



**G'Oganyo v Independent Electoral Commission Selection Panel & 2 others;
Independent Electoral and Boundaries Commission & 6 others (Interested
Parties) (Constitutional Petition E345 of 2022) [2022] KEHC 10184 (KLR)
(Constitutional and Human Rights) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E345 OF 2022**

AC MRIMA, J

JUNE 30, 2022

BETWEEN

NORNAEL OKELLO G'OGANYO PETITIONER

AND

**INDEPENDENT ELECTORAL COMMISSION SELECTION PANEL 1ST
RESPONDENT**

NATIONAL ASSEMBLY 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION INTERESTED PARTY**

FRANCIS MATHENGE WANDERI INTERESTED PARTY

JUSTUS ABONYO NYANG'AYA INTERESTED PARTY

IRENE CHEROP MASIIT INTERESTED PARTY

JULIANA WHONGE CHERERA INTERESTED PARTY

KATIBA INSTITUTE INTERESTED PARTY

FIDA KENYA INTERESTED PARTY



Gazettement for primaries and later abandoning the pursuit of an elective position, was legally deemed to have been part of an election.

The petition challenged the appointment of Irene Cherop Masiit (the 4th interested) party as an Independent and Electoral Boundaries Commission (IEBC) commissioner on grounds that she stood for an election in 2017 and had held public office. The court held that the removal from office of the 4th interested party with less than two months to the general election, was likely to adversely affect the IEBC. It was in public interest that an ideal environment be created for the IEBC to discharge its constitutional mandate.

Reported by John Ribia

Constitutional Law – two thirds gender rule – application of the two thirds gender rule - application in appointive positions – whether the composition of Independent Electoral and Boundaries Commission commissioners at 5 men and 2 women was compliant with the two-thirds gender principle - Constitution of Kenya, 2010 article 27(6), (7) and (8).

Constitutional Law – constitutional commissions – Independent Electoral and Boundaries Commission (IEBC) – IEBC commissioners – eligibility to be an IEBC commissioner - whether a person who unsuccessfully took part in a party primary could be considered to have vied for an election so to be ineligible for appointment as a commissioner of IEBC before the lapse of five years – whether a person that undertook to resign from public office upon appointment as a commissioner to IEBC would be deemed ineligible to be a commissioner on grounds of holding State or public office - whether a person that had contested for an election 4 years and 4 months before their appointment as a commissioner of the IEBC was eligible to be a commissioner considering the requirement that one was ineligible for appointment as an IEBC commissioner if the person had at any time within the preceding five years vied as a candidate in an election - Constitution of Kenya, 2010, article 88(2).

Electoral Law – elections - candidate for an electoral position – who was a candidate - when was a candidate deemed to have taken part in an election - whether a person that had been gazetted as taking part in party primaries, but had abandoned the pursuit of the elective position, was legally deemed to have taken part or vied for an election – Elections Act, sections 2 and 31; Political Parties Act section 2; Constitution of Kenya, 2010, article 88(2).

Words and Phrases – aspirational - having a strong desire to achieve - Black's Law Dictionary 11th edition; Thomson Reuters Publishers, page 141.

Words and Phrases – aspirant - aspiring towards a particular achievement or status; a person who had aspirations to succeed in something - Concise Oxford English Dictionary, twelfth edition; Oxford University Press, page 77.

Brief facts

The petitioner contested the appointment of Irene Cherop Masiit (the 4th interested party) as an Independent and Electoral Boundaries Commission (IEBC) commissioner on grounds that the 4th interested party met two of the criteria set out in article 88(2) and (3) of the Constitution of Kenya, 2010 (Constitution) for persons who were ineligible for appointment as IEBC commissioners. In particular, the 4th interested party stood for an election as a Member of the National Assembly - Women Representative of the Elgeyo-Marakwet County in 2017 and she had held public office. The petitioner also contested the constitution of the IEBC, alleging that the composition of 5 men and 2 women violated the two thirds gender rule.

Issues

- i. Whether a person who unsuccessfully took part in a party primary could be considered to have stood for an election in accordance with article 88(2)(a) of the Constitution as to be ineligible for appointment as a commissioner of IEBC before the lapse of five years.
- ii. Whether a person that had been gazetted as taking part in party primaries, but had abandoned the pursuit of the elective position, was legally deemed to have taken part or stood for an election.



- iii. As regards electoral positions, who was a candidate?
 - 1. When was a candidate deemed to have taken part in an election?
- iv. Whether a person that undertook to resign from public office upon appointment as a commissioner to IEBC would be deemed ineligible to be a commissioner on grounds of holding State or public office.
- v. Whether a person that had contested for an election 4 years and 4 months before their appointment as a commissioner of the IEBC was eligible to be a commissioner considering the requirement that one was ineligible for appointment as an IEBC commissioner if the person had at any time within the preceding five years stood as a candidate in an election.
- vi. Whether the composition of IEBC commissioners at 5 men and 2 women was compliant with the two-third gender principle.
- vii. Whether the High Court could sanction an unconstitutionality where the circumstances favoured public interest maintenance of the prevailing status quo.

Held

1. Article 88 (2) and (3) of the Constitution listed considerations that could disqualify one from being eligible for appointment as a member of the IEBC. They were if the person had, at any time within the preceding five years, held office, or stood for election as a Member of Parliament or of a county assembly; or a member of the governing body of a political party; or held any State office. A member of the IEBC was not to hold another public office.
2. There was no evidence or any assertion that the 4th interested party, at any time prior to her appointment as a commissioner, was a Member of Parliament or a Member of a County Assembly anywhere in Kenya. There was equally no evidence that the 4th interested party was a member of the governing body of any political party in Kenya within five years prior to her impugned appointment.
3. Section 31 of the Elections Act set out the manner in which political parties were to nominate their candidates. From section 31, two terms, a candidate and an aspirant came to the fore. The Constitution was silent on the two terms. The Elections Act defined the term candidate as a person contesting for an elective post. An aspirant was a person that was aspiring towards a particular achievement or status. A person who had aspirations to succeed in something. Being aspirational was having a strong desire to achieve.
4. Aspiring to hold a political office was not recognized in law and was of no legal consequence. Any person was at liberty to aspire to hold any political office. In the context of elections, a political aspirant was a person who only had a strong desire to attain a certain political seat. It was a person desirous of achieving a political status. Such a person had no legal recognition *per se*.
5. A candidate was a person who had travelled beyond simply aspiring to attain a political office. A candidate went ahead and was subjected to the law concerning the nomination of candidates. For instance, for a contested elective position in a political party set up, a candidate had to first take part in the party primaries. If successful, then the person's name was submitted to the IEBC in accordance with section 31 of the Elections Act and the candidate found way to the ballot.
6. For a candidate irrespective of being independent or belonging to a political party, it was the IEBC which had to be satisfied that such a person had met all the legal requirements before it published the name in the Kenya Gazette. Such a person's name then appeared in the ballot and was eligible to be elected at the election.
7. The Elections Act defined an election as a presidential, parliamentary or county election and it included by-elections. The Political Parties Act defined an election in a more elaborate manner. Section 2 of the Political Parties Act defined an election as the act of selecting by vote, of a person or persons from among a number of candidates to fill an office or to membership of any political party and included a presidential, parliamentary or county election.



8. An election, being a process included the manner in which a person was nominated as a candidate. The process of nomination of the candidates who eventually took part in an election was also part of an election.
9. There was a distinction between standing for an election and holding an office. When one transcended the borders of political aspirations and offered themselves for party nominations, then such a person was a candidate and was deemed to have taken part in an election as long as one was gazetted by IEBC to take part in the primaries. That was the same position when the successful person in party primaries proceeded to contest for the elective position in an election. The person took part in an election even if they later lost in the election.
10. In the event the one who contested in an election was successfully elected and assumed office, he or she held that office. Therefore, any participation beyond one aspiration into an elective position transcended one from an aspirant into a candidate who took part in an election if such a person was gazetted by IEBC to take part in party primaries.
11. It mattered not at what point in time the person abandoned the pursuit of the elective position. As long as the person's name appeared in the Kenya Gazette as taking part in party primaries, such a person was legally deemed to have taken part or stood for an election.
12. There was evidence that the 4th interested party expressed interest in the seat of women representative for Elgeyo-Marakwet County in 2017. She offered herself and took part in the party primaries through her then party, Jubilee Party. The IEBC published Gazette Notice No. 3796 dated April 13, 2017 pursuant to section 13(2C) of the Elections Act. Whereas the 4th interested party was not successful in her bid to be in the ballot, she nevertheless took part in the party primaries. By doing so, and in line with the legal principle that an election was a process and not an event, the 4th interested party was deemed to have stood for an election in terms of article 88(2)(a) of the Constitution.
13. By the time the 4th interested party was appointed as a commissioner on September 1, 2021, 5 years had not lapsed. The 4th interested party was appointed 8 months before the lapse of the constitutionally decreed 5-year period.
14. There was no evidence that the 4th interested party held any State office at her appointment. From the vetting report by the National Assembly's Departmental Committee of Justice and Legal Affairs Committee, the 4th interested party admitted that by the time of her nomination she was a serving board member of the National Government – Constituency Development Fund (NG-CDF). She further admitted that her position was a public office and, given the nature of the position of a commissioner of IEBC, she undertook to resign if she was eventually appointed as a commissioner of IEBC. The record remained silent on whether the 4th interested party indeed resigned from the board membership of the NG-CDF either before or on her appointment. Granting the benefit of doubt, it was found that the 4th interested party did not hold a State or a public office at the time of appointment.
15. The 4th interested party was ineligible for appointment as a member of the IEBC since she had stood for an election as a Member of Parliament in 2017 and at the time of her appointment the period of 5 years from the time she stood for the election had not lapsed.
16. The constitutional foundation of the gender rule was article 27 of the Constitution on equality and freedom from discrimination. Whereas Parliament had been on the receiving end over the failure to pass the necessary legislation to effectuate the gender rule and had been perceived as the greatest impediment to the rule. It had, nevertheless, taken some measures towards attainment of the rule.
17. One of the initiatives by Parliament to effectuate the gender rule was the enactment of the National Gender and Equality Commission Act, 2011. The legislation was aimed at establishing the National Gender and Equality Commission as a successor to the Kenya National Human Rights and Equality Commission pursuant to article 59(4) of the Constitution, to provide for the membership, powers and functions of the Commission, and for related purposes. Whereas the gender rule on the elective



- positions called for progressive realization, the realization of the rule on appointive positions could only be immediate.
18. The IEBC as constituted had 7 commissioners, 5 men and 2 women. Applying the gender rule on the 7 commissioners, the commissioners ought to be in the ratio of 4.6667 to 2.3333. Without any legislative guidance on how such computations ought to be dealt with, by applying the standard mathematical formula in rounding off figures, those figures translated to 5 and 2 respectively. The IEBC as constituted of 7 commissioners in the ratio of 5 men and 2 women complied with the gender rule.
 19. Even as the petitioner was well aware that the 4th interested party had been appointed and sworn into office, the petition was not amended to seek a specific prayer on the removal. Given the history of Kenya on women empowerment and the clamour on the gender rule, it would be imprudent and against public interest to reduce the current number of women in the IEBC. Whereas there were other women who could be qualified to serve as commissioners of the IEBC, the process of replacing a commissioner took time. The selection panel stood dissolved by operation of the law.
 20. Any appointment of a commissioner of IEBC had to be initiated through the passing of the necessary legislation setting up another selection panel. The chances of that happening with the general elections scheduled being in less than two months, were very minimum, if at all any. If the 4th interested party was removed from office then the IEBC would have to operate for a while with only one woman and 5 men. Such a scenario ate into the little gains made on women empowerment.
 21. The removal from office of the 4th interested party, with less than two months was likely to adversely affect the IEBC. The IEBC was on a very high gear in its preparations for the general elections. Committees with specific mandates had to be in place and the removal of any of its members would affect the performance of such committees. It was in public interest that an ideal environment be created for the IEBC to discharge its constitutional mandate. The converse would not be fitting for Kenya.
 22. After the elections, the courts would battle with election petitions. That would be for a minimum of one year considering the timelines in law. During that time, the IEBC, which was a party to every such election petition, was expected to participate. That called for the involvement of all those who took part in the preparations, otherwise the IEBC could find itself straying.
 23. It prudent to allow the 4th interested party to remain in office. Whereas the court could be seen as sanctioning an unconstitutionality, the circumstances of the matter called for the maintenance of the prevailing status quo. It was in the greater public interest and good that the preparations towards the holding of the general election were not interfered with lest Kenya could find itself in a constitutional crisis.

Petition dismissed.

Orders

No orders as to costs.

Citations

Cases

Kenya

1. *Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others* Petition 371 of 2016; [2017] eKLR - (Followed)
2. *East Africa Cables Limited v Public Service Board* Civil Application 109 of 2007 (UR 71/712007); [2007] eKLR - (Explained)
3. *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* Petition 102 of 2011; [2011] eKLR - (Explained)



4. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] 3 KLR 717 - (Followed)
5. *Kalya Soi Farmers' Cooperative Society v Paul Kirui & another* Civil Suit 276 of 2012; [2013] eKLR - (Explained)
6. *Kamuru, Marilyn Muthoni v Attorney General* Petition 566 of 2012; [2016] eKLR - (Explained)
7. *Kitbeka, Simeon Kioko & 18 others v County Government of Machakos & 2 others* Petition 9 of 2018; [2018] eKLR - (Explained)
8. *Mwau, John Harum & 2 others v Independent Electoral & Boundaries Commission & 2 others* Petition 2 & 4 of 2017 (Consolidated); [2017] eKLR - (Explained)
9. *National Gender and Equality Commission & another v Judicial Service Commission & 2 others* Petition 446 & 456 of 2016; [2017] eKLR (Consolidated) - (Explained)
10. *Ndii, David & 4 others v Attorney General & 3 others; Kenya Human Rights Commission & 2 others (Intended Amicus Curiae)* Petition E282 of 2020; [2020] eKLR - (Explained)
11. *O'donovan, Anita Chelangat & 2 others v Fedrick Kwame Kumah & 2 others* Civil Appeal 300 of 2015; [2015] eKLR - (Explained)
12. *Odinga, Raila Amolo & another v Independent Electoral and Boundaries Commission & 2 others* Presidential Petition 1 of 2017; [2017] eKLR - (Explained)
13. *Okello, Bernard Odero & another v Cabinet Secretary for Industrialization, Trade and Enterprise Development & another; Cyprian Mugambi Ngutari & 7 others (Interested Parties)* Petition 100 & 99 of 2020 (Consolidated); [2020] eKLR - (Explained)
14. *Pepublic v Law Society of Kenya & another ex-parte Frank Ochieng Waluke* Judicial Review Case 41 of 2016; [2016] eKLR - (Explained)
15. *Republic v Chief Magistrate's Court, Nairobi & another ex parte Hinesh K Chudasama* [2008] 2 EA 311 - (Explained)
16. *Total Kenya Limited v Kenya Revenue Authority* Civil Application 135 of 2012; [2013] KECA 437 (KLR) - (Explained)
17. *Wandayi, James Opiyo v Kenya National Assembly & 2 others* Judicial Review Application 258 of 2016; [2016] eKLR - (Explained)

South Africa

Fose v Minister of Safety & Security (CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 - (Explained)

Texts

1. Bachcini, S., (Ed) (2012), *Concise Oxford English Dictionary* Bingley, West Yorkshire: Emerald Group Publishing Limited 12th Edn p 77
2. Garner, BA., (Ed) (2019), *Black's Law Dictionary* Toronto: Thomson Reuters 11th Edn
3. Lasseko-Phooko M., Mahomed, S., (Eds) (2021), *The Challenges to Gender Equality in the Legal Profession in South Africa* Pretoria: Africa Human Rights Law Journal Vol 21

Statutes

Kenya

1. Constitution of Kenya articles 9(2); 27(3)(6)(7)(8); 88(2)(a); 97; 98; 118; 124; 137; 177; 180; 232(1)(i); 250(2)(b) - (Interpreted)
2. Elections Act, 2011 (Act No 24 of 2011) sections 13(3)(c); 31; 33 - (Interpreted)
3. Independent Electoral and Boundaries Commission Act, 2011 (Act No 9 of 2011) paragraphs 3, 4, 5 - (Interpreted)
4. National Gender and Equality Commission Act, 2011 (Act No 15 of 2011) sections 2, 3, 7 - (Interpreted)
5. Political Parties Act, 2011 (Act No 11 of 2011) section 2 - (Interpreted)



6. Public appointments (Parliamentary Approval) Act, 2011 (Act No 33 of 2011) section 7 - (Interpreted)
7. Supreme Court Act, 2011 (Act No 7 of 2011) In general - (Cited)

Advocates

Mr. Malenya, Learned Counsel for the Petitioner
Miss. Akama, Learned Counsel for the 2nd Respondent
Miss. Wamuyu, Learned Counsel for the 3rd Respondent
Dr. Mutubwa, Learned Counsel for the 1st Interested Party
Mr. Kouna, Learned Counsels for the 4th Interested party
Mr. Ochiel Dudley, Learned Counsel for the 6th Interested Party

JUDGMENT

Introduction

1. In this matter, the composition of the Independent Electoral and Boundaries Commission (hereinafter referred to as ‘the 1st interested party’, or ‘the IEBC’ or ‘the Commission’) and the eligibility of one of its Commissioners are impugned.
2. It is contended that the composition of the IEBC offends article 27 of the [Constitution](#) whereas the appointment of one of the Commissioners is in contravention of article 88(2) of the [Constitution](#).
3. The petition is partly supported by Katiba Institute, the 7th interested party herein and is opposed by the 2nd and 3rd respondents and the 1st and 4th interested parties. The rest of the parties did not take part despite service.

The Petition:

4. The petition is dated August 31, 2021. It is supported by two affidavits sworn by the petitioner herein, Nornaël Okello G’oganyo, on August 31, 2021 and September 1, 2021 respectively.
5. The petitioner’s grievance is two-pronged. He challenged the composition of the IEBC on the fact that it offends the two-third gender requirement under article 27(6), (7) & (8) of the [Constitution](#).
6. It was his case that the decision by the Independent Electoral Commission Selection Panel, (hereinafter referred to as ‘the Selection Panel’ or ‘The 1st respondent’) to forward to the President for appointment, the names of two females and two males was in contravention of the gender parity principle since there were already 3 commissioners at the IEBC all of whom were all men thereby making a total of 5 men against 2 women.
7. The second limb of the petition stemmed from the contention that Irene Cherop Masiit, the 4th interested party herein, was ineligible for appointment as a commissioner.
8. It was the petitioner’s case that the 4th interested party stood for the position of Women Representative in Elgeyo-Marakwet County in 2017 and, therefore, her appointment was in contravention of article 88(2) (a) of the [Constitution](#) which bars a person from appointment as a member of the Commission if the person has, at any time within the preceding five years, held office of the governing body of a political party or stood for election.
9. On the foregoing factual and legal foundation, the petitioner sought the following reliefs: -



- a. A declaration be and is hereby made that the respondent by failing to obtain and/or consider the Nominees' past political standing and/or interest from the interested party prior to approving the four names and forwarding the same to the President and in particular the name of Ms Irene Cherop Masit contravenes article 88(2) of the Constitution.
- b. A declaration be and is hereby made that the list of the four nominees to the IEBC comprising of two males namely: Mr Francis Mathenge Wanderi and Mr Justice Abonyo Nyang'aya and two female nominees namely; Ms Irene Cherop Masit and Ms Juliana Whonge Cherera as selected by the 1st respondent contravenes article 27(6), (7) and (8) of the Constitution on the requirement for compliance with the two-Thirds gender principle therefore null and void.
- c. A declaration be and is hereby given that the 2nd respondent shall not and cannot approve the name of Ms. Irene Cherop Masit for appointment as a member of the Independent Electoral and Boundaries Commission as she is ineligible for appointment by dint of article 88(2) of the Constitution.
- d. A declaration be and is hereby given that the 2 respondent cannot approve nor forward the list of Four names of the nominees to the President for appointment as members of the IEBC as their selection contravene article 27(6)(7) and (8) of the Constitution.
- e. An order be and is hereby given barring the President from appointing and/or gazetting the four nominees namely; Mr Francis Mathenge Wanderi, Mr Justice Abonyo Nyang'aya, Ms Irene Cherop Masit and Ms Juliana Whonge Cherera as members of the interested party.
- f. An order be and is hereby given directing the 1st respondent to submit a new and/or revised list of four nominees to the President from the thirty-six shortlisted and interviewed candidates in strict compliance with article 27, 73 and 88 of the Constitution.
- g. The costs of this petition be provided for.

The Petitioners' Submissions:

10. In further support of his case, the petitioner filed written submissions dated October 4, 2021. In addressing the issue of minimum gender representation, he submitted that the court has an obligation under article 27 to actualize gender mainstreaming in respect of composition of the IEBC.
11. He referred to sections 2 and 7 of the National Gender and Equality Commission Act on the need to actualize gender mainstreaming and the guiding principles of the Commission in urging the court to ensure women and men benefit equally and that inequality is not perpetuated in all administrative, political and societal spheres.
12. The petitioner further referred to the Advisory Opinion by Chief Justice Emeritus, David Maraga that directed the President to dissolve Parliament for failing to accord to the two-third gender rule where he observed *inter-alia*: -

The two thirds gender rule is an acronymy for the constitutional imperative which prohibits any form of discrimination in the appointive and elective positions in our country on the basis of one gender. It is grounded on the declaration in article 27(3) of the Constitution that women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and societal spheres.

13. The petitioner further pitched his case on the basis of the South African scholarly work of “The Institute for Justice and Reconciliation, titled “Despite progressive laws, barriers to full gender equality



persists in South Africa” and the works of Phooko M. Mahomed, The Challenges to Gender equality in the legal profession in South Africa; A case for substantive equality as a means of achieving gender transformation”, where it was observed by the former that: -

Equality in the Constitution also has to be understood to entail a remedial and redistributive aspect as a legal right in section 9(2) of the Constitution.

14. In rejecting the propriety of the 4th interested party’s position as a commissioner, it was submitted that election is a process and not an event. He referred to section 2 of Political Parties Act which defines election to mean the act of selecting by vote, of a person or persons from among a number of a candidate to fill an office. Reference was also made to the Supreme Court decision in Raila Amolo Odinga & another v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR where it was observed;

Elections are not isolated events, but are part of a holistic process of democratic transition and good governance...

Incidentally, IEBC’s own Election manual (source book) recognizes that an election is indeed a process.

15. Further reliance was placed on Republic v Law Society of Kenya & another ex-parte Frank Ochieng Waluke [2016] eKLR and in John Harum Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others where it was observed in the latter that: -

...nomination is depicted as a process through which candidates are identified for participation in an election, subject to them being properly qualified under the law for the elective seat that they seek. It is a critical component of an electoral process, without which there would be no election.

16. On the foregoing, the petitioner reiterated that nomination must be seen as part of election process and to that end, article 88(2) barred the 4th interested party from becoming a commissioner.
17. In his oral submissions, learned counsel for the petitioner reiterated that the Commission as presently constituted with 5 men and 2 women is in violation of the Constitution under article 27(3), (6), and (7) and section 3 & 7 of Gender and Equality Commission Act.
18. It was further her case that the 5-year implementation period of the gender parity principle had long passed and that IEBC ought to have 3 women and not 2 women.
19. On the eligibility of the 4th interested party as a Commissioner, it was his case that since she stood for the position of a Women Representative in 2017 in Elgeyo-Marakwet County through Jubilee Party, her independence was compromised.
20. Counsel distinguished the decision in FIDA Kenya and 5 others v The Attorney General & another, relied upon by the 2nd respondent on gender principle by stating that the decision was made one year after promulgation of the Constitution and the court, in the decision, was aware that state was to take steps to adhere to gender parity. He also hastened to add that the famous ‘BBI case’ did not address the gender issue of the IEBC but its quorum.
21. Counsel urged the court not to entertain the Utilitarianism School of Thought as poised by the Commission on the basis that it is a school of thought not a tool of interpretation of the Constitution.
22. In the end, counsel urged the court to note that it’s been 12 years since the promulgation of the Constitution and compliance is now long overdue.



23. The court was, hence, urged to allow the petition as prayed.
24. As the petition was partly supported by the 7th interested party, I will now consider its case.

The 7th Interested Party's Case:

25. The 7th interested party, Katiba Institute, a constitutional research, policy and litigation institute established to promote knowledge and understanding of Kenya's Constitution and constitutionalism, partly supported the petition through written submissions dated November 29, 2021.
26. In highlighting the submissions, counsel stated that the Constitution of Kenya Review Commission (CKRC) had provisions which form the basis of article 27 of the Constitution.
27. Counsel pointed out that the CKRC Report indicated that, beyond lack of effective participation in the economy, women have made little progress in politics and that the primary reason is that women's right to vote remain restricted principally because, in most cases, the only candidates to vote for are male.
28. It was its case that women do not often offer themselves for elective posts for reasons including culture, patriarchal systems, political institutional structures, and mode of elections hence article 27(8) which sought to bring the balance.
29. Counsel submitted that IEBC is an appointive body and is bound by the Constitution and other international instruments which Kenya is a signatory to. As such, it should have appointed 4 men and 3 women.
30. It was its further case that under article 232(1)(i) of the Constitution, both men and women are entitled to the right to "equal and fair access to opportunities in all political, economic, cultural and social spheres" and to "adequate and equal opportunities for appointment, training and advancement at all levels of the public service" under article 232(1)(i).
31. It was submitted that the gender ceiling of not more than two-thirds of the members of elective or appointive bodies not to be of one gender requires that, of the 7 Commissioners at IEBC, not more than 4 Commissioners can be of the same gender.
32. Counsel submitted that the gender parity under article 27(8) must be attained at once as opposed to progressively. He referred to the decision in Marilyn Muthoni Kamuru v Attorney General [2016] eKLR where the court observed that as far as appointive positions are concerned, they be realized immediately and that not more than two-thirds of the members of an appointive body is of the same gender is the bare minimum.
33. Further support was drawn from Bernard Odero Okello & another v Cabinet Secretary for Industrialization, Trade and Enterprise Development & another; Cyprian Mugambi Ngutari & 7 others (Interested Parties) [2020] eKLR where the ELRC court spoke to article 27(8) and the need to realize it immediately as follows:

There is no lack of qualified women for appointment to the Tribunal. No valid reason has been given by the respondents for failure to appoint at least two thirds of women to the Tribunal. The legal fraternity is awash with women who meet the qualifications that the respondents allege they were looking for. All they needed to do was to advertise publicly for those qualified to apply. I thus entirely agree with the sentiments of the Judge in Marilyn Muthoni Kamuru & 2 others v Attorney General & another [2016] eKLR that: "I would



therefore agree that article 27(8), especially as far as the appointive positions are concerned, should be realized immediately.

34. The 7th interested party prayed that the petition be allowed on the aspect of the composition of the IEBC. It, however, left the issue of the eligibility of the 4th interested party to the court.
35. I will now deal with the parties that opposed the petition.

The 2nd Respondent's Case

36. The National Assembly opposed the petition through the replying affidavit of Michael Sialai, the Clerk to the National Assembly, deposed to on March 4, 2022.
37. He deposed that the National Assembly has the constitutional mandate under article 250(2)(b) of the *Constitution* to approve the members of the IEBC.
38. He deposed that the Selection Panel recommended to the President 8 persons for consideration for appointment of four persons as required under paragraphs 3, 4 and 5 of the 1st schedule to the *Independent Electoral and Boundaries Commission Act*.
39. That subsequently, the National Assembly received notification from the President appointing the Juliana Whonge Cherera, Francis Mathenge, Irene Cherop Masit and Justus Abonyo Nyang'aya and the matter was referred to the National Assembly's Departmental Committee of Justice and Legal Affairs Committee for approval and vetting in accordance to article 124 and Standing Order 42(3)(c) of the National Assembly.
40. He further deposed that the Justice and Legal Affairs Committee, in conducting the approval hearings was guided by section 7 of the *Public appointments (Parliamentary Approval) Act 2011*, undertook public participation as required under article 118 and thereafter notified the general public in print advertisement on August 10, 2021, of the intention of the Committee to conduct vetting and approval and to that end, inviting memoranda on the suitability of otherwise hearing of the nominees.
41. It was his case that the Committee thereafter conducted the approval hearings in accordance to the *Constitution* and on September 1, 2021, through gazette notice No 9082 appointed 2nd to 5th interested parties as members of the IEBC. They were subsequently sworn to office on September 2, 2021.
42. On appointment of the 4th interested party, he deposed that all the interested parties appeared before the Departmental Committee of the National Assembly and confirmed that the 4th interested party had not stood for any elections within 5 years preceding the elections and therefore was compliant with article 88 of the *Constitution*.
43. On gender principle rule, he deposed that the court ought to find guidance by the decision in *National Gender and Equality Commission & another v Judicial Service Commission & 2 others* [2017] eKLR where the court upheld that of seven persons, two-thirds amounts to five persons while one third amounts to two persons.

The Submissions:

44. The court's jurisdiction was challenged on the basis that the matters raised in the petition had been overtaken by events.
45. On whether the 4th interested party was fit for disqualification, it was submitted that she had been subjected to the procedure under section 5 of the IEBC Act and was approved by Parliament where there was public participation. Further that the Legal Affairs Committee had confirmed that the 4th



interested party was not in contravention of article 88 of the *Constitution*. It was his case that the 4th interested party only participated in nominations and that party primaries are different from general elections.

46. On the gender principle, he submitted that the approval was conducted by the Justice & Legal Affairs committee at public hearings. In reference to the decision in *FIDA Kenya & 5 others v The Attorney General & another*, he submitted that the requirement is attained gradually.
47. In the end, it was maintained that the petition was misguided and ought to fail.

The 3rd Respondent's Case:

48. The 3rd respondent, the honourable Attorney General, opposed the petition through grounds of opposition dated May 23, 2022.
49. It claimed that the 1st respondent was not a body corporate and could not sue or be sued in law. it asserted that the orders sought against it were untenable since it stood dissolved.
50. Challenge to the petition was further made on the position that the membership of the commission in issue was similar to the membership of the Supreme Court which was upheld by the High Court to be constitutionally sound.
51. As regards propriety of the 4th interested party, it was its case that she did not make it to the list for the general elections of 2017 and was, therefore, not a candidate nor a holder of an electoral seat to bring her within the disqualification under article 88(2) of the *Constitution*.

The Submissions

52. The 3rd respondent urged its case further through written submissions dated May 23, 2022.
53. was its case that the issue of two-thirds gender principle as settled in *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* [2011] eKLR.
54. On propriety of the 4th interested party, it was submitted that the petitioner misconstrued article 88(2) of the *Constitution* to disqualify her.
55. It was submitted that party primary means “the process through which a political party elects or selects its candidates for a forthcoming general election or for a forthcoming by-election and unless and until a member of a political party wins at the party primaries, he/she cannot contest for an elective post’.
56. It was further its case that the rest of the prayers sought to bar the appointments are now overtaken by events.
57. In her oral submissions, counsel for the 3rd interested party aligned herself to the submissions of the 2nd interested party. It was her case that the petition cannot stand since party nominations are different from the general election.
58. Counsel argued further that the 1st respondent cannot be sued since it’s not a body corporate. That it is disbanded upon completion of duty and as such no orders can issue against the 1st respondent.

The 1st Interested Party's Case

59. The 1st interested party opposed the petition through an amended reply to the petition dated September 10, 2021.



60. It was its case that since no prayer was directed at it, it was non-suited in the dispute. It stated that the IEBC is a constitutional Commission and the process of appointment of its chairpersons, commissioners is set out in article 250(2) of the Constitution as being the function of national legislation.
61. On the foregoing, it was its case that the IEBC does not play any role in the appointment of the Commissioners and the petition against it is a non-starter.
62. Separately, the IEBC made its case stating that the quest to injunct the National Assembly was an interference of its legislative, representative and oversight roles.
63. It claimed further that it was in the interest of the stability of the nation, smooth preparation of the forthcoming elections and implementation of the Election operation plan, that the process of appointment is left to go on.

The Submissions

64. In further support of its case, the 1st interested party filed written submissions dated May 19, 2022.
65. It was submitted that most of the prayers sought by the petitioner were overtaken by events since the 2nd to 5th interested parties had been concluded and swearing in had taken place on September 2, 2021.
66. To buttress the foregoing, support was found on various decisions including, Anita Chelangat O'donovan 2 others v Fedrick Kwame Kumah & 2 others [2015] eKLR, Kalya Soi Farmers' Cooperative Society v Paul Kirui & another [2013] eKLR where it was observed in the former that: -

Orders may not be issued if the same would not be enforced or will be ineffective for practical purposes as the same would merely be an academic exercise.

67. As regards composition of the Commission, it was submitted that the Supreme Court decision on the BBI case made it clear that the IEBC was properly constituted in accordance with the Constitution and the law. He urged the court to be guided by the decision.
68. He further urged the court not to allow the petition based on operation of the principle of proportionality and public interest. It was his submission that the court must consider realities on the ground and maintain the status quo for the sake of the country.
69. Reliance was placed on James Opiyo Wandayi v Kenya National Assembly & 2 others [2016] eKLR where public interest was considered as paramount in the following terms: -

...it follows that to purport to administer power in a manner that is contrary to the expectation to the people of Kenya would be contrary to the said constitutional provisions.....
70. Counsel further referred to East Africa Cables Limited v Public Service Board where the Court of Appeal settled for the utilitarianism in creating greater happiness for greater majority. The learned judges observed as follows: -

We think that in the particular circumstances of this case, if we allowed the application, the consequences of our orders would harm the greatest number of people. In the instance we would recall that advocates of utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action... then we should choose the



alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods.

71. In conclusion it was urged that granting the orders would cast a shadow of doubt on IEBC's ultimate declaration of the results of the forthcoming general elections, a far-reaching consequence that could undermine stability of the nation.
72. This court was urged to dismiss the petition with costs.

The 4th Interested Part's Case:

73. The 4th interested party, Irene Cherop Masit, opposed the petition through her replying affidavit deposed to on September 2, 2021 and further affidavit deposed to on May 23, 2022.
74. It was her case that the petition is factually incorrect, since, five years before her nomination as a commissioner, she did not hold office nor vie for elections as a member of parliament or county assembly; or a member of the governing body of a political party.
75. She deposed that the election process as per section 13 of the *Elections Act* commences after political parties have submitted the list of nominees to the IEBC and the same applies to independent candidates who are issued with clearance to vie for an elective position.
76. It, therefore, was her case that election process commences upon the day specified by the IEBC under section 13(3) of the *Elections Act* and as such, party primaries is a pre-election process. She urged the court to distinguish pre-election processes from election process. For the former, it was her case that the disputes are handled by Political Parties' Disputes Tribunal and the latter by the IEBC.
77. In the further affidavit, she deposed that her name did not appear in the list of persons candidates who vied for the position of Women Representative for Elgeyo-Marakwet County. She referred the court to data report of 2017 Elections on County Woman Representative to the National Assembly Elections results for the August 8, 2017.
78. She deposed further that she is a person of integrity with no affiliations to any political party and as such will not exercise any bias. To lend credence to her assertion, she referred the court to the clearance she received for the Office of the Registrar of Political Parties.
79. It was her case further that she disclosed the issue about vying and she was extensively interrogated by the National Assembly's Committee on Legal Affairs where it was eventually determined that she had participated in pre-election process.

The Submissions

80. The 4th interested party filed written submissions dated May 3, 2022. In contesting the assertion that she vied for the position of women representative, it was her case that she only contested in Jubilee Party Primary elections seeking nomination from her party as a candidate in the general elections for the position of women representative.
81. She was emphatic that she did not contest the position of women representative to the National Assembly for Elgeyo-Marakwet County in the 2017 general elections.
82. She asserted that Jubilee Party Primaries held in 2017 did not constitute an election as envisaged under article 88(2)(a) of the *Constitution*.



83. While referring to section 2 of the *Elections Act* she submitted that the party primaries and elections are distinct. It was her case that in party primaries, only registered members of a contestant's political party are eligible to vote under section 38 of the *Political Party's Act*.
84. On the foregoing, she submitted that party primaries precede general elections and to that end, section 13(1) of the *Elections Act* requires political parties to nominate its candidates for elections at least ninety days before a general election.
85. To further draw the distinction between party primaries and elections, she submitted that while general elections are governed by chapter seven of the *Constitution* of Kenya, *Elections Act* and the IEBC Act, party primaries are self-governed and are conducted in accordance with each political party's constitution and nomination rules.
86. The 4th interested party submitted that she would only have been barred from being a member of the Commission had she been successful in her bid for nomination as the Jubilee Party Candidate for women representative.
87. She stated that the petitioner did not provide any piece of evidence to support the allegation that the 4th interested party was nominated by Jubilee Political Party.
88. On the foregoing, she referred to the data report of 2017 Elections on County Woman Representative to the National Assembly Elections results for the August 8, 2017 where her name did not feature in the candidates that participated in 2017 general elections.
89. In his oral highlights, counsel for the 4th interested party submitted that the 4th interested party did not stand for election. It was his case that election process has its timelines and election period is set out in the *Elections Act*.
90. Counsel further asserted that the petitioner had come to court late in the day since the process had been ongoing and in public domain for the past three months. She stated that a Gazette Notice had been issued, the final step in the appointment.
91. It was his case that election process starts when IEBC's jurisdiction sets in and when the IEBC issues a list of those who stood for elections. To that end, he submitted that the 4th interested party's name was not in the list for Elgeyo-Marakwet County.
92. He submitted that participating in party primaries is not the same as participating in elections. He referred to the decision in Jekoiwa Okinga case on the distinction between nominations and elections and reiterated that nomination is not what is anticipated in article 88(2) of the *Constitution*.
93. The 4th interested party called for the dismissal of the petition.

Issues for Determination

94. From the foregoing arguments and counter-arguments, the issues that emerge for determination are the following;
 - i. Whether the 4th interested party was eligible for appointment as a Commissioner of the Independent Electoral and Boundaries Commission.
 - ii. Whether the composition of the Independent Electoral and Boundaries Commission is compliant with the two-third gender principle under article 27(6), (7) & (8) of the *Constitution*.



95. I will hence deal with the issues sequentially.

Analysis & Determination:

a. Whether the 4th interested party was eligible for appointment as a Commissioner of the IEBC:

96. The parties' rival positions and submissions on this issue has already been captured above.

97. As the contention is on the eligibility of the 4th interested party, the starting point is the Constitution.

98. The guiding provision is article 88(2) and (3) of the Constitution which provides as follows: -

88. Independent Electoral and Boundaries Commission

(2) A person is not eligible for appointment as a member of the Commission if the person —

(a) has, at any time within the preceding five years, held office, or stood for election as—

(i) a member of Parliament or of a county assembly; or

(ii) a member of the governing body of a political party; or

(b) holds any State office.

(3) A member of the Commission shall not hold another public office.

99. Before I proceed further with this analysis, given that the matter hinges on constitutional interpretation, I will briefly look at how the Constitution ought to be interpreted.

100. The High Court in *David Ndi & others v Attorney General & others* [2021] eKLR (famous referred to as 'the BBI case') captured with precision the manner in which our transformative Constitution ought to be interpreted. The learned judges presented themselves thus: -

399. One of the imports of recognition of the nature of the transformative character of our Constitution is that it has informed our methods of constitutional interpretation. In particular, the following four constitutional interpretive principles have emerged from our jurisprudence:

a) First, the Constitution must be interpreted holistically; only a structural holistic approach breathes life into the Constitution in the way it was intended by the framers. Hence, the Supreme Court has stated in *In the Matter of the Kenya National Commission on Human Rights*, Supreme Court Advisory Opinion Reference No 1 of 2012; [2014] eKLR thus (at paragraph 26):

But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is 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 the light of its history, of the issues in dispute, and of the prevailing circumstances.

b) Second, our Transformative Constitution does not favour formalistic approaches to its interpretation. It must not be interpreted as one would a mere statute. The



Supreme Court pronounced itself on this principle *In re Interim Independent Election Commission* [2011] eKLR, para [86] thus:

The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the preamble, in article 10, in chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.

- c) Third, the Constitution has provided its own theory of interpretation to protect and preserve its values, objects and purposes. As the Retired CJ Mutunga expressed in his concurring opinion in *In re the Speaker of the Senate & another v Attorney General & 4 others*, Supreme Court Advisory Opinion No 2 of 2013; [2013] eKLR. (paragraphs 155-157):
- (155) In both my respective dissenting and concurring opinions, *In the Matter of the Principle of Gender Representation in the National Assembly and Senate*, Sup Ct Appl No 2 of 2012; and *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Sup Ct Petition No 4 of 2012, I argued that both the Constitution, 2010 and the Supreme Court Act, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect.
- (156) The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The constitutional text and letter may not properly express the minds of the framers, and the minds and hands of



the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the court as the searchlight for the illumination and elimination of these legal penumbras.

d) Fourthly, in interpreting Constitution of Kenya, 2010, non-legal considerations are important to give its true meaning and values. The Supreme Court expounded about the incorporation of the non-legal considerations and their importance in constitutional interpretation in the *Communications Commission of Kenya* Case. It stated thus:

(356) We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on Chapter Four – The Bill of Rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the Constitution that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to articles 4(2), 33, 34, and 35 of our Constitution has been given above in paragraphs 145-163.

(357) We begin with the concurring opinion of the CJ and President in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition No 2B of 2014 left off (see paragraphs 227- 232). In paragraphs 232 and 233 he stated thus:

(232) ...References to *Black’s Law Dictionary* will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts.

(233) It is possible to set out the ingredients of the theory of the interpretation of the Constitution: the theory is derived from the Constitution through conceptions that my dissenting and concurring opinions have signalled, as examples of interpretative coordinates; it is also derived from the provisions of section 3 of the Supreme Court Act, that introduce non-legal phenomena into the interpretation of the Constitution, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this court as the custodian of the norm of the Constitution has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks dully authorized. The overall objective of the interpretative theory, in the terms of the Supreme Court Act, is to “facilitate the social, economic and political growth” of Kenya.

(400) With these interpretive principles in mind, which we will call the Canon of constitutional interpretation principles to our Transformative Constitution, we will presently return to the transcendental question posed in these consolidated petitions.....

101. With such a background, I now proceed with the consideration of the issue.



102. In ascertaining the eligibility of the 4th interested party, I will consider the following two sub-issues: -
- i. Whether the 4th interested party, at any time within the preceding five years of the appointment, held office, or stood for election, as a Member of Parliament or of a County Assembly; or was a member of the governing body of a political party.
 - ii. Whether the 4th interested party held a State or a public office at the time of appointment.
103. I will consider the sub-issues *in seriatim*.

(b) Whether the 4th interested party, at any time within the preceding five years of the appointment, held office, or stood for election, as a Member of Parliament or of a County Assembly; or was a member of the governing body of a political party:

104. Having carefully considered the record, there is no evidence or any assertion that the 4th interested party, at any time prior to her appointment as a Commissioner, was a Member of Parliament or a Member of a County Assembly anywhere in Kenya. There is equally no evidence that the 4th interested party was a member of the governing body of any political party in Kenya within five years prior to her impugned appointment.
105. The bone of contention is, however, that the 4th interested party stood for an election as a Member of the National Assembly - Women Representative of the Elgeyo-Marakwet county in 2017.
106. The propriety of the 4th interested party's appointment as a commissioner, therefore, calls for an interrogation of the question of nomination of candidates for purposes of the elections.
107. The Constitution in article 82 accorded Parliament the duty to enact legislation to provide for the nomination of candidates in elections.
108. Article 89(4)(d) of the Constitution placed the duty to regulate the process by which parties nominate their candidates for elections to the IEBC.
109. In discharging its mandate of enacting legislation on the nomination of candidates, Parliament passed several pieces of legislation. They include the Elections Act No 24 of 2011, the Political Parties Act No 11 of 2011, the Independent Electoral and Boundaries Commission Act No 9 of 2011, among others.
110. The Elections Act provides for nomination of candidates.
111. Section 31 of the Elections Act sets out the manner in which political parties nominate their candidates. It states as follows: -
31. Nomination of political party candidates
 - (1) A person qualifies to be nominated by a political party for presidential, parliamentary and county elections for the purposes of articles 97, 98, 137, 177 and 180 of the Constitution if that person—
 - (a) is selected in the manner provided for in the constitution or rules of the political party concerned relating to members of that party who wish to contest presidential, parliamentary and county elections;
 - (b) subject to subsection (4), the party certifies the nomination to the Commission.



- (2) The Commission shall, upon the request of a political party, conduct and supervise the nomination of candidates by the political party for presidential, parliamentary or county elections in accordance with article 88 of the Constitution.
- (2A) Every political party shall submit the names of the party candidates who have been selected to participate in the general elections under this Act at least sixty days before the elections.
- (2B) A political party shall, at least twenty- one days before the nomination day, submit to the Commission the names of the persons contesting in its party primary and the date of its party primary.
- (2C) The Commission shall publish, in the Gazette the names of the persons contesting in a party primary under subsection (1) and the date of the party primary within seven days of receipt of the names of party candidates.
- (2D) A candidate for a presidential, parliamentary or county election shall be selected by persons who are members of the respective political parties and whose names appear on the party membership list as submitted to the Commission under section 28.
- (2E) Where the Commission receives multiple requests under subsection (2), the Commission shall conduct and supervise the nomination of candidates for presidential, parliamentary or county elections for all the requesting political parties —
 - (a) on the same day;
 - (b) in the same polling centres; and
 - (c) in different polling streams for each participating political party.
- (2F) Parliament shall appropriate monies for the effective implementation of this section.
- (3) Every political party shall notify the Commission of the name of the person authorised by the party to certify to the Commission that a person has or persons have been selected by the party under subsection (1) and the person or persons so named shall deposit his or their specimen signature with the Commission in such manner as the Commission may require.
- (4) The authorised person or persons referred to in subsection (4) shall, in writing, certify that a candidate has been nominated by the party.

112. From the foregoing, two key terms come to the fore. They are ‘a candidate’ and ‘an aspirant’.

113. The Constitution is silent on the two terms.

114. It is the Elections Act, which only defines the term ‘candidate’ in section 2 as follows: -

“candidate” means a person contesting for an elective post.

115. The *Concise Oxford English Dictionary*, twelfth edition, Oxford University Press, defines an aspirant at page 77 as follows: -

Aspiring towards a particular achievement or status. A person who has ‘aspirations’ to succeed in something.



116. The *Black's Law Dictionary* 11th edition, Thomson Reuters Publishers defines the word 'aspirational' at page 141 in reference to a person in the following way: -

Having a strong desire to achieve.

117. From the foregoing definitions, it comes to fore that aspiring to hold a political office is not recognized in law and is of no legal consequence. In other words, any person is at liberty to aspire to hold any political office.

118. In the context of elections, a political aspirant is a person who only has a strong desire to attain a certain political seat. It is a person desirous of achieving a political status. As said, such a person has no legal recognition per se.

119. A candidate, on the other hand, is a person who has travelled beyond simply aspiring to attain a political office. A candidate goes ahead and is subjected to the law concerning the nomination of candidates. For instance, for a contested elective position in a political party set up, a candidate first takes part in the party primaries. If successful, then the person's name is submitted to the IEBC in accordance with section 31 of the *Elections Act* and the candidate finds way to the ballot.

120. To understand the concept of candidacy further, I will look at how one becomes an independent candidate.

121. The nomination of independent candidates is provided for in section 33 of the *Elections Act*.

122. An independent candidate must, in the first instance, be subjected to the Commission for approval to take part in an election. On clearance, the Commission then publishes, in the Gazette, the name of such a person as an independent candidate.

123. A common thread on the issue of nomination of candidates, therefore, is that for a candidate irrespective of being independent or belonging to a political party, it is the IEBC which must be satisfied that such a person has met all the legal requirements before it publishes the name in the Kenya Gazette. Such a person's name then appears in the ballot and is eligible to be elected at the election.

124. The question which then arises is whether a person who unsuccessfully took part in a party primary may be considered to have stood for an election in accordance with article 88(2)(a) of the *Constitution* as to be ineligible for appointment as a commissioner of IEBC before the lapse of five years.

125. In order to answer that pertinent question, a look at what an election is become inevitable.

126. The *Constitution* does not define what an election is.

127. The *Elections Act*, without much aid, defines an 'election' as: -

"election" means a presidential, parliamentary or county election and includes a by-election.

128. It is the *Political Parties Act* which, at least, defines an election in a more elaborate manner. Section 2 thereof defines an election as follows: -

"election" means the act of selecting by vote, of a person or persons from among a number of candidates to fill an office or to membership of any political party and includes a presidential, parliamentary or county election.

129. With a view to breath more life into what an election is, courts have also dealt with the subject of what an election entail. It is the Supreme Court which finally settled what an election is. That was



in Presidential Petition No 1 of 2017 *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.

130. The apex court, in affirming the position that an election is a process and not an event, had the following to say: -

[224] On our part, having considered the opposing positions, we are of the view that, the contentions by the 1st and 2nd respondents ignore two important factors. One, that elections are not only about numbers as many, surprisingly even prominent lawyers, would like the country to believe. Even in numbers, we used to be told in school that to arrive at a mathematical solution, there is always a computational path one has to take, as proof that the process indeed gives rise to the stated solution. Elections are not events but processes. As Likoti, JF opines “[e]lections are not isolated events, but are part of a holistic process of democratic transition and good governance...”[101] Incidentally, IEBC’s own *Election Manual (Source Book)*[102] recognizes that an election is indeed a process.

[225] There are many other authorities which speak to this proposition. In *Kanhiyalal Omar v RK Trivedi & others*[103] and *Union of India v Association for Democratic Reforms & another*[104], the Supreme Court of India, for example, stated that the word ‘election’ is used in a wide sense to include the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the result of the process. These stages include voter registration; political party and candidate registration; the allocation of state resources and access to media; campaign activities; and the vote, count, tabulation and declaration of results.[105] Lady Justice Georgina Wood, the former Chief Justice of Ghana, made the same point and added other stages when she stated:

The Electoral process is not confined to the casting of votes on an election day and the subsequent declaration of election results thereafter. There are series of other processes, such as the demarcation of the country into constituencies, registration of qualified voters, registration of political parties, the organization of the whole polling system to manage and conduct the elections ending up with the declaration of results and so on. [106]

And according to the European Human Rights Committee, the process also includes the right to challenge the election results in a court of law or other tribunal. [107]

[226] Here in Kenya, the issue of elections as a process was discussed in the case of *Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 others* [108] where the High Court observed that:

“ an election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by Gazettement. In determining the question of the validity of the election of a candidate, the court is bound to examine the entire process up to the declaration of results....The concept of free and fair elections is expressed not only on the voting day but throughout the election process....Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament.”

[227] This case was cited with approval by the Supreme Court in In the matter of the Gender Representation in the National Assembly and Senate. [109] Therefore the process of getting



a voter to freely cast his vote, and more importantly to have that vote count on an equal basis with those of other voters is as important as the result of the election itself.

131. An election, therefore, being a process includes the manner in which a person is nominated as a candidate. In other words, the process of nomination of the candidates who eventually take part in an election is also part of an election.
132. Having said so, and deriving from the foregoing, perhaps it is important to note that there is a distinction between standing for an election and holding an office.
133. When one transcends the borders of political aspirations and offers himself or herself for party nominations, then such a person is a candidate and is deemed to have taken part in an election as long as one is gazetted by IEBC to take part in the primaries. That is the same position when the successful person in party primaries proceeds to contest for the elective position in an election. The person still takes part in an election even if he or she later loses in the election.
134. In the event the one who contests in an election is successfully elected and assumes office, he or she holds that office. Therefore, any participation beyond one aspiration into an elective position transcends one from an aspirant into a candidate who takes part in an election if such a person is gazetted by IEBC to take part in party primaries.
135. It matters not at what point in time the person abandons the pursuit of the elective position. As long as the person's name appears in the Kenya Gazette as taking part in party primaries, such a person is legally deemed to have taken part or stood for an election.
136. Turning back to the matter at hand, there is evidence that the 4th interested party expressed interest in the seat of women representative for Elgeyo-Marakwet County in 2017. She offered herself and took part in the party primaries through her then party, Jubilee Party.
137. The IEBC published Gazette Notice No 3796 dated April 13, 2017 pursuant to section 13(2C) of the [Elections Act](#). The Notice was on all those who had expressed interest in various elective posts and were to be subjected to party primaries. In the said Gazette Notice, the name of the 4th interested party was therein.
138. Whereas the 4th interested party was not successful in her bid to be in the ballot, she nevertheless took part in the party primaries. By doing so, and in line with the legal principle that an election is a process and not an event, the 4th interested party is deemed to have stood for an election in terms of article 88(2)(a) of the [Constitution](#).
139. The 1st respondent (the Selection Panel) and the 2nd respondent (the National Assembly) dealt with the 4th Interested party at different times.
140. During the process of conducting the interviews, the Selection Panel, in a letter dated June 15, 2021, wrote to the IEBC requesting for information on who, among the shortlisted candidates, had held office or stood for an elective office as a Member of Parliament or a County Assembly.
141. In a letter dated June 25, 2021, IEBC confirmed that none of the 36 shortlisted candidates had held office or stood for an elective office as a Member of Parliament or a County Assembly within the preceding 5 years. The 4th interested party was among the shortlisted candidates.
142. The National Assembly then dealt with the approval hearings after the 4th interested party had been nominated for appointment as a commissioner. It then filed vetting report by the National Assembly's Departmental Committee of Justice and Legal Affairs Committee dated August 27, 2021 as part of its evidence that it committed no legal wrong while discharging its mandate.



143. Having perused the vetting report, it is apparent that the issue as to whether the 4th interested party had either held office or stood for an elective office as a Member of Parliament or a County Assembly within the preceding 5 years arose during the hearing before the Justice and Legal Affairs Committee. The 4th interested party denied standing for any election 5 years prior to her nomination. The Committee ended the matter there and approved the 4th interested party's nomination. Subsequently, the 4th interested party was gazetted and sworn into office as a commissioner.
144. A look at the response by IEBC on whether the 4th interested party had either held office or stood for an elective office as a Member of Parliament or a County Assembly within the preceding 5 years conspicuously shows that IEBC did not address itself to the concepts of an election being a process and whether the 4th interested party stood for an election. Instead, IEBC based its response on the fact that the 4th interested party had not made it to the ballot, hence, she did not contest in an election.
145. This court has already demonstrated how such an approach by the IEBC is impugned.
146. On the basis of the foregoing finding, this court is further bound to ascertain whether the 4th interested party stood for the said election in a period within 5 years preceding her appointment.
147. The Selection Panel was appointed by the President of the Republic of Kenya through Gazette Notice No 4004, Vol CXXIII No 84, dated April 26, 2021.
148. After interviewing the shortlisted candidates, the candidates were subjected to approval hearings before the National Assembly. The President eventually appointed the 4th interested party among other Commissioners through Gazette Notice No 9082 Vol CXXIII No 182 dated September 1, 2021.
149. The Gazette Notice naming the 4th interested party as a candidate for party primaries is dated April 13, 2017. Therefore, time began running from that date. As such, by the time the 4th interested party was appointed as a commissioner on September 1, 2021, 5 years had not lapsed. The 4th interested party was appointed 8 months before the lapse of the constitutionally decreed 5-year period.

Whether the 4th interested party held a State or a public office at the time of appointment:

150. There is no evidence that the 4th interested party held any State office at her appointment.
151. From the vetting report by the National Assembly's Departmental Committee of Justice and Legal Affairs Committee, the 4th Interested Party admitted that by the time of her nomination she was a serving Board member of the National Government– Constituency Development Fund (NG-CDF).
152. She further admitted that her said position was a public office and, given the nature of the position of a commissioner of IEBC, she undertook to resign if she was eventually appointed as a commissioner of IEBC.
153. The record still remains silent on whether the 4th interested party indeed resigned from the Board membership of the NG-CDF either before or on her appointment.
154. Be that as it may, this court finds that nothing much turns out on this sub-issue. Granting the benefit of doubt to the 4th interested party, the sub-issue is answered in the negative.
155. On the basis of the findings on the two sub-issues, the upshot is that the 4th interested party was ineligible for appointment as a member of the IEBC since she had stood for an election as a Member of Parliament in 2017 and at the time of her appointment the period of 5 years from the time she stood for the said election had not lapsed.



Whether the composition of the IEBC is compliant with the two-third gender principle under article 27(6), (7) & (8) of the Constitution:

156. The gender parity requirement has its foundation in article 27 of the Constitution. It guarantees every person equality before the Law and freedom from discrimination.
157. The clamour for the two-thirds gender rule (hereinafter referred to as ‘the gender rule’) has by now taken firm footing in Kenya. There are several initiatives taken by the State and other players towards attaining such a constitutional requirement.
158. Courts have, as well, pronounced and affirmed the need for compliance with the gender rule. (See the Supreme Court in Advisory Opinions Application 2 of 2012, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR, Petition 102 of 2011, Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another [2011] eKLR, Petition No 371 of 2016 Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others [2017] eKLR. among many others).
159. Further, in an effort to compel Parliament to pass legislation on the gender rule, the then Hon Chief Justice DK Maraga on September 21, 2020, and in compliance with the decision in Constitutional Petition No. 371 of 2016, issued an advisory to the President of the Republic of Kenya to dissolve Parliament for non-compliance with the judgment.
160. Whereas the gender rule applies to both elective and appointive positions, the discussion herein will centre on the application of the gender rule in the appointive positions. The simple reason being that this matter concerns appointive positions.
161. The constitutional foundation of the gender rule is article 27 of the Constitution. The right to equal benefit and protection of the law is provided for sub-articles (6), (7) & (8) in the following way:
27. Equality and freedom from discrimination:
- (6) To give full effect to the realisation of the rights guaranteed under this article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
- (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
- (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two thirds of the members of elective or appointive bodies shall be of the same gender.
162. Whereas Parliament has been on the receiving end over the failure to pass the necessary legislation to effectuate the gender rule and has been perceived as the greatest impediment to the rule, it has, nevertheless, taken some measures towards attainment of the said rule.
163. One of such initiatives was the enactment of the National Gender and Equality Commission Act, 2011. The legislation was aimed at establishing the National Gender and Equality Commission as a successor to the Kenya National Human Rights and Equality Commission pursuant to article 59(4) of the Constitution, to provide for the membership, powers and functions of the Commission, and for related purposes.



164. The said legislation establishes the National Gender and Equality Commission in section 3 thereof and provides for its functions in section 8 as follows: -

8. Functions of the Commission

The functions of the Commission shall be to—

- (a) promote gender equality and freedom from discrimination in accordance with article 27 of the Constitution;
- (b) monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions;
- (c) act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalised persons, women, persons with disabilities, and children;
- (d) co-ordinate and facilitate mainstreaming of issues of gender, persons with disability and other marginalised groups in national development and to advise the Government on all aspects thereof;
- (e) monitor, facilitate and advise on the development of affirmative action implementation policies as contemplated in the Constitution;
- (f) investigate on its own initiative or on the basis of complaints, any matter in respect of any violations of the principle of equality and freedom from discrimination and make recommendations for the improvement of the functioning of the institutions concerned;
- (g) work with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights specified in article 43 of the Constitution and other written laws;
- (h) co-ordinate and advise on public education programmes for the creation of a culture of respect for the principles of equality and freedom from discrimination;
- (i) conduct and co-ordinate research activities on matters relating to equality and freedom from discrimination as contemplated under article 27 of the Constitution;
- (j) receive and evaluate annual reports on progress made by public institutions and other sectors on compliance with constitutional and statutory requirements on the implementation of the principles of equality and freedom from discrimination;
- (k) work with the National Commission on Human Rights, the Commission on Administrative Justice and other related institutions to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration in the protection and promotion of rights related to the principle of equality and freedom from discrimination;
- (l) prepare and submit annual reports to Parliament on the status of implementation of its obligations under this Act;



- (m) conduct audits on the status of special interest groups including minorities, marginalised groups, persons with disability, women, youth and children;
- (n) establish, consistent with data protection legislation, databases on issues relating to equality and freedom from discrimination for different affected interest groups and produce periodic reports for national, regional and international reporting on progress in the realization of equality and freedom from discrimination for these interest groups;
- (o) perform such other functions as the Commission may consider necessary for the promotion of the principle of equality and freedom from discrimination; and
- (p) perform such other functions as may be prescribed by the Constitution and any other written law.

165. Having said so, this court joins other courts in the position that whereas the gender rule on the elective positions calls for progressive realization, the realization of the rule on appointive positions can only be immediate. As the parties herein have captured the various decisions on this point in their submissions, I need not repeat the same here.
166. In this case, the contention is that IEBC is not constitutionally-constituted in terms of the gender rule.
167. A similar issue was raised in *Federation of Women Lawyers Kenya (Fida-K) & 5 others v Attorney General & another* [2011] eKLR. The High Court in a judgment rendered on August 25, 2011 declined to accede to an argument akin to the Petitioner's in this manner on the mathematical computation on the gender rule. In that case, the contention was out of the 7 Judges of the Supreme Court recommended for appointment and who were eventually appointed into office, they ought to have been in the ratio of 4 men and 3 women and not, as it were, 5 men and 2 women. That is the same argument before this court.
168. The High Court in a well-reasoned judgment urged parties to await legislative and other measures by the State and declined to read into the Constitution what was not part of it.
169. This court has carefully read the said decision. It concurs with it in the finding that the then composition of the Supreme Court did not contravene the Constitution. The said position applies to this matter in equal measure.
170. Having said so, I may just add the following. The Commission as presently constituted has 7 commissioners. They are as follows: -Mr Wafula W Chebukati - ChairpersonJuliana Cherera - Vice ChairpersonMr Francis Wanderi - CommissionerMr Justus Nyang'aya - CommissionerIrene Masit - CommissionerProf Abdi Yakub Guliye - CommissionerMr Boya Molu - Commissioner
171. There are, therefore, 5 men and 2 women.
172. Applying the gender rule on the 7 commissioners, it means that the Commissioners ought to be in the ratio of 4.6667 to 2.3333. Even without any legislative guidance on how such computations ought to be dealt with, by applying the standard mathematical formula in rounding off figures, those figures translate to 5 and 2 respectively.
173. It, therefore, turns out that the Commission as presently constituted of 7 Commissioners in the ratio of 5 men and 2 women complies with the gender rule.
174. In the end, the second issue is answered in the affirmative.



Remedies

175. Whereas the petitioner has failed to prove that the Commission as currently constituted violates the gender rule, on one hand, he has successfully demonstrated that the 4th interested party was not eligible for appointment as a Commissioner, on the other hand.
176. In such a case, this court is called upon to address the appropriateness of the reliefs to issue.
177. Courts have severally rendered on reliefs. 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 Kitbeka & 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.
178. 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.

179. 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.

180. The main relief expected in this matter is the removal from office and the replacement of the 4th interested party.
181. I have deeply considered the foregoing. This court, however, has some reservations. First, even as the petitioner was well aware that the 4th interested party had been appointed and sworn into office, the petition was not amended to seek a specific prayer on the removal. Second, given the history of our country on women empowerment and the clamour on the gender rule, it will be imprudent and against public interest to reduce the current number of women in the Commission.



182. Third, whereas there are other women who may be qualified to serve as Commissioners of the IEBC, the process of replacing a Commissioner can only take time. At the moment, the Selection Panel stands dissolved by operation of the law.
183. Any appointment of a Commissioner of IEBC has to be initiated through the passing of the necessary legislation setting up another Selection Panel. The chances of that happening between now and the forthcoming elections scheduled for August 9, 2022, being less than two months away, are very minimum, if at all any. It, hence, means that if the 4th interested party is removed from office then the Commission may have to operate for a while with only one woman and 5 men. Such a scenario definitely eats into the little gains made on women empowerment.
184. Fourth, the removal from office of the 4th interested party at the moment is likely to adversely affect the Commission. With less than two months to the General election, the Commission is on a very high gear in its preparations. Committees with specific mandates must be in place and the removal of any of its members will no doubt affect the performance of such committees. It is in public interest that an ideal environment be created for the Commission to discharge its constitutional mandate. The converse will not be fitting for our country.
185. Fifth, after the holding of the forthcoming elections, the courts will battle with election petitions. That will be for a minimum of one year considering the timelines in law. During that time, the Commission, which is a party to every such election petition, is expected to participate. That calls for the involvement of all those who took part in the preparations otherwise the Commission may find itself straying.
186. It is on the foregoing that this court finds it prudent to allow the 4th interested party to remain in office. Whereas this court may be seen as sanctioning an unconstitutionality, the circumstances of the matter call for the maintenance of the prevailing *status quo*. It is in the greater public interest and good that the preparations towards the holding of the forthcoming general election are not interfered with lest the country may find itself in a constitutional crisis.

Disposition

187. Flowing from the foregoing, despite the petition partially succeeding, the prayers sought cannot be availed.
188. The upshot is, therefore, that the petition dated August 31, 2021 be and is hereby dismissed.
189. Being a public interest litigation, there shall be no orders as to costs.
Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JUNE, 2022.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Malenya, Learned Counsel for the Petitioner in person.

Miss. Akama, Learned Counsel for the 2nd Respondent.

Miss. Wamuyu, Learned Counsel for the 3rd Respondent.

Dr. Mutubwa, Learned Counsel for the 1st Interested Party.

Mr. Kouna, Learned Counsels for the 4th Interested Party.



Mr. Ochiel Dudley, Learned Counsel for the 6th Interested Party.

Jared Ouma – Court Assistant.

