIES
COMMISSION RESPONDENT**

To the extent that the Electoral Code vested powers in the IEBC’s Enforcement Committee to summon witnesses and to conduct hearings was contrary to the Constitution

Reported by Kakai Toili

Constitutional Law – constitutional commissions -Independent Electoral and Boundaries Commission (IEBC) – powers of the IEBC – power to investigate complaints and summon witnesses - procedure to be followed once IEBC had carried out investigations on a complaint - whether the IEBC had the power to issue summonses to witnesses in the course of undertaking investigations into complaints – what were the factors to consider in determining whether one was bound by IEBC’s Electoral Code - whether the vesting of power to summon witnesses and to conduct hearings in respect of complaints relating to breach of the Electoral Code on the IEBC Enforcement Committee was contrary to the Constitution - Constitution of Kenya, 2010 article 252; Elections Act, No 24 of 2011, section 2, Second Schedule (Electoral Code), sections 7, 8, 10 and 15; IEBC Rules of Procedure on Settlement Disputes rules 15(4) and 17(1) and (2).

Statutes – parts of a statute – schedules to a statute - whether a schedule to a statute was part of that statute.

Constitutional Law – constitutional instruments vis a vis statutory instruments – nature of constitutional and statutory instruments - what was the nature of constitutional and statutory instruments - Statutory Instruments Act, No. 23 of 2013, section 2.



Electoral Law – Electoral Code of Conduct – enforcement of the Electoral Code of Conduct - what were the ways in which the Electoral Code was to be enforced – Elections Act, No 24 of 2011, Second Schedule (Electoral Code), sections 7 to 12; Elections Offences Act, No 37 of 2016, section 21.

Statutes – interpretation and construction of statutes - what was the distinction between interpretation and construction of a legal provision.

Words and Phrases – jurisdiction – definition of jurisdiction – the court’s power to entertain, hear and determine a dispute before it - Black’s Law Dictionary, 9th Edition.

Brief facts

The petitioner, who was a member of the National Assembly, was indicted by the respondent, the Independent Electoral and Boundaries Commission (IEBC), on allegations that she made utterances at a public rally in contravention of the Electoral Code of Conduct. The petitioner was summoned to appear before the IEBC’s Electoral Code of Conduct Enforcement Committee (the Enforcement Committee) for hearing of the complaint against her. At the hearing, the petitioner unsuccessfully raised some preliminary issues some which hinged on the jurisdiction of the IEBC to conduct the hearing. The petitioner subsequently instituted the instant proceedings.

The petitioner claimed that the IEBC was not one of the Chapter Fifteen Commissions of the Constitution of Kenya, 2010 (Constitution) with legal authority to issue summons to a witness hence it could not conduct the hearing, but could only investigate any complaint and then move the High Court. It was posited that article 88 of the Constitution, the Elections Act as well as the Independent Electoral and Boundaries Commission Act did not grant the IEBC the power to conduct judicial proceedings of whatever kind. As such, the Code of Conduct under Schedule Two of the Elections Act in so far as they granted power to the IEBC, to investigate, prosecute and preside over a trial were unconstitutional.

Issues

- i. Whether the vesting of powers to summon witnesses and to conduct hearings in respect of complaints relating to breach of the Electoral Code on the Enforcement Committee was contrary to the Constitution?
- ii. What was the nature of constitutional and statutory instruments?
- iii. Whether a schedule to a statute was part of that statute.
- iv. What were the ways in which the Electoral Code was to be enforced?
- v. What was the distinction between interpretation and construction of a legal provision?
- vi. Whether the IEBC had the power to issue summonses to witnesses in the course of undertaking investigations into complaints.
- vii. What was the procedure to be followed once IEBC had carried out investigations on a complaint?
- viii. What were the factors to consider in determining whether one was bound by IEBC’s Electoral Code?

Held

1. Jurisdiction was defined in Halsbury’s Laws of England (4th Ed.) Vol. 9 as the authority which a court had to decide matters that were litigated before it or to take cognizance of matters presented in a formal way for decision. Jurisdiction was everything, without it, a court had no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings.
2. The issue of jurisdiction could be raised at any stage of the proceedings. Jurisdiction either existed or it did not. Neither could it be acquiesced or granted by consent of the parties. It was a threshold question and best taken at inception. It was definitive and determinative and prompt pronouncement on it once it appeared to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that would end in barren *cui-de-sac*. Courts, like nature, should not sit in vain.
3. A court’s jurisdiction flowed from either the Constitution or legislation or both. Thus, a court of law could only exercise jurisdiction as conferred by the Constitution or other written law. It could



- not arrogate to itself jurisdiction exceeding that which was conferred upon it by law. The issue as to whether a court of law had jurisdiction to entertain a matter before it, was not one of mere procedural technicality, it went to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.
4. Where the Constitution exhaustively provided for the jurisdiction of a court of law, the court had to operate within the constitutional limits. It could not expand its jurisdiction through judicial craft or innovation. Nor could Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution conferred power upon Parliament to set the jurisdiction of a court of law or tribunal, the Legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.
 5. The term ‘constitutional instruments’ was neither provided for nor defined in the Constitution and the law. It was a term which the instant court had crafted for purposes of identifying such instruments which had the force of law, but did not include the Constitution *per se*, the legislations passed by Parliament or county assemblies, the statutory instruments or subsidiary legislation, international instruments, common law or customary law.
 6. In a general sense, constitutional instruments could be described as special kind of instruments which directly derived their basis and legitimacy from the Constitution and not from a statute. The power to make such instruments was usually, directly conferred to a person or entity by the Constitution. The instruments were also not subject to the rigours of the law-making processes as provided for in the Constitution and the law.
 7. The holders of the powers to formulate constitutional instruments were usually not called upon to comply with the legislative processes provided in the Constitution and the law, but the resultant instrument had to measure to the expected constitutional parameters and had to embrace the spirit of the Constitution.
 8. In Kenya, the Constitution made provision for constitutional instruments. An example was in article 22(3). Article 22(3) specifically mandated the Chief Justice to make certain rules. In coming up the rules, the Chief Justice was, for instance, not called upon to subject the rules to parliamentary approval. Article 22(3) granted the Chief Justice the power to directly come up with the rules. In the process of coming up with rules, the Chief Justice had to, however, be alive to the calling that the rules had to be within the Constitution.
 9. Statutes were the creation of Parliament and county assemblies. Such had to undergo specific processes in the Parliament and county assemblies and could only assume the sanctity of the law with the assent of the President, in the case of national laws, and that of a county governor in the case of a county legislation.
 10. The Constitution could make provisions for Parliament or county assemblies to make certain laws or the Parliament and county assemblies could do so on their own volition and in discharging their cardinal mandates. The statutes passed by Parliament or the county assemblies which eventually became law could contain schedules. A schedule to a statute was part of that statute.
 11. Statutory instruments were instruments deriving their basis and legality directly from Acts of Parliament or county legislations. The parent statute specifically granted the power to an entity or a person to come up with a subsidiary legislation or statutory instruments. Statutory instruments were further subject to the Statutory Instruments Act, No. 23 of 2013. Section 2 of the Act defined a statutory instrument to mean any rule, order, regulation, direction, form, tariff of costs or fees, letters, patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation was expressly authorized to be issued.



12. The Electoral Code had a constitutional basis. Article 88(5) of the Constitution commanded the IEBC to exercise its powers and perform its functions in accordance with the Constitution and national legislation. The law expressly provided for the applicability of and subscription to the Electoral Code. The Electoral Code further provided that its applicability and binding nature would be on the basis of subscription. Therefore, the Electoral Code only applied to those who subscribed to it; such included political parties, candidates and members of the referendum committees.
13. Failure by a political party, a candidate and members of the referendum committees to execute and subscribe to the Electoral Code or any other breach of the Electoral Code constituted offences. Sections 7 to 12 of the Electoral Code provided for the enforcement of the Electoral Code. The Electoral Code by itself provided for two ways in which it could be enforced. That could be by the IEBC itself or through the High Court. The Electoral Code also provided that the enforcement could be on the basis of the IEBC on its own motion or on a complaint lodged. Another way in which the Code could be enforced was in section 21 of the Elections Offences Act which provided that the Director of Public Prosecutions (DPP) would have the power to order investigations and to prosecute offences under the Act.
14. One of the offences under the Elections Offences Act was the breach of the Electoral Code in section 20. From the face of it, it stood out that it was the DPP who was vested with the duty and power to order investigations and prosecute offences under the Electoral Code. A further manner in which the Electoral Code could be enforced was provided for in the Rules of Procedure on Settlement Disputes (the Rules of Procedure) which were promulgated by the IEBC *vide* Legal Notice No. 139 of 2012.
15. The basis of the Rules of Procedure was section 109 of the Elections Act which accorded the IEBC the power to make regulations. The Rules of Procedure were, hence, a subsidiary legislation or a statutory instrument. While discharging its mandate, the Enforcement Committee was empowered by rule 17(3) of the Rules of Procedure to conduct its own investigations to enable it arrive at a reasonable decision.
16. Article 259 of the Constitution obligated the court to interpret the Constitution in a manner that promoted its purposes, values and principles; advanced the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permitted the development of the law; and contributed to good governance. Constitutional interpretation included both interpretation and construction. Interpretation entailed discovering the meaning of words used in a statutory or other written document. Construction of a legal provision on the other hand was wider in scope than interpretation, and was directed at the legal effect or consequences of the provision in question. Interpretation had to, of necessity, come before construction, and having ascertained the meaning of the words, one construed them to determine how they fit into the scheme of the law or legal document in question.
17. A holistic and purposive interpretation of the Constitution that called for the investigation of the historical, economic, social, cultural and political background of the provision in question had been consistently affirmed by the courts.
18. The IEBC was one of the constitutional commissions in Kenya and as so provided for in article 248(2) of the Constitution. The IEBC was established under article 88(1) of the Constitution. The IEBC and other commissions and independent offices were called upon under article 249 of the Constitution, while discharging their duties, to protect the sovereignty of the people, to secure the observance by all State organs of democratic values and principles and to promote constitutionalism. It was for that reason that the IEBC and other commissions and independent offices were clothed with both financial and operational independence under article 249.
19. Article 252 of the Constitution was on the general functions and powers of the constitutional commissions and independent offices. According to article 252, any constitutional commission had the powers to conduct investigations either on its own initiative or on the basis of a complaint made by a member of the public. The IEBC was not an exception. In the course of undertaking such investigations, the Constitution limited the power of the constitutional commissions and independent



- offices to issue summonses to a witness to only four such entities. The entities were the Kenya National Human Rights and Equality Commission, the Judicial Service Commission, the National Land Commission and the Auditor-General.
20. The IEBC was not one of such entities which the Constitution bestowed any powers to summon witnesses in the course of undertaking its investigations. As a result, any law or statutory instrument that conferred the IEBC with the powers to issue summonses to a witness could only be running afoul the Constitution. Any such law or statutory instrument, would to that extent, stand in contravention of the Constitution, hence, null and void.
 21. The IEBC could carry out the investigations in the manner it settled for and could even involve the Peace Committees established under section 17 of the Electoral Code. Once the IEBC completed such investigations it could refer the matter to the DPP or it could opt to institute appropriate proceedings in the High Court. The IEBC could also involve its Peace Committees in conciliation and mediation.
 22. By juxtaposing the nature and objects of the Enforcement Committee and the manner in which the Constitution ought to be interpreted and in light of article 252 of the Constitution, the Enforcement Committee was vested with powers to summon witnesses and to conduct hearings in respect of complaints relating to breach of the Electoral Code. The vesting of the powers to the Enforcement Committee was not by the Constitution, but by the Electoral Code under the Elections Act. In such a case, and to that extent, the Electoral Code in vesting powers to the Enforcement Committee to summon witnesses and to conduct hearings could only be contrary to the Constitution more so article 2(4).
 23. The provisions of the Elections Act, the Electoral Code and the Rules of Procedure that conferred upon the IEBC any powers to summon any witness in the course of its investigation and to conduct hearings could not stand in the face of the Constitution. Those provisions included parts of sections 7, 8 10 and 15 of the Electoral Code as well as rules 15(4) and 17(1) and (2) of the Rules of Procedure.
 24. The constitutional design for the IEBC was that its main duty was conducting or supervising referenda and elections. In doing so, disputes were bound to arise. In order to shield the IEBC from venturing into the arena of taking active part in disputes, the Constitution intentionally excluded the IEBC from those commissions and independent offices with powers to summon witnesses in the course of carrying out investigations. It was quite disturbing that despite such clear constitutional dimensions, the Electoral Code circumvented the Constitution in an attempt to give the IEBC the very powers which the Constitution declined.
 25. The burden which was already on the shoulders of the IEBC in *inter alia* conducting and supervising fair and transparent elections and referenda was heavy enough and the IEBC ought to contend with that. Infact, the IEBC was struggling to fully discharge its mandate. There was no justification whatsoever for the IEBC to look for more work to engage in. In fact, if the IEBC was to enforce the Electoral Code as it intended in the instant case, many a times it would be locked up in instances where it was the complainant, the witness, the prosecutor and the arbiter. That was the exact prevailing position in the instant matter. Such can only be in violation of article 50 of the Constitution.
 26. The IEBC had no jurisdiction to either summon any witness or to conduct any hearing in relation to a complaint on breach of the Electoral Code or at all. The Enforcement Committee had no jurisdiction to enforce the Electoral Code by summoning any witness or conducting any hearing in relation to a complaint on breach of the Electoral Code or at all. The Enforcement Committee was an unconstitutional outfit and lacked any legality.
 27. There was in place an Electoral Code courtesy of the Elections Act and the Second Schedule thereto. The Electoral Code had operational timelines. The IEBC contended that the petitioner was bound by the Electoral Code on the basis of being a member of the Jubilee Party and also a candidate in the forthcoming general elections. It appeared that the IEBC's argument ran contrary to the law. The law provided that whether it was a political party or a candidate or a member of the Referendum



- Committee taking part in an election or referenda, the first port of call was subscription to the Electoral Code.
28. The IEBC had not adduced any evidence to confirm that indeed the petitioner or the Jubilee Party subscribed to the Electoral Code for the current election period running from January 20, 2022 to the declaration of the results of the general election to be held on August 9, 2022. There was also no evidence that the Jubilee Party or the petitioner were charged and convicted for failing to subscribe to the Electoral Code.
 29. Section 2 of the Elections Act defined a candidate as meaning a person contesting for an elective post while nomination was defined as meaning the submission to the IEBC of the name of a candidate in accordance with the Constitution and the Act. It was in public purview that according to the notices and the election timetable released by the IEBC, party nominations were yet to be conducted and there had yet to be formal submission of nominations to the IEBC. As a result, the petitioner could not be deemed to be a candidate in the forthcoming elections.
 30. On the basis of lack of subscription to the Electoral Code by the petitioner and the Jubilee Party, there being no evidence of conviction of the petitioner or the Jubilee Party for failing to subscribe to the Electoral Code and there being no evidence that the petitioner was a candidate in the forthcoming elections, there was no basis of holding that the Electoral Code bound the petitioner.
 31. If an act was void, then it was in law a nullity. It was not only bad, but incurably bad. There was no need for an order of the court to set it aside. It was automatically null and void without more ado, although it was sometimes convenient to have the court declare it to be so. Therefore, it did not matter whether the Chairperson of the IEBC rightly so chaired the Enforcement Committee or otherwise. The Chairperson was riding on a constitutionally-dead horse.
 32. In the unique circumstances of the instant matter, article 2(4) of the Constitution was violated to the extent that the Enforcement Committee was contrary to article 252 of the Constitution, article 3(1) of the Constitution was contravened in the IEBC's not upholding the Constitution, article 27(1) of the Constitution was infringed for not according the petitioner equal protection and equal benefit of the law. Article 33 of the Constitution was not infringed since the freedom of expression was qualified and the IEBC could, going forward, properly so deal with the complaint.
 33. There was evidence that the petitioner was not availed with all the necessary evidence against her to be able to properly prepare for her defence. That was so since the IEBC received the alleged footage from the Communications Commission of Kenya *vide* a letter dated February 15, 2022, the very day the petitioner appeared before the Enforcement Committee and proceedings began. The state of affairs further contravened articles 47 and 50 of the Constitution.

Petition partly allowed.

Orders

- i. *A declaration was issued that the IEBC's Electoral Code of Conduct Enforcement Committee contravened articles 2(4), 3(1), 249 and 252 of the Constitution, hence, it was unconstitutional, null and void ab initio.*
- ii. *A declaration was issued that the summons and the statement of breach both dated February 11, 2022 by the IEBC to the petitioner were in contravention of articles 2(4), 3(1), 27(1) 35, 47 and 50 of the Constitution.*
- iii. *An order of certiorari was issued quashing the parts of sections 7, 8, 10 and 15 of the Electoral Code of Conduct under the Second Schedule of the Elections Act as well as the parts of rules 15(4) and 17(1) and (2) of the Rules of Procedure on Settlement Disputes establishing and granting powers to the IEBC's Electoral Code of Conduct Enforcement Committee to summon witnesses and to conduct hearings of complaints based on allegations of breach of the Electoral Code of Conduct. The said specific portions were quashed.*
- iv. *An order of certiorari was issued quashing the summons and the statement of breach both dated February 11, 2022 by the IEBC to the petitioner as well as all the proceedings conducted before the IEBC's Electoral Code of Conduct Enforcement Committee in the matter of breach of the Electoral Code of Conduct by*



the petitioner on February 15, 2022 or on any other date. The said summons, statement and proceedings were quashed.

v. Each party to bear its own costs.

Citations

Cases

East Africa;

1. *Adero & another v Ulinzi Sacco Society Limited* [2002] I KLR 577 — (Explained)
2. *Murandi, Augustin Michael & 2 others v Nolturesh Loitoktok Water and Sanitation Co Ltd (Successor in title of National Water Conservation and Pipeline Conservation)* Petition 8 of 2017; [2017] eKLR — (Mentioned)
3. *Center for Rights Education and Awareness & others v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012 [2012] 2 KLR 261 — (Explained)
4. *Abwao, Daniel Ongong'a v Mohamed Ali Mohamed & 2 others* Election Petition 6 of 2017; [2018] eKLR — Mentioned
5. *Kilonzo, Diana Ketbi v Independent Electoral & Boundaries Commission & 2 others* Civil Appeal (Application) 309 of 2013; [2014] eKLR — (Mentioned)
6. *Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others* Civil Appeal 109 of 2016; [2019] eKLR — (Mentioned)
7. *Kidero, Evans Odhiambo & 4 others v Ferdinand Ndungu Waititu & 4 others* Petition No 18 of 2014; [2015] eKLR — (Mentioned)
8. *Ayako, George Mbogo Ochillo v Independent Electoral and Boundaries Commission & 2 others* Election Petition 13 of 2017; [2018] eKLR — (Mentioned)
9. *Salim, Jamal v Yusuf Abdulahi Abdi & another* Civil Appeal No 103 of 2016; [2018] eKLR — (Explained)
10. *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [2021] eKLR — Mentioned
11. *Ndungu Kagiri, Joseph v Republic* Criminal Appeal 69 of 2012; [2016] eKLR — (Explained)
12. *Judicial Service Commission v Mbalu Mutava & another* Civil Appeal No 52 of 2014; [2015] eKLR — (Mentioned)
13. *Hamisi, Kakuta Maimai v Peris Pesi Tobiko & 2 others* Civil Appeal 154 of 2013; [2013] eKLR — (Explained)
14. *Law Society of Kenya v Attorney General & another* Constitutional Petition E327 of 2020; [2021] eKLR — (Explained)
15. *Macharia & another v Kenya Commercial bank Limited & 2 others* [2012] 3 KLR 199 — (Explained)
16. *Masai (SOPA) Limited v Narok County Government* Petition 336 of 2015; [2016] eKLR — (Explained)
17. *Kamau, Michael Sistu Mwaura v Ethics & Anti-Corruption Commission & 3 others* Petition of Appeal 18 of 2019; [2019] eKLR — (Explained)
18. *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* Civil Appeal 37 of 2018; [2018] eKLR — (Explained)
19. *Owners of Motor Vessel 'Lillian S'v Caltex Oil (Kenya) Limited* [1989] KLR 1 — (Explained)
20. *Republic ex parte Chudasama v The Chief Magistrate's Court, Nairobi & another Nairobi* [2008] 2 EA 311 — (Explained)
21. *Republic v Independent Electoral & Boundaries Commission & Another exparte George Mbogo Ochilo Ayacko* Judicial Review 439 of 2017; [2017] eKLR — (Explained)
22. *Republic v Kenya Revenue Authority Exparte Yaya Towers Limited* Miscellaneous Civil Application 374 of 2006 [2008] eKLR — (Explained)
23. *Republic v Attorney General & another Ex parte Waswa & 2 others* [2005] 1 KLR 280 — (Mentioned)



24. *Republic vs Karisa Chengo & 2 others* Petition 5 of 2017; [2017] eKLR — (Explained)
25. *In the Matter of the Interim Independent Electoral Commission* Advisory Opinion No 2 of 2011; [2011] eKLR — (Explained)
26. *Ojioyo, Samson Owimbav Independent and Electoral Boundaries Commission & another* Petition 104 of 2013; [2013] eKLR — (Mentioned)
27. *Sceneries Limited v National Land Commission* Miscellaneous Constitutional Application 1 of 2016; [2017] eKLR — (Mentioned)
28. *Sigilani v Republic* [2004] 2 KLR 480 — (Explained)
29. *Kitheka, Simeon Kioko & 18 others v County Government of Machakos & 2 others* Petition 9 of 2018; [2018] eKLR — (Explained)
30. *Speaker of the National Assembly of the Republic of Kenya & another v Senate of the Republic of Kenya & 12 others* [2021] KECA 282 — (Explained)
31. *Total Kenya Limited v Kenya Revenue Authority* Civil Application 135 of 2012 (UR 101/2012); [2013] eKLR — (Mentioned)

United Kingdom;

1. *Macfoy v United Africa Company* [1961] 3 All ER 1169 — (Explained)
2. *Russel v Duke of Norfolk* [1940] All ER 109 — (Mentioned)
3. *Westminster Corporation v London and Northwestern Rail Co* [1905] AC 426 — (Explained)

South Africa;

Fose v Minister of Safety & Security [1977] ZACC 6 — (Explained)

Statutes

East Africa;

1. Constitution of Kenya, 2010 articles (1)(1); 2(1)(4)(c); 3(1); 19; 20(1); 22; 22(3); 23; 24(1)(a)-(e); 27; 33; 35(1); 35(3); 47; 47(1)(2); 50; 82; 86; 88; 88(4)(e)(j); 88(5); 157; 248(1); 252(1)(a)(3) — (Interpreted)
2. Criminal Procedure Codes (cap 75) In general — (Cited)
3. Election Offences Act, 2016 (Act No 37 of 2016) In general — (Cited)
4. Elections Act, 2011 (Act No 24 of 2011) sections 14, 16, 17, 19, 20, 51(6) ; 109(1)(2)(3)(4); 110(1)(6) — (Interpreted)
5. Evidence Act (cap 80) In general — (Cited)
6. Public Service Commission Act, 2017 (Act No 10 of 2017) — section 92(1) — (Interpreted)
7. Statutory Instruments Act, 2013 (Act No 23 of 2013) section 2 — (Interpreted)
8. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya, 2010 Sub Leg) In general — (Cited)
9. Independent Electoral And Boundaries Commission Act, 2011 (Act No 9 of 2011) In general - (Cited)

Texts & Journals

1. Hogg, QM., Lord Hailsham (Ed) (1990) *Halsbury's Laws of England* London: Butterworth's 4th Edn Vol 9
2. Saunders, JB., (Ed) (2000) *Words and Phrases Legally Defined* London: Butterworth's Vol 3

Advocates

1. Dr Oloo & Mr Oringe Waswa holding brief for Mr Orengo, SC & Dr Otiende Amollo for the petitioner
2. Mr Kipkogei, Mr Ken Melli & Mr Ochola for the respondent



JUDGMENT

1. The petitioner herein, Hon Sabina Wanjiru Chege, is a member of the National Assembly of Kenya currently serving as the Woman Representative of Murang'a County.
2. The petitioner was indicted by the respondent herein, the Independent Electoral and Boundaries Commission, on allegations that she made utterances at a public rally in contravention of the Electoral Code of Conduct.
3. She was summoned to appear before the respondent's Electoral Code of Conduct Enforcement Committee (hereinafter referred to as 'the Enforcement Committee') on February 15, 2022 for hearing of the complaint against her. She obliged.
4. At the hearing, the petitioner unsuccessfully raised some preliminary issues some which hinged on the jurisdiction of the Respondent to conduct the hearing.
5. The petitioner then instituted these proceedings.

The Petition:

6. The petitioner filed a Petition dated February 18, 2022 together with an evenly dated application by way of Notice of Motion.
7. The application sought for some conservatory orders staying further proceedings before the Enforcement Committee. The application was supported by two Affidavits sworn by the petitioner. They are a supporting affidavit she swore on March 18, 2022 and a Further Affidavit sworn on March 10, 2022.
8. The petitioner deposed that on February 11, 2022 she received summons from the Enforcement Committee to attend a hearing on February 15, 2022 on the grounds that it was seized of a report and material against her regarding violation of Clause 6(a) and (l) of the Electoral Code of Conduct. She also received a statement of breach, informing her of the words she allegedly uttered during a public rally at Isibuye area within Vihiga County.
9. According to the petitioner, the respondent alleged that the words contained in the said statement created an impression that the Jubilee Party which the petitioner belonged to 'stole' the 2017 election and that the said Party plans to steal or compromise the 2022 general elections.
10. She further averred that the respondent alleged that the petitioner cast aspersions in the integrity of the 2017 general elections, specifically the voting system developed by the respondent being penetrable, not secure and falls foul of the requirement of article 86 of the Constitution.
11. She contended that the respondent was obligated to furnish her with a copy of their investigation report, materials in their possession and to have documented procedure on how the Enforcement Committee exercises its mandate as a quasi-judicial body in enforcing the Electoral Code of Conduct.
12. It was averred that the objections by the petitioner were all dismissed and that her request for the material to be relied upon elicited contradictory responses.
13. The petitioner lamented that the alleged investigations were carried out after the preferred charges were made against her. She made reference to a letter made to the Communications Authority of Kenya on February 15, 2022 requesting for the NTV clip aired on February 10, 2022 and to the Affidavit by one



- Winnie Ngaiza confirming that the evidence was sought for after the February 15, 2022, the day the Petitioner appeared before the Enforcement Committee.
14. Further to the issues the petitioner raised in the objections before the Enforcement Committee, she further claimed that the respondent violated the provisions of the Code of Conduct by initiating the proceedings *suo moto*; failed to appoint a Chairperson of the Enforcement Committee contrary to clause 9 and 15(1) of the Code and that the petitioner was prosecuted amid material conflict.
 15. The petitioner also contended that the complaint as framed was incapable of receiving any response as it did not comply with clause 6(a) of the Code, hence a violation of articles 47 and 50 of the Constitution. The respondent was also faulted for not formulating any rules or regulations to govern its conduct in investigating a breach of the Code on its own motion, receiving and hearing of breaches of the electoral code and how to implement the provision for article 47 of the Constitution.
 16. Further assault was visited upon the respondent that it was not one of the Chapter Fifteen Commissions with legal authority to issue summons to a witness hence it could not conduct the hearing, but could only investigate any complaint and then move the High Court.
 17. It was posited that article 88 of the Constitution, the Elections Act as well as the Independent Electoral and Boundaries Commission Act did not grant the respondent the power to conduct judicial proceedings of whatever kind. As such, the Code of Conduct under Schedule Two of the Elections Act in so far as they grant power to the respondents, to investigate, prosecute and preside over a trial are illegal and unconstitutional.
 18. The petitioner further posited that section 109(1) and (3) of the Elections Act obligated the respondent to develop draft regulations and submit them to public participation and parliamentary approval, before gazettment which had not been undertaken. She, therefore, contended that the legal Notice No 139 of 2012 on the rules of procedure on settlement of disputes did not rise to the expectation of the statute from which the requirement was expected to flow from.
 19. It was also averred that contrary to the respondent's assertion that pursuant to rule 4 of the procedure of settlement of disputes, the rules apply to disputes or complaints arising among others and to violations of the electoral code of conduct, there was no evidence to show that such a dispute was in existence.
 20. The petitioner contended that the petition raised several constitutional issues and ought to be allowed.
 21. In the main, the petition sought for the following reliefs: -
 - a) An Order of *certiorari* be and is hereby issued, calling into this court, and quashing the statement of breach, summons, and entire proceedings by the Electoral code of Conduct Enforcement Committee in respect of the petitioner, which proceedings offend articles (1) (1), 2(1), 2(4), 3(1), 20(1), 22, 23, 24 (1) (a)-(e), 27, 33, 35(1), 35(3), 47(1), 47(2) and 50 of the Constitution of Kenya.
 - b) An Order of *certiorari* be and is hereby issued calling into this court and quashing the ruling by the Electoral code of Conduct Enforcement Committee made on February 15, 2022 dismissing the petitioner's objections as unlawful, unconstitutional, and offending articles (1) (1), 2(1), 2(4), 3(1), 20(1), 22, 23, 24 (1) (a)-(e), 27,33, 35(1), 35(3), 47(1), 47(2) and 50 of the Constitution of Kenya.
 - c) A Declaration be and hereby issued that the summons served by the Commission and statement of breach both dated February 11, 2022, are unlawful, unconstitutional, and in violation of articles (1) (1), 2(1), 2(4), 3(1), 20(1), 22, 23, 24 (1) (a)-(e), 27,33, 35(1), 35(3), 47(1), 47(2) and 50 of the Constitution of Kenya.



- d) A declaration be and hereby issued that the failure by the Commission to publish the regulations under Section 109 (cc) and (ff) to prescribe regulations for the enforcement of the second schedule to the Elections Act is unlawful, unconstitutional and a violation of articles (1) (1), 2(1), 2(4), 3(1), 20(1), 22, 23, 24 (1) (a)-(e), 27, 33, 35(1), 35(3), 47(1), 47(2) and 50 of the Constitution of Kenya.
- e) A Declaration be and hereby issued that Clause 15(6) of the Second Schedule to the Elections Act 2011 is unlawful for being based on Section 110 (6) of the Elections Act which was deleted by dint of Act No 36 of 2016, s 25 (c).
- f) A declaration be and hereby issued that the decision by the commission to invoke article 252 of the Constitution to commence a hearing into alleged breaches by the petitioner on violations of Clause 6 (a) ad 6 (l) are unlawful, and unconstitutional offends articles (1) (1), 2(1), 2(4), 3(1), 20(1), 22, 23, 24 (1) (a)-(e), 27, 33, 35(1), 35(3), 47(1), 47(2) and 50 of the Constitution of Kenya.
- g) A declaration be and hereby issued to the effect that by claiming that it was seized with a report and materials in respect of a complaint against the petitioner, the decision by the Commission to commence investigations suo moto as stated in its ruling of February 15, 2022 is unlawful, illegal and offends articles (1) (1), 2(1), 2(4), 3(1), 20(1), 22, 23, 24 (1) (a)-(e), 27,33, 35(1), 35(3), 47(1), 47(2) and 50 of the Constitution of Kenya.
- h) An Order of Prohibition be and hereby issues restraining Electoral code of Conduct Enforcement Committee from enforcing the Second Schedule of the Elections Act, without first prescribing the regulations contemplated in section 109(cc) and (ff) in accordance with the provisions of the Constitution of Kenya.
- i) A Conservatory Order be and hereby issues restraining the respondent from acting unlawfully, unconstitutionally before drafting the regulations, conducting public participation, and submitting the regulations to Parliament as per the law and constitution.
- j) A Conservatory Order be and hereby issues restraining the respondent from violating the Rights and fundamental freedoms in contravention of articles (1) (1), 2(1), 2(4), 3(1), 20(1), 22, 23, 24 (1) (a)-(e), 27,33, 35(1), 35(3), 47(1), 47(2) and 50 of the Constitution of Kenya.
- k) Any other relief that the honourable court deems appropriate, just and fit to grant.
- l) The costs of the petition be provided for.

The Petitioner's Submissions:

22. The petitioner filed submissions dated March 9, 2022. She raised the following issues: -
 - i. Is the design of the IEBC and its mandates considering Chapter 15 of the Constitution and respective articles, consistent with the spirit of constitutionalism?
 - ii. Does the Constitution clothe the IEBC with jurisdiction to investigate, prosecute, and preside over breaches or election offences including offences against the Elections Code of Conduct?
 - iii. Is the IEBC acting within its constitutional mandate by failing to prescribe regulations to enforce the Electoral code of Conduct?
 - iv. Is IEBC's hurriedly appointed and convened Committee on the enforcement of Electoral code of conduct proper at law, and reflective of the rule of law?



- v. Are there elements of the *Elections Act*, 2011 and especially schedule two which is the Electoral Code of conduct that are unconstitutional and illegal?
 - vi. Is there a real and potential threat to the petitioner’s rights under article 50 going by the reckless manner in which the respondent seeks to enforce its “mandate”?
 - vii. Is the respondent, an administrative body, in violation of article 47 of the *Constitution*?
23. The petitioner submitted that the respondent did not have judicial power to conduct and preside over trials in respect to any breaches of the Electoral Code of Conduct or election offences which are a preserve of the Director of Public Prosecutions and the Judiciary and that the Respondent is not one of independent commissions under article 252(3) of the *Constitution* clothed with the power to issue summons to a witness for the purpose of investigations hence had no jurisdiction to act as it did.
 24. On constitutional law basis, she submitted that the respondent was one of the Commissions created under the Constitution envisaged as an Independent Commission backed with statute as well. She further noted that world over, the designs of the Electoral Management Bodies (EMBs) draw from regional and international treaties beside each country’s contexts as reflected in the respective Country’s Constitutions and legislations.
 25. According to the petitioner, article 25 of the *International Covenant on Civil and Political Rights (ICCPR)*, presupposes that there will be independent electoral authorities or bodies established to supervise the electoral process and to ensure elections are conducted fairly, impartially, and in accordance with the covenant. Further, the *African Union’s Charter on Democracy, Elections, and Governance* (2007) mandates member states to establish Independent Commissions separate from the Government and encourages the principles of impartiality and independence to shield the electoral commissions from politically motivated manipulation.
 26. On comparative analysis, the petitioner noted that there are four designs of Electoral Management Bodies (EMBs) world over. They are the Independent Model such as the one for the respondent; the Government EMB Model such as the one in Denmark, UK, Switzerland and USA; a mixed Model such as the one in France, Japan and Francophone countries such as Mali and Senegal; and full judicial EMBs like Brazil pursuant to article 121 of its Constitution and Costa Rica pursuant to article 9 of its Constitution.
 27. She submitted that in Kenya, the respondent is established under article 88 of Constitution with Sub-article (4) setting out its objectives which are also reproduced in the Independent Electoral & Boundaries Commission Act No 9 as revised in 2020. She reiterated that the Respondent is obligated to develop a Code of Conduct for candidates and parties contesting election and to monitor compliance with the law contemplated under article 82 of the Constitution.
 28. It was submitted that article 88(5) of the respondent obligates the respondent to exercise its power and perform functions in accordance with the Constitution and national legislation. It is further anchored in article 248(1) and (2)(c) and under article 252(1)(a) of the Constitution which grants the Respondent general functions and powers to conduct investigations on its own initiative or on a complaint made by a member of the public but not to summon.
 29. On the *Elections Act*, the petitioner submitted on the relevant Sections applicable to this Petition as being, section 109 (1), 109 (1) (cc), 109(2), 109(3), 109 (4), 110 (1), 110 (6) and Clause 7 of the second schedule to the *Elections Act* 2011.
 30. On the *Election Offences Act* No 37 of 2016, she submitted that the election period means the period between the publications of a notice by the Respondent for a presidential, parliamentary, or county



- election under sections 14, 16, 17 and 19 of the [Elections Act](#) and the declaration of results after an election. Further, section 20 of the Act sets out the offences relating to the breach of Electoral Code of Conduct and Section 21 grants the prosecutorial powers to the Director of Public Prosecutions to order investigations, and to prosecute offences under the Act.
31. It was, hence, submitted that it is for the Respondent to monitor compliance, while the Director of Public Prosecution, and the Police investigate and prosecute any breaches before a court of law.
 32. On Regulations, Rules, and procedures, she submitted that the respondent's authority to issue any regulations, rules, or procedures, could only be drawn from the Constitution and statutes and that while issuing regulations, the same should be done in conformity with the general policy behind the legislation. Further, a provision intended to create a general obligation or prohibition, and to establish punishment for non-compliance, belonged in regulation, not procedure and a law or legal enactment of a lower level that conflicts with one of a level above is deemed to be invalid (*ultra vires*) to the extent of the conflict.
 33. Accordingly, the procedures and rules referred to by the respondent in Legal Notice No 139 of 2012 conflict with the provisions of Sections 109 (1) and (3) of the [Elections Act](#). She argued that paragraph 29 of the respondent's affidavit is suggestive of a dispute between two parties on matters of electoral code of conduct, without giving any examples of such disputes.
 34. On Separation of Powers in matters of investigation, prosecution, and judicial proceedings, the Petitioner submitted that article 157 of the Constitution establishes the office of the Director of Public Prosecution with power to direct investigations into criminal conduct and to institute criminal proceedings against any person before any court. That, investigations into criminal conduct is the remit of the National police service and arbitrating disputes as prosecuted by respective organs is the remit of the Judiciary and Independent Tribunals.
 35. Based on the above cited provisions of the law and analogy and relying on [Owner of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd \[1989\] eKLR](#) and [In the Matter of Interim Independent Electoral Commission \[2011\] eKLR](#) the petitioner argued that by purporting to charge and summon her, the respondent acted without jurisdiction as there is no provision in law that grants them the power.
 36. Relying on [R v Karisa Chengo \[2017\] eKLR](#) on jurisdiction being limited in some instances, she submitted that article 252 of the Constitution limits the power to summon to 4 commissions and that the Electoral code only grants the respondent jurisdiction over those who have subscribed to the code, which the petitioner had not.
 37. Relying on [Lillian S \(supra\)](#) and [Augustin Michael Murandi & 2 others v Nouturesh Loitoktok Water and Sanitation Co Ltd \(Successor in title of National Water Conservation and Pipeline Conservation\) \[2017\] eKLR](#) on the importance of jurisdiction and the need to inquire into facts of the case, she argued that contrary to these cases, the respondent refused to inquire into the facts of the case with regards to jurisdiction by considering only one of the five issues raised.
 38. According to the petitioner, her right to a fair hearing is enshrined under article 50 of the Constitution was infringed. Relying on [John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others \[2021\] eKLR](#), she argued that one cannot say that they accorded someone a fair hearing if, there was no adequate opportunity to prepare a case and adequate notice and reasons for certain actions. She contended that she was summoned on February 12, 2022 to appear before the Enforcement Committee on February 15, 2022 for examination and even then, there was not enough material for them to prepare for the examination.



39. Further relying on [*Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others Petition No 18 of 2014*](#) on the norms and components of a fair hearing, she submitted that the opportunity granted was not reasonable as, a vague statement of breach, limited time between the summons and appearance, refusal to give material being relied on in advance, commencing a hearing immediately without having informed her in clear terms that there would be a hearing and purporting to proceed with the hearing without availing material being relied on, seeking to avail them after the hearing.
40. Further reliance was made on [*Joseph Ndunga Kagiri v Republic*](#) [2016] eKLR on the fundamental right to a fair hearing that the same never happened in this case for the reasons aforesaid.
41. While relying on [*Sigilani v Republic*](#) [2004] 2 KLR and [*Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 3 others*](#) [2019] eKLR she argued that the charge lacked specificity and was incapable of eliciting a response contrary to article 50(1) of the Constitution and Clause 6 (a) which is clear on the elements that constitute breach and proposed that such a charge is subject to a certiorari order.
42. On the basis of [*Westminster Corporation vs. London and Northwestern Rail Co*](#) (1905) AC 426 quoted with approval in [*Republic vs Kenya Revenue Authority Ex parte Yaya Towers Limited*](#) [2008] eKLR, she argued that it was procedural impropriety for the Respondent to appoint himself chair of the committee contrary to clause 15(1) of the code.
43. It was the petitioner's case that there was violation of the right to fair administrative action under article 47 of the Constitution in this case as they had demonstrated the respondent's unlawful actions- summoning her without jurisdiction, refusing to avail material being relied on in advance, the chairperson the respondent refusing to appoint someone to chair the enforcement committee. She relied on [*Judicial Service Commission v Mbalu Mutava & another*](#) [2015] eKLR; [*Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others*](#) [2019] eKLR; and [*Sceneries Limited v National Land Commission*](#) [2017] eKLR.
44. Relying on [*Republic vs Attorney General & another Ex parte Waswa & 2 others*](#) [2005] 1KLR 280 and [*Masai \(SOPA\) Limited vs Narok County Government*](#) [2016] eKLR, she submitted that she had legitimate expectation that the respondent would accord them, enough time to prepare for any hearing, prior notice to the hearing, provide a charge with sufficient details and full compliance with the electoral code including the fact that they would not summon her suo moto and that the chairperson would appoint a chair of the committee. She further relied on [*Sceneries Limited v National Land Commission*](#) [2017] eKLR on the procedural fairness and urged the court to disallow the decision by the respondent.
45. Dr Oloo, Counsel for the petitioner, further argued that the main issue in this matter was with the statutes. According to Counsel, [*Elections Act*](#) has two relevant provisions of the Code of Conduct. Section 109 of [*Elections Act*](#) provides for making of regulations and the manner in which the power is to be exercised; the regulation are to be subjected to National Assembly. He maintained that the respondent has never developed any regulations but instead has Rules and Procedure, 2012 in respect to enforcement of the conduct which are in respect of disputes arising out of enforcement. He also maintained that the respondent has no, legal; administration; legislative; judicial powers; and prosecutorial powers. It could only move the High Court if there is need to pursue a matter further.
46. He argued that the [*Elections Act*](#), Schedule Two provides for powers with no basis to Constitution and Law. Further, the Code also makes a provision to summon witnesses and that it is not bound by criminal and civil provisions/procedures despite alike provision having been repealed in 2016 hence it is unconstitutional a nullity *ab initio*.



47. Counsel argued that under the Elections Offences Act, the law provided that any breach of electoral code will be investigated through the Office of Director of Public Prosecutions. Thus, the power donated by code to respondent is unconstitutional.
48. Dr Oloo told the court that whereas they had raised constitutional issues, the respondent only dealt with the making of the procedural issues and had not responded at all to the main issues raised before the Enforcement Committee. He argued that section 109 (cc) of Elections Act fails to promote constitutionalism hence the said Schedule of Elections Act is unconstitutional.
49. He stated that the Constitution, Elections Act and Elections Offences Act provides that the respondent is bound by the Criminal Procedure Code and as such section 15(2) of the said Schedule be declared unconstitutional. Further, that in so far as any code of conduct purports to donate procedural powers, it must be revoked.
50. Counsel called upon the court to the express fear as shared by the petitioner that articles 1, 2, 3, 19, 20, 21, 22, 23 and 24 of the Constitution were about to be breached by respondent and to question how the respondent could be allowed to arbitrate what it had made up its mind. He further noted that unlike the JR No 592 of 2017, this case has constitutional issues as opposed to the Judicial Review jurisdiction which is limited in mandate.
51. Mr Oringe, Learned Counsel appearing with Dr Oloo added that the respondent cannot sit in a matter where they are the complainant, investigators and prosecutions and the jury in the same trial as that affects the principle under article 47 of Constitution.
52. The petitioner urged this Court to allow the Petition as prayed.

The Response:

53. The respondent opposed the Petition.
54. It filed Grounds of Opposition dated 23rd February, 2022 and a Replying Affidavit by one Chrispine Owiye sworn on 25th February, 2022.
55. The respondent's case can be aptly summed up as follows: -
 - Pursuant to paragraph 18 of the Second Schedule to the Elections Act, the Electoral Code of Conduct is in force and applicable by dint of Gazette Notices Nos 430, 431, 432, 433, 434, and 435 published on 20th January 2022.
 - The petitioner is bound by the Electoral Code of Conduct pursuant to the provisions of paragraph 1(2) of the Code and by virtue of her being a Women Representative of Murang'a County and as a Member of the of the Jubilee Party Parliamentary group. Also, by dint of section 110 of the Elections Act, every political party and every person who participates in an election under the Constitution and under the Elections Act is required to subscribe to and observe the Electoral Code of Conduct set out under the Second Schedule of the Elections Act, Paragraph (1) of the Second Schedule to the Elections Act.
 - Pursuant to article 252(1)(a) & (d) as read with section 107 of the Elections Act, the Independent Electoral & Boundaries Commission Act and paragraph 15 of the Code, the respondent is empowered to conduct its own investigations on its behalf or on a complaint made by a member of the public or as may be provided by national legislation, issue summons to persons suspected to have breached the Code, examine them, and to arrest those who have committed election offences.



- The Chairperson was right in designating himself as the Chairperson of the Enforcement Committee being that, he is a member of the respondent and he is the only member who by law possesses the qualifications required to chair the said Committee.
- The Enforcement Committee considered the preliminary issues raised by the petitioner before dismissing them. Further, the Enforcement Committee is established pursuant to paragraph 15 of the Second Schedule to the Elections Act and that despite section 110(6) of the Elections Act being amended in 2016, paragraph 15(6) of the Second Schedule to the Elections Act makes the provision that the Enforcement Committee shall not be bound by the provisions of the Criminal Procedure Code.
- The Rules of Procedure on Settlement had been enacted through Legal Notice No 139 of 2012 pursuant to the provisions of the Elections Act. Rule 4 applies to disputes or complaints arising from among others, violation of the Electoral Code of Conduct.

The Respondent's Submissions:

56. In its submissions, the respondent raised the following issues: -
- a) Whether the Electoral Code of Conduct is in force;
 - b) Whether the Electoral Code of Conduct is binding upon the Petitioner;
 - c) Whether the respondent's Chairperson erred in chairing the sittings of the Committee;
 - d) Whether the Electoral Code of Conduct Enforcement Committee, has the jurisdiction to entertain the violations of the Code of Conduct; and
 - e) Whether the respondent has formulated "regulations" to guide the proceedings before the Committee.
57. The respondent maintained that the Electoral Code of Conduct (hereinafter referred to as 'the Electoral Code') was in force by dint of paragraph 18 of the Second Schedule to the Elections Act. It submitted that appropriate notices on the General Elections were published on 20th January 2022 vide gazette Notices Nos 430, 431, 432,433, 434 and 435, hence, the Electoral Code has been effective and was still in force on 10th February, 2022 when the Petitioner breached the Electoral Code.
58. It was argued that despite the petitioner not subscribing to the Electoral Code and by virtue of paragraph 1(2) thereof, the petitioner was still bound by the said Electoral Code as she was a Member of the Jubilee Party, she is a Government official serving in the National Assembly as the Women Representative to Murang'a County and she is a member of the Jubilee Party Parliamentary Group.
59. According to the respondent, it was lawful for the Chairperson to Chair the proceedings of the Enforcement Committee in accordance with the Elections Act and the Schedules therein as read together with the provisions of the IEBC Act.
60. Reliance was made to Republic v Independent Electoral & Boundaries Commission & another ex parte George Mbogo Ochilo Ayacko [2017] eKLR; Daniel Ongong'a Abwao v Mohamed Ali Mohamed & 2 others [2018] eKLR; and Samson Owimba Ojioyo v Independent and Electoral Boundaries Commission & another [2013] eKLR for the argument that by the petitioner violating Clause 6(a) and (l) of the Electoral Code, the Enforcement Committee was clothed with jurisdiction to hear and determine the matter.



61. The respondent affirmed that there are Rules guiding the procedure before the Enforcement Committee enacted through Legal Notice No 139 of 2012 pursuant to the provisions of the [Elections Act](#). Pursuant to rule 4 of the Rules of Procedure of Settlement of Disputes, the rules apply to disputes or complaints arising from among others, violations of the Electoral Code. Further, by virtue of rule 17 thereof the Petitioner will be granted an opportunity to cross-examine witnesses who testify and give evidence against her and already she had representation on February 12, 2022 and February 19, 2022. It relied on [Russel vs Duke of Norfolk](#) (1940) All ER 109 to advance that argument.
62. It was further submitted that the proceedings before the Enforcement Committee are in line with article 88(4)(e) of the Constitution and they are inquisitorial in nature as held in [Diana Kethi Kilonzo vs Independent Electoral and Boundaries Commission](#).
63. Mr Kipkoge, learned counsel for the respondent, in his highlights to the court argued that the petitioner had abandoned its case as pleaded in the petition and ventured into a new realm of issues and submissions. Counsel pointed out that the Electoral Code was attacked in its entirety in the submissions whereas in the Petition only paragraph 15 thereof had been impugned.
64. On whether regulations were formulated by the respondent to support the Electoral Code, Counsel stated that section 109 of the Election Act provided for the Rules of Settlement of Disputes and not Regulations, but instead the petitioner chose to frame the said Rules as Regulations. He further stated that section 109(3) of [Elections Act](#) provides that the National Assembly can approve draft regulations before Parliament deals with them under the Statutory Instruments Act and that courts have dealt with those Regulations and they have not been cited for any wrong.
65. Counsel argued that the Constitution envisages the Code of Ethics and that the Electoral Code is confined in the said Schedule of [Elections Act](#) and the Constitution. He argued that the respondent was exercising quasi-judicial powers which are a mix of quasi-judicial and administration powers but not judicial powers. Further, that it was argued that it was only investigating the petitioner and dealing with infractions of the Electoral Code as envisaged under article 58 of Constitution.
66. He made reference to [Diani Kitili Kibiro v IEBC](#) at paragraph 109, where the court concluded that to the extent that the respondent's powers are provided for by the Constitution, an attack on the powers is to attack the Constitution, hence it could not be argued that the exercise of powers is an unconstitutional issue. He also referred to Nairobi JR No 592 of 2017 [Republic v IEBC and Attorney General ex parte Prof Philip Kaluki](#) and [George Mbogoh Ochillo Ayako v IEBC](#) on the issue and affirmed that the respondent can enforce the Electoral Code.
67. Counsel then argued that the petitioner cannot be heard to challenge the meaning of what she uttered before this court but before the respondent and that she must explain what she meant by "they stole an earlier election".
68. It was also submitted that the interim orders had been overtaken by events.
69. The respondents argued that the petition be dismissed with costs.

Issues for Determination:

70. Having read and understood the documents filed in this matter, this court hereby discerns the following issues for determination: -
 - (a) Whether the Enforcement Committee has the jurisdiction to entertain the violations of the Electoral Code.



- (b) Whether the Electoral Code is in force and if so, whether the Electoral Code is binding upon the Petitioner.
 - (c) Whether the respondent's Chairperson erred in chairing the sittings of the Enforcement Committee.
 - (d) Whether the respondent has formulated Regulations to guide the proceedings before the Enforcement Committee.
 - (e) Whether the proceedings against the petitioner before the Enforcement Committee are in violation of articles (1)(1), 2(1), 2(4), 3(1), 20(1), 22, 23, 24 (1) (a)-(e), 27, 33, 35(1), 35(3), 47(1), 47(2) and 50 of the Constitution.
 - (f) Whether the petitioner is entitled to any reliefs.
71. As I proceed to deal with the issues as under, suffice to state that this judgment is on both the Notice of Motion and the petition.
- (a) Whether the Enforcement Committee has the jurisdiction to entertain the violations of the Electoral Code:
72. I will consider this issue under the following sub-issues: -
- (i) What jurisdiction is.
 - (ii) Constitutional instruments, Statutes and Schedules thereto and Statutory instruments.
 - (iii) The enforcement of the Electoral Code.
73. A look at each of the sub-issues now follows: -
- Jurisdiction:
74. The subject of jurisdiction is by now well settled by the Constitution, the law and legal principles.
75. Jurisdiction is defined in Halsbury's Laws of England 4th Ed Vol 9 as "...the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". Black's Law Dictionary, 9th Edition, defines jurisdiction as the court's power to entertain, hear and determine a dispute before it.
76. In Words and Phrases Legally Defined Vol 3, John Beecroft Saunders defines jurisdiction as follows:
- By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.
77. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in Owners of Motor



Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...

78. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in *Jamal Salim v Yusuf Abdulahi Abdi & another* Civil Appeal No 103 of 2016 [2018] eKLR stated as follows: -

Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this court in *Adero & another v Ulinzi Sacco Society Limited* [2002] 1 KLR 577, as follows;

- 1)
- 2) The jurisdiction either exists or does not *ab initio* ...
- 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

79. On the centrality of jurisdiction, the Court of Appeal in *Kakuta Maimai Hamisi -vs- Peris Pesu Tobiko & 2 Others (2013) eKLR* stated that: -

So central and determinative is the jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in *barren cui-de-sac*. Courts, like nature, must not sit in vain.

80. On the source of a court's jurisdiction, the Supreme Court of Kenya in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others (2012) eKLR* stated as follows: -

A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

81. And, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR*, the Court of Appeal further stated: -



- (44) ... a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...
82. From the foregoing, it is sufficiently settled that a court's jurisdiction is derived from the Constitution, an Act of Parliament or both.

Constitutional instruments, Statutes and Schedules thereto and Statutory instruments:

83. This sub-issue is important in this case as it tends to bring forth the difference between Constitutional instruments, Statutory instruments and Statutes and Schedules to a statute with a view to rightly classify where the various instruments referred into this matter fall.
84. The term 'constitutional instruments' is neither provided for nor defined in the Constitution and the law. It is a term which this court has crafted for purposes of identifying such instruments which have the force of law, but do not include the Constitution per se, the legislations passed by Parliament or County Assemblies, the statutory instruments or subsidiary legislation, international instruments, common law or customary law.
85. In a general sense, constitutional instruments may be described as special kind of instruments which directly derive their basis and legitimacy from the Constitution and not from a statute.
86. The power to make such instruments is usually, directly conferred to a person or entity by the Constitution. The instruments are also not subject to the rigours of the law-making processes as provided for in the Constitution and the law.
87. The holders of the powers to formulate such instruments are usually not called upon to comply with the legislative processes provided in the Constitution and the law, but the resultant instrument must measure to the expected constitutional parameters and must embrace the spirit of the Constitution.
88. In Kenya, the Constitution makes provision for constitutional instruments. An example is in article 22(3) which provides as follows: -
- The Chief Justice shall make rules providing for the court proceedings referred to in this article, which shall satisfy the criteria that—
- (a) the rights of standing provided for in clause (2) are fully facilitated;
 - (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
 - (c) no fee may be charged for commencing the proceedings;
 - (d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
 - (e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.
89. The above provision specifically mandates the Hon Chief Justice to make certain rules. In coming up the said rules, the Hon Chief Justice is, for instance, not called upon to subject the rules to



parliamentary approval. Article 22(3) of the Constitution grants the Hon Chief Justice the power to directly come up with the rules.

90. In the process of coming up with rules, the Hon Chief Justice must, however, be alive to the calling that the rules must be within the Constitution. For example, the rules cannot make provisions which are in conflict with the national values and principles of governance or run contra the Bill of Rights or even usurp the powers of other constitutional entities.
91. In exercising the powers granted under article 22(3) of the Constitution, the Hon Chief Justice came up with the [*Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013*](#) which were published in the Kenya Gazette under Legal Notice No 117 dated 28th June, 2013.
92. The above rules are commonly referred to as ‘the *Mutunga* Rules’.
93. As it can be seen, the *Mutunga* Rules derive their basis and legitimacy directly from the Constitution and were not subjected to the law-making processes provided in the Constitution and the law. The rules assume the character of a legal binding instrument which is between the Constitution and the laws. Such are the so-called ‘constitutional instruments’.
94. On the other hand, statutes are the creation of Parliament and County Assemblies. Such must undergo specific processes in the Parliament and County Assemblies and can only assume the sanctity of the law with the assent of the President, in the case of national laws, and that of a County Governor in the case of a County legislation.
95. The Constitution may make provisions for Parliament or County Assemblies to make certain laws or the Parliament and County Assemblies may do so on their own volition and in discharging their cardinal mandates.
96. The statutes passed by Parliament or the County Assemblies which eventually become law may contain Schedules. There has been rival positions on whether such schedules are part of the statute or are subsidiary legislation.
97. The Court of Appeal has now settled the issue by affirming that a schedule to a statute is part of that statute. In Civil Appeal Nos 74 & 82 of 2012 [*Centre for Rights Education & Awareness & 2 others v John Harun Mwangi & 6 others*](#), the court held as follows: -

It is clear to us that the above amendment made a specific provision for determination of duty on cigarettes. The appellant cannot validly ignore the amendment and rely only on sections 127 and 173 of the Act. It cannot be gainsaid that a schedule is an integral part of the Act with the same status as the other provisions of the Act. In other words, a schedule does not have any less status than a provision of the Act. The learned authors of Halsbury’s Laws of England, 4th Ed. Re-issue, para. 1399 at page 853 state thus:

“A schedule to an Act is to be construed by virtue of the functional construction rule, as an adjunct to the main body of the Act but nevertheless fully part of it. Any conflict between the inducing section (or any other section of the Act) and the schedule is to be resolved without regard to the fact that some of the relevant words are contained in the schedule rather than in the section.”

In *Centre for Rights Education & Awareness & 2 others v John Harun Mwangi & 6 others*, CA Nos 74 & 82 of 2012 this court reiterated that a schedule is an integral part of the statute and must be given effect like all other provisions of the statute. Accordingly, we are satisfied



that the learned judge did not err in holding that assessment of tax on cigarettes is to be determined as specifically provided for in Part II of the Fifth Schedule.

The argument that the respondents cannot charge tax because of reference to “the fourth column” of the Fifth Schedule which did not in fact exist, is in our view disingenuous.

98. Speaking to a Schedule of the Constitution, the Court of Appeal in Civil Appeal 74 & 82 of 2012 *Center for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR, the Learned Judges made the following findings: -

Furthermore, the schedules including the Sixth schedule to the current Constitution were contained in the Proposed Constitution of Kenya which was approved in a national referendum.

It follows therefore, and we hold, that the sixth schedule is an integral part of the current Constitution and has the same status as the provisions of the other articles although it is of a limited duration.

99. Turning to statutory instruments, these are instruments deriving their basis and legality directly from Acts of Parliament or county legislations. The parent statute specifically grants the power to an entity or a person to come up with a subsidiary legislation or statutory instruments.

100. Statutory instruments are further subject to the *Statutory Instruments Act*, No 23 of 2013.

101. Section 2 of the Act defines a ‘statutory instrument’ to mean any rule, order, regulation, direction, form, tariff of costs or fees, letters, patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.

102. An example of a statutory instrument in the form of Regulations is provided for in section 92(1) of the *Public Service Commission Act*, No 10 of 2017 as follows: -

- (1) The Commission may make regulations prescribing anything required by this Act to be prescribed generally for the better carrying into effect the provisions of this Act.

103. In that case, an Act of Parliament (the *Public Service Commission Act*) grants subsidiary powers to the Public Service Commission to make regulations. The resultant regulations shall be referred to as subsidiary legislation or statutory instruments.

104. Having dealt with constitutional instruments, statutes and schedules thereto as well as statutory instruments, I now look at the next sub-issue.

The enforcement of the Electoral Code:

Its Nature:

105. The Electoral Code has a constitutional basis. Article 88(4)(j) of the Constitution provides as follows: -

- (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(j) the development of a code of conduct for candidates and parties contesting elections;



106. Article 88(5) of the Constitution commands the Respondent herein to exercise its powers and perform its functions in accordance with the Constitution and national legislation.
107. It is the *Elections Act*, No 24 of 2011 which provides for the Electoral Code. In section 110, the *Elections Act* state as follows: -
110. Electoral code of conduct
- (1) Every political party and every person who participates in an election or referendum under the Constitution and this Act shall subscribe to and observe the Electoral Code of Conduct set out in the Second Schedule in such manner as the Commission may, subject to paragraph 6 of that Schedule, determine.
- (2) A political party that is eligible to nominate candidates under the Constitution, this Act or any other written law shall not be eligible to contest in any election unless the political party and the candidate have subscribed to the Electoral Code of Conduct referred to in subsection (1).
- (5) The trial of an offence under this section shall be without prejudice to any proceedings in or consequent upon a petition.
108. Further, section 51(6) of the *Elections Act* calls upon every member of the Referendum Committees to subscribe to and abide by the Electoral Code set out in the second schedule of the Act.
109. The Electoral Code provides its purpose in section 1(3) thereof as follows: -
- The object of this Code is to promote conditions conducive to the conduct of free and fair elections and a climate of tolerance in which political activity may take place without fear, coercion, intimidation or reprisals.
- It's applicability and subscription:
110. The law expressly provides for the applicability of and subscription to the Electoral Code.
111. Section 1(2) thereof states as follows: -
- (2) This Code shall, in so far as it is applicable, bind the Government and every political party, leader, office bearer, agent and member of a political party or a person who supports a political party, and every candidate nominated under the electoral laws for any election.
112. The Electoral Code further provides that its applicability and binding nature shall be on the basis of subscription. Section 1(1) states as follows: -
- (1) This Code shall be subscribed to by—
- (a) every political party participating in the election of a president, a member of Parliament, a county governor, a member of a county assembly;
- (b) every candidate; and
- (c) every leader, chief agent, agent or official of a referendum committee.



113. In Section 1(3), the Electoral Code further reiterates the need for subscription as follows: -

All registered political parties and referendum committees shall execute this Code through the hand of their respective registered officials to signify their acceptance to be bound by the provisions of this Code and their commitment to strive to ensure that their members and any person who supports the political party abide by the code at all stages of elections and referendum.

114. From the above provisions, it is, therefore, clear that the Electoral Code only applies to those who subscribe to it. Such include political parties, candidates and members of the referendum committees.

115. It is on the basis of the foregoing that section 4 of the Electoral Code provides as follows: -

4. All registered political parties and other persons bound by this Code shall endeavour to promote the object of the code to enable free political campaigning and open public debate to take place in all parts of Kenya during an election period.

116. Failure by a political party, a candidate and members of the referendum committees to execute and subscribe to the Electoral Code or any other breach of the Electoral Code constitutes offences.

117. Section 20 of the *Election Offences Act*, No 37 of 2016 provides for such and as follows: -

20. Breach of Electoral Code of Conduct

(1) Every officer of a political party and every nominated candidate who, attempts to participate in or participates in an election without subscribing to the Electoral Code of Conduct commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding six years or to both.

(2) Any person who contravenes the Electoral Code of Conduct commits an offence.

(3) The trial of an offence under this section shall be without prejudice to any proceedings in or consequent upon a petition.

It's enforcement:

118. Sections 7 to 12 inclusive of the Electoral Code provides for the enforcement of the Electoral Code. Due to the centrality of the subject in this matter, I will reproduce the said provisions verbatim: -

7. Where, in the opinion of the Commission, any political party or referendum committee participating in any election or referendum or the leader, office-bearer or member of a political party or person who supports the political party or referendum committee or any candidate at any election, in any way infringes any provision of this Code, the Commission may—

(a) in the case of a political party and, subject to sub-paragraph (b), and in the case of the leader, any office-bearer or member of a political party or person who supports the political party referendum committee or candidate, impose upon that political party one or more of the following penalties or sanctions which any or all may be suspended on specific conditions-



- (i) a formal warning;
 - (ii) a fine determined by the Commission;
 - (iii) notwithstanding the provisions of any other written law, an order prohibiting the political party, whether permanently or for a specified period, from utilizing any public media time, through the television or radio broadcasting service of such media as have been or may be allocated to the political party for electoral purposes;
- (vi) an order prohibiting the political party, referendum committee or candidate from-
- (b) Where a political party, referendum committee, leader or any office bearer, member or person who supports the political party, referendum committee or any candidate at an election fails, neglects or refuses to comply with the orders of the Commission issued under paragraph 7(a), the Commission shall impose upon the defaulting party any of the following sanctions which may be suspended on specific conditions-
- (i) in case of fine imposed, prohibit the defaulting party from participating in ongoing and future elections as candidates in case of a defaulting candidate or prohibit the political party or the referendum committee official from participating in ongoing elections and referendum, and future elections or referendum or any activity facilitated by the Commission until such fine has been paid;
 - (ii) in case of failure to comply with any other sanctions imposed, cancel the right of such political party or candidate to participate in the next election; and
 - (iii) file execution proceedings in the High Court to enforce the recovery of the fine.
8. A fine imposed by the Commission under this Code shall be registered in the High Court.
9. Without prejudice to the provisions of paragraph 7, the Commission may either of its own motion or in consequence of any report made to it, institute proceedings in the High Court as may be appropriate in the case of any alleged infringement of this Code by a political party or by the leader, any office-bearer or member of a political party or person who supports a political party or any candidate and where the court finds the infringement of the provisions of this Code-
- (a) in the case of a political party, any act or omission involving violence, intimidation or a gross or systematic violation of the rights of any political party, candidate or voter, the court may, in addition to or in substitution for any other penalty or sanction specified in paragraph 7(a), make an order cancelling the right of such party to participate in the election concerned; or



- (b) in the case of the leader, any office-bearer or member of a political party or person who supports the political party or of any candidate, that any act or omission involving violence or intimidation or gross or systematic violation of the rights of any political party candidate or voter, the court may in addition to or in substitution of any other penalty or sanction specified in paragraph 7(a) (i) and (ii), make an order disqualifying, in the case of a person who is a candidate, that person from being a candidate or deleting the name of that candidate from the list or lists of candidates concerned.
10. In making its decision regarding appropriate penalties or sanctions, the Commission or, as the case may be, the High Court shall have regard to any other legal consequences that may result from civil or criminal proceedings instituted by reason of the same occurrence.
11. The High Court shall ensure that any proceedings initiated under paragraph 9 are dealt with in priority to all other matters brought before it, and that the decision of that court is given before the date of the election concerned.
12. The procedure of the High Court in cases falling within the provisions of this Code shall, without prejudice to paragraph 9, be in accordance with such Rules of Procedure as shall from time to time be promulgated by the Chief Justice.
119. The Electoral Code by itself provides for two ways in which it may be enforced. That can be by the respondent itself or through the High Court.
120. The Electoral Code also provides that the enforcement may be on the basis of the respondent on its own motion or on a complaint lodged.
121. There is still another way in which the Code may be enforced. It is in section 21 of the Elections Offences Act. The provision states as follows: -
21. Powers of prosecution
The Director of Public Prosecutions shall have the power to order investigations and to prosecute offences under this Act.
122. One of the offences under the Elections Offences Act is the breach of the Electoral Code in section 20 thereof. From the face of it, it stands out that it is the Director of Public Prosecutions who is vested with the duty and power to order investigations and prosecute offences under the Electoral Code. I will, however, deal with this issue further in this judgment.
123. A further manner in which the Electoral Code may be enforced is provided for in the Rules of Procedure on Settlement Disputes (hereinafter referred to as ‘the Rules of Procedure’) which were promulgated by the respondent vide Legal Notice No 139 of 2012.
124. The basis of the Rules of Procedure is section 109 of the *Elections Act* which accords the respondent the power to make regulations. The Rules of Procedure are, hence, a subsidiary legislation or a statutory instrument.



125. Rule 4(1)(c) thereof states as follows: -

4. Application of rules

- (1) These rules shall apply to disputes or complaints arising from—
- (c) violations of the Code of Electoral Conduct;

126. Rule 15 provides the process of lodging a complaint with the Respondent as follows: -

15. Complaint arising from violation of the electoral code of conduct

- (1) Any aggrieved person may file a written complaint against any political party participating in an election for violation of the provisions of the electoral code of conduct.
- (2) A complaint under sub-regulation (1) shall be accompanied by a statement of the complainant and his witnesses, all of which must be under oath, as well as other documents to support the complaint.
- (3) A complaint for under this regulation shall be filed with the Commission.
- (4) Based on the decision of the Committee, Commission may impose any of the sanctions provided for under paragraph 7 of the Electoral Code of Conduct.

127. While discharging its mandate, the Enforcement Committee is empowered by rule 17(3) of the Rules of Procedure to conduct its own investigations to enable it arrive at a reasonable decision.

128. In sum, there are three ways in which the Electoral Code may be enforced. They are: -

- (a) By the respondent on its own initiative or on filing of a complaint by any person;
- (b) By the High Court on application by the Respondent;
- (c) By the Director of Public Prosecution on its own motion or on receipt of a complaint.

The respondent's jurisdiction to enforce the Electoral Code:

129. As this part of our discussion will call upon this court to ascertain whether the Constitution was infringed and whether some provisions of statutes are constitutional, it will be in order to, in the first instance, look at the settled principles in constitutional and statutory interpretation.

130. As a starting point, I will deal with the manner in which the Constitution is to be interpreted.

131. The Court of Appeal in *Speaker of the National Assembly of the Republic of Kenya & another v Senate of the Republic of Kenya & 12 others* (Civil Appeal E084 of 2021) [2021] KECA 282 (KLR) (Civ) (19 November 2021) (Judgment) endeavoured a fabulous discussion in the manner a court ought to approach the subject of constitutional interpretation. The court yielded as follows: -

42. Our starting point in this regard is article 259 of the Constitution, which obligates us 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.”
43. It is notable in this respect that constitutional interpretation includes both interpretation and construction. As explained by Vincent Crabbe in his text *Legislative Drafting: Volume 1* at pages 231 to 233, interpretation entails discovering the meaning of words used in a statutory or other written document, and is of various types. Authentic interpretation is used when the meaning of a word is expressly provided for in the document; usual or customary interpretation when based on accepted usages of the word; doctrinal, when it is based on the grammatical arrangement of the words in a sentence; and logical, when based on the intention of Parliament. Crabbe also pointed out that logical interpretation can be liberal or strict.
44. Construction of a legal provision on the other hand is wider in scope than interpretation, and is directed at the legal effect or consequences of the provision in question. Interpretation must of necessity come before construction, and having ascertained the meaning of the words, one construes them to determine how they fit into the scheme of the law or legal document in question. Crabbe in this respect opines that a Constitution is in this respect different from an Act of Parliament, and describes it as a living organism capable of growth and development. In his words “a constitution is a mechanism under which laws are made, and not a mere Act which declares what the law should be”
45. We are persuaded by this explanation, and indeed the approach suggested therein has been adopted by the Kenyan courts. A holistic and purposive interpretation of the Constitution that calls for the investigation of the historical, economic, social, cultural and political background of the provision in question has been consistently affirmed by the courts. The Supreme Court in this respect explained the approach in constitutional interpretation in *Council of Governors v Attorney General & 7 others* [2019] eKLR as follows:
 “[42] Under article 2(1), the Constitution is the Supreme law of the land. Article 259 of the Constitution then gives the approach to be adopted in interpreting the Constitution, basically in a manner that promotes its purposes, values and principles. Suffice it to say that in interpreting the Constitution, the starting point is always to look at article 259 for it provides the matrix, or guiding principles on how it is to be interpreted and then article 260 where specific words and phrases are interpreted. It is imperative to note that while article 259 deals with construing of the Constitution and outlines the principles that underpin that act; article 260 deals with interpretation, that is, it is explicit in assigning meaning to the words and phrases it addresses. Hence the opening words in that article are: “In this Constitution, unless the context requires otherwise-”.[43]Consequently, in search of the meaning assigned to some words and phrases as used in the Constitution, one needs to consult article 260 to find out if that particular term or phrase has already been defined. It is only where the same has not been defined that the Court will embark on seeking a meaning by employing the various principles of constitutional interpretation.....”



46. The various principles of constitutional interpretation have also been the subject of different decisions of this court and the Supreme Court. *In the Matter of Kenya National Commission on Human Rights* [2014] eKLR, the Supreme Court considered the meaning of a holistic interpretation of the Constitution, and stated:

“[26] But what is meant by a ‘holistic interpretation of the Constitution’? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”

47. This view was also expressed by the Supreme Court in *Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others*, [2015] eKLR, that “the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.”

48. A purposive interpretation on the other hand acknowledges that the meaning of language is imprecise, and measures words against contextual, schematic, and purposive considerations. Aharon Barak in the text

“*Purposive Interpretation in Law*” at page 111 explains that:

“According to purposive interpretation, the purpose of a text is a normative concept. It is a legal construction that helps the interpreter understand a legal text. The author of the text created the text. The purpose of the text is not part of the text itself. The judge formulates the purpose based on information about the intention of the text’s author (subjective purpose) and the “intention” of the legal system (objective purpose).”

49. As such, the purposive interpretation avoids the shortcomings of the literal approach, namely absurd interpretations or those that appear to run counter to the purpose and functioning of the legislative regime. The Supreme Court of Kenya in the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others*, [2014] eKLR, confirmed that a purposive interpretation should be given to statutes so as to reveal their true intention. The court observed as follows:

“*In Pepper v Hart* [1992] 3 WLR, Lord Griffiths observed that the “purposive approach to legislative interpretation” has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the court is not to be held captive to such phraseology. Where the court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

“The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give



effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted’.”

50. The persuasive decision of this court in the case of County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR is also illuminating, and it was held therein that:

“Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.”

51. The Constitution in this respect provides the purposes that should guide the Courts in interpreting it in article 259, including the purpose of the specific provisions, and broader rule of law and good governance objectives.

52. It is with these principles in mind that we shall proceed to consider the issues raised in this appeal.

132. Turning on to the applicable criterion in determining whether a statute is constitutional, this Court discussed three guiding principles in Nairobi High Court Petition No E327 of 2020 *Law Society of Kenya v Attorney General & another* (2021) eKLR as follows: -

104. I will also look at the decision in *R v Oakes*. The brief facts are that the respondent, David Edwin Oakes, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s 4(2) of the Narcotic Control Act, but was convicted only of unlawful possession. After the trial judge made a finding that it was beyond a reasonable doubt that the respondent was in possession of a narcotic, the Respondent brought a motion challenging the constitutional validity of s 8 of the Narcotic Control Act. That section provides that if the court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he or she must be convicted of trafficking. The Ontario Court of Appeal, on an appeal brought by the Crown, found that this provision constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence now entrenched in s 11(d) of the Canadian Charter of Rights and Freedoms. The Crown appealed and a constitutional question was stated as to whether s 8 of the Narcotic Control Act violated s 11(d) of the Charter and was therefore of no force and effect. Inherent in this question, given a finding that s 11(d) of the Charter had been violated, was the issue of whether or not s 8 of the Narcotic Control Act was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of s 1 of the Charter.



105. The appeal was dismissed and the constitutional question answered in the affirmative. In so holding, the Supreme Court of Canada, then presided by the Chief Justice in a Seven-Judge bench discussed the criteria in ascertaining the manner in which a limitation to a right or fundamental freedom may be justified. The court came up with a three-pronged criteria. First, the objective which the limitation is designed to serve. Second, the means chosen to attain the objective must be reasonable and demonstrably justified. This is the proportionality test. Third, the effect of the limitation.
106. On the objective test, the Supreme Court stated as follows: -
67. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R v Big M Drug Mart Ltd, supra*, at p 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
107. On the proportionality test, the Supreme Court stated that: -
70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R v Big M Drug Mart Ltd, supra*, at p 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R v Big M Drug Mart Ltd, supra*, at p 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".
108. On the third test, that is the effect of the limitation, the Supreme Court stated that: -
71. With respect to the third component, it is clear that the general effect of any measure impugned under s 1 will be the



infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

133. With such a foundation, I will now proceed to look at the sub-issue at hand which is the jurisdiction of the Enforcement Committee.
134. There can be no doubt that the respondent is one of the constitutional commissions in Kenya and as so provided for in article 248(2) of the *Constitution*.
135. The respondent is established under article 88(1) of the *Constitution*. The respondent and other commissions and independent offices are called upon under article 249, while discharging their duties, to protect the sovereignty of the people, to secure the observance by all State organs of democratic values and principles and to promote constitutionalism.
136. It is for that reason that the respondent and other commissions and independent offices are clothed with both financial and operational independence under article 249 of the Constitution.
137. Article 252 of the Constitution is on the general functions and powers of the constitutional commissions and independent offices. It provides as under: -
 252. General functions and powers
 - (1) Each commission, and each holder of an independent office—
 - (a) may conduct investigations on its own initiative or on a complaint made by a member of the public;
 - (b) has the powers necessary for conciliation, mediation and negotiation;
 - (c) shall recruit its own staff; and
 - (d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.



- (2) A complaint to a commission or the holder of an independent office may be made by any person entitled to institute court proceedings under article 22(1) and (2).
- (3) The following commissions and independent offices have the power to issue a summons to a witness to assist for the purposes of its investigations—
 - (a) the Kenya National Human Rights and Equality Commission;
 - (b) the Judicial Service Commission;
 - (c) the National Land Commission; and
 - (d) the Auditor-General.

138. According to the foregoing provision, any constitutional commission has the powers to conduct investigations either on its own initiative or on the basis of a complaint made by a member of the public. The respondent herein is not an exception.

139. In the course of undertaking such investigations, the Constitution limits the power of the constitutional commissions and independent offices to issue summonses to a witness to only four such entities. The entities are the Kenya National Human Rights and Equality Commission, the Judicial Service Commission, the National Land Commission and the Auditor-General.

140. The respondent herein is certainly not one of such entities which the Constitution bestowed any powers to summon witnesses in the course of undertaking its investigations. As a result, any law or statutory instrument that confers the Respondent with the powers to issue summonses to a witness can only be running afoul the Constitution. Any such law or statutory instrument, shall to that extent, stand in contravention of the Constitution, hence, null and void.

141. This court must, however, make it clear that the respondent still has powers to carry out investigations either on its own initiative or on receipt of a complaint made by a member of the public. The respondent may carry out the investigations in the manner it settles for and may even involve the Peace Committees established under section 17 of the Electoral Code.

142. Once the respondent completes such investigations it may refer the matter to the Director of Public Prosecutions or it may opt to institute appropriate proceedings in the High Court. The respondent may also involve its Peace Committees in conciliation and mediation.

143. Having said so, I will now deal with the Enforcement Committee which is established under section 15 of the Electoral Code. The provision sates as follows: -

- (1) The Commission shall set up the Electoral Code of Conduct Enforcement Committee which shall comprise of not less than five members of the Commission and shall be chaired by a member appointed by the Chairperson: the Commission may nominate a member of its staff to be the secretary to the Committee.
- (2) The Chairperson of the committee shall be a person who is qualified to hold the office of Judge of the High Court.
- (3) Every candidate, official and agent shall—



- (a) acknowledge the authority of the Committee to enforce the provisions of this Code on behalf of the Commission;
 - (b) ensure compliance with summons issued to the party, its candidates or representatives by the Committee;
 - (c) co-operate in the official investigation of issues and allegations arising at election period; and
 - (d) respect and comply with the orders issued by the Committee.
- (4) The Committee shall issue summons to the person, political party or referendum committee against whom a complaint has been received as having infringed the provisions of this Code and any other person who the Commission has reason to believe to have infringed the provisions of this Code to attend its meetings. The meetings will be convened at any place which the Committee may deem fit.
- (5) In its proceedings, the Committee may examine the person summoned and may allow a person to have legal representation.
- (6) The committee shall not be bound by the provisions of the *Criminal Procedure Code* or the *Evidence Act* in its proceedings.
- (7) Every person who is summoned by the Committee and who attends the meetings of the Committee shall be accorded the right to be heard.
- (8) The Committee shall exercise the powers provided under this Code to punish any person found to have infringed this Code.
- (9) The Committee shall deliver its verdict expeditiously and inform the parties of the decision.
- (10) Notwithstanding the provisions of this Code, any complaint submitted in writing alleging any irregularity with any establishment of the electoral process at any stage if not satisfactorily resolved by the peace committee shall be examined and determined by the Committee.

144. By juxtaposing the nature and objects of the Enforcement Committee and the manner in which the Constitution ought to be interpreted and in light of article 252 of the *Constitution*, it is as clear as daylight that the Enforcement Committee was vested with powers to summon witnesses and to conduct hearings in respect of complaints relating to breach of the Electoral Code. The vesting of the powers to the Enforcement Committee is not by the Constitution, but by the Electoral Code under the *Elections Act*.

145. In such a case, and to that extent, the Electoral Code in vesting powers to the Enforcement Committee to summon witnesses and to conduct hearings can only be contrary to the Constitution more so article 2(4) which provides that: -

Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

146. In the present case, therefore, the provisions of the *Elections Act*, the Electoral Code and the Rules of Procedure that confer upon the respondent any powers to summon any witness in the course of its



- investigation and to conduct hearings cannot stand in the face of the Constitution. Those provisions include parts of sections 7, 8 10 and 15 of the Electoral Code as well as rules 15(4) and 17(1) and (2) of the Rules of Procedure. These provisions do not pass the three-tier-test laid in *R v Oakes* case (*supra*).
147. As I come to the end of this issue, I must point out that the constitutional design for the respondent was that its main duty be conducting or supervising referenda and elections. In doing so, disputes are bound to arise. In order to shield the Respondent from venturing into the arena of taking active part in disputes, the Constitution intentionally excluded the respondent from those commissions and independent offices with powers to summon witnesses in the course of carrying out investigations.
148. It is quite disturbing that despite such clear constitutional dimensions, the Electoral Code circumvented the Constitution in an attempt to give the respondent the very powers which the Constitution declined.
149. I think the burden which is already on the shoulders of the respondent in inter alia conducting and supervising fair and transparent elections and referenda is heavy enough and the respondent ought to contend with that. Infact, the respondent is still struggling to fully discharge its mandate. There is no justification whatsoever for the respondent to look for more work to engage in.
150. In fact, if the respondent is to enforce the Electoral Code as it intended in this case, many a times it will be locked up in instances where it is the complainant, the witness, the prosecutor and the arbiter. That is the exact prevailing position in this matter. Such can only be in violation of article 50 of the Constitution.
151. Flowing from the foregoing, this court finds and hold that the respondent: -
- (a) Has no jurisdiction to either summon any witness or to conduct any hearing in relation to a complaint on breach of the Electoral Code or at all.
 - (b) The Electoral Code of Conduct Enforcement Committee has no jurisdiction to enforce the Electoral Code by summoning any witness or conducting any hearing in relation to a complaint on breach of the Electoral Code or at all.
 - (c) The Electoral Code of Conduct Enforcement Committee is an unconstitutional outfit and lacks any legality.
 - (d) The respondent, whether through itself or any of its Committees, has the jurisdiction to conduct investigations on its own initiative or on a complaint made by a member of the public, but cannot summon any witness neither can it conduct any hearing of such a complaint.
 - (e) Once the respondent completes its investigations and forms the opinion that there is need for further action, the respondent may refer the matter to the Director of Public Prosecutions or it may institute proceedings in the High Court. The respondent may also initiate mediation and conciliation through its Peace Committees.
152. Having found that the Electoral Code of Conduct Enforcement Committee is unconstitutional and lacks any jurisdiction to enforce the Electoral Code, the first issue is hereby answered in the negative.
153. I now proceed to deal with the next issue.
- (b) Whether the Electoral Code is in force and if so, whether the Electoral Code is binding upon the Petitioner:
154. The discussion on the first issue has to a great extent answered most of the remaining issues. I will, nevertheless and for completeness of the record, consider them.



155. It has been demonstrated that there is in place an Electoral Code courtesy of the *Elections Act* and the Second Schedule.
156. The Electoral Code as well as the *Elections Act* and the *Election Offences Act* makes it mandatory that the Electoral Code must be subscribed to by every political party participating in the election of a President, a Member of Parliament, a County Governor, a Member of a County Assembly, every candidate and every leader, chief agent, agent or official of a Referendum Committee.
157. Section 20 of the *Election Offences Act* criminalizes the failure to subscribe to the Electoral Code.
158. Further, the Electoral Code has operational timelines. Section 18 provides as follows: -
18. This Code shall apply —
- (a) in the case of a general election, from the date of publication of a notice of election until the swearing in of newly elected candidates; and
- (b) in the case of a by-elections, from the date of declaration of a vacancy until the swearing in of elected candidates.
159. The respondent contended that the petitioner was bound by the Electoral Code on the basis of being a member of the Jubilee Party and also a candidate in the forthcoming general elections.
160. It appears that the respondent's argument runs contrary to the law. The law provides that whether it is a political party or a candidate or a member of the Referendum Committee taking part in an election or referenda, the first port of call is subscription to the Electoral Code.
161. The respondent has not adduced any evidence to confirm that indeed the petitioner or the Jubilee Party subscribed to the Electoral Code for the current election period running from the January 20, 2022 to the declaration of the results of the general election to be held on August 9, 2022.
162. There is also no evidence that the Jubilee Party or the petitioner were charged and convicted for failing to subscribe to the Electoral Code.
163. The issue of whether the petitioner is a candidate in the forthcoming general elections also comes to the fore. Section 2 of the *Elections Act* defines a 'candidate' and 'nomination' as follows: -
- “candidate” means a person contesting for an elective post;
- "nomination" means the submission to the Commission of the name of a candidate in accordance with the Constitution and this Act;
164. It is in public purview that according to the Notices and the election timetable released by the respondent, party nominations are yet to be conducted and there has yet to be formal submission of nominations to the respondent. As a result, the petitioner cannot be deemed to be a candidate in the forthcoming elections.
165. On the basis of lack of subscription to the Electoral Code by the petitioner and the Jubilee Party, there being no evidence of conviction of the petitioner or the Jubilee Party for failing to subscribe to the Electoral Code and there being no evidence that the petitioner is a candidate in the forthcoming elections, this Court finds no basis of holding that the Electoral Code binds the petitioner.
166. Whereas this court finds that the Electoral Code is in force, it declines to find that the Petitioner is bound by the Electoral Code in the circumstances of this matter.



- (c) Whether the respondent's Chairperson erred in chairing the sittings of the Enforcement Committee.
167. The Enforcement Committee has by now been found to be an unconstitutional entity. It is a nullity and void ab initio.
168. In the words of Privy Court in Appeal No 67 of 1960 *Benjamin Leonard Macfoy v United Africa Company Ltd*: -
If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, although it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.....
169. It, therefore, matters not whether the Chairperson of the respondent rightly so chaired Enforcement Committee or otherwise. The Chairperson was without doubt riding on a 'constitutionally-dead horse'.
170. This court, hence, declines to answer the issue for it is overtaken by events and its determination will serve no purpose or at all in this matter.
- (d) Whether the respondent has formulated regulations to guide the enforcement of the Electoral Code:
171. The petitioner's contention in this issue is that the respondent failed to publish the regulations contemplated under section 109(cc) and (ff) of the Electoral Code for the enforcement of the Electoral Code.
172. This court already demonstrated that the Rules of Procedure were promulgated as subsidiary legislation under the powers conferred to the respondent under section 109 of the *Elections Act*.
173. There is evidence that the said Rules of Procedure, although not headed as Regulations, were published in Legal Notice No 139 of 2012.
174. In fact, section 2 of the Statutory Instruments Act defines a statutory instrument to include a rule.
175. The issue is, hence, misconceived and hereby fails.
- (e) Whether the proceedings against the petitioner before the Enforcement Committee are in violation of articles (1)(1), 2(1), 2(4), 3(1), 20(1), 22, 23, 24 (1) (a)-(e), 27, 33, 35(1), 35(3), 47(1), 47(2) and 50 of the *Constitution*:
176. Having found the Enforcement Committee to have been constituted against the Constitution, that in itself is a violation of the Constitution.
177. Without much ado, this court returns the verdict that, in the unique circumstances of this matter, article 2(4) of the Constitution was violated to the extent that the Enforcement Committee was contrary to article 252 of the *Constitution*, article 3(1) was contravened in the respondent's not upholding the Constitution, article 27(1) was infringed for not according the petitioner equal protection and equal benefit of the law.
178. Article 33 of the Constitution was not infringed since the freedom of expression is qualified and the respondent may, going forward, properly so deal with the complaint.



179. On Article 35, there is evidence that the petitioner was not availed with all the necessary evidence against her to be able to properly prepare for her defence. I say so since the respondent received the alleged footage from the Communications Commission of Kenya vide a letter dated February 15, 2022, the very day the petitioner appeared before the Enforcement Committee and proceedings began.

180. The state of affairs further contravenes articles 47 and 50 of the Constitution.

181. In sum, articles 2(4), 3(1), 27(1) 35, 47 and 50 of the Constitution were infringed in this matter.

(f) Reliefs, if any?

182. The petition has to very large extent succeeded. With an exception of finding that article 33 of the Constitution was not infringed the rest of the claims have been sustained.

183. This court is, hence, called upon to consider appropriate remedies. Courts have severally rendered on this subject. The Court of Appeal in Total Kenya Limited v Kenya Revenue Authority (2013) eKLR held that even in instances where there are express provisions on specific reliefs a court is not precluded from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties. The High Court in Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others (2018) eKLR held that article 23 of the Constitution does not expressly bar the court from granting conservatory orders where a challenge is taken on the constitutionality of legislation.

184. In Republic ex parte Chudasama v The Chief Magistrate's Court, Nairobi & another Nairobi HCCC No 473 of 2006, [2008] 2 EA 311, Rawal, J (as she then was) stated that:

While protecting fundamental rights, the court has power to fashion new remedies as there is no limitation on what the court can do. Any limitation of its powers can only derive from the Constitution itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal. See *Gaily v Attorney-General* [2001] 2 RC 671; *Ramanoop v Attorney General* [2004] Law Reports of Commonwealth (From High Court of Trinidad and Tobago); *Wanjuguna v Republic* [2004] KLR 520...The court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many faceted jurisdiction and discretionary powers of the High Court. See *The Judicial Review Handbook* (3rd Edn) by Michael Fordham at 361.

185. The Constitutional Court of South Africa in Fose v Minister of Safety & Security [1977] ZACC 6 emphasized the foregoing as follows: -

Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.

186. Whereas the court will consider the appropriate reliefs in this matter, I must point out that each party shall bear its own costs. I say so because the respondent, in assuming jurisdiction, relied on a High



Court decision in Nairobi Judicial Review Misc Application No 592 of 2017 *Republic v Independent Electoral and Boundaries Commission ex parte Prof Philip Kaloki* which decision had declared the Enforcement Committee a lawful entity.

Disposition:

187. Having so rendered, the following final orders hereby issue: -

- (a) A declaration be and is hereby issued that the respondent's Electoral Code of Conduct Enforcement Committee contravenes articles 2(4), 3(1), 249 and 252 of the Constitution, hence, it is unconstitutional, null and void ab initio.
- (b) A declaration be and is hereby issued that the Summons and the Statement of Breach both dated February 11, 2022 by the respondent to the petitioner are in contravention of articles 2(4), 3(1), 27(1) 35, 47 and 50 of the Constitution.
- (c) An order of *certiorari* be and is hereby issued, calling into this court, and quashing the parts of sections 7, 8, 10 and 15 of the Electoral Code of Conduct under the Second Schedule of the *Elections Act* as well as the parts of rules 15(4) and 17(1) and (2) of the Rules of Procedure on Settlement Disputes establishing and granting powers to the respondent's Electoral Code of Conduct Enforcement Committee to summon witnesses and to conduct hearings of complaints based on allegations of breach of the Electoral Code of Conduct. The said specific portions be and are hereby quashed.
- (d) An order of *certiorari* be and is hereby issued, calling into this court, and quashing the summons and the Statement of Breach both dated February 11, 2022 by the Respondent to the petitioner as well as all the proceedings conducted before the respondent's Electoral Code of Conduct Enforcement Committee in the matter of breach of the Electoral Code of Conduct by the petitioner on February 15, 2022 or on any other date. The said Summons, Statement and proceedings are hereby quashed.
- (e) Each party to bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF APRIL, 2022.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Dr. Oloo and Mr. Oringe Waswa, Learned Counsel appearing for the Petitioner and holding brief for Mr. Orengo, SC and Dr. Otiende Amollo for the Petitioner as well.

Mr. Kipkogei, Mr. Ken Melli and Mr. Ochola, Learned Counsel for the Respondent.

Elizabeth Wanjohi – Court Assistant.

