Ombati v Chief Justice & President of the Supreme Court & another; Kenya National Human Rights and Equality Commission & 2 others (Interested Party) (Petition E242 of 2022) [2022] KEHC 11630 (KLR) (Constitutional and Human Rights) (17 August 2022) (Judgment)

Neutral citation: [2022] KEHC 11630 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E242 OF 2022

M THANDE, J

AUGUST 17, 2022

BETWEEN

OMWANZA OMBATI ..... PETITIONER

AND

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

KENYA NATIONAL HUMAN RIGHTS AND EQUALITY COMMISSION ..... INTERESTED PARTY

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

KENYA HUMAN RIGHTS COMMISSION ..... INTERESTED PARTY

The Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 declared unconstitutional for want of public participation.

The Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022, having been made in exercise of the powers conferred upon the Supreme Court directly by the Constitution, were not statutory instruments within the meaning of the Statutory Instruments Act. However they were still subject to Constitutional requirements of public participation.

Reported by John Ribia

Constitutional Law *– national values and principles – public participation – allegation that the Supreme Court enacted rules without public participation – whether the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 were unconstitutional for want of public participation – ; .*

Statutes *– statutory instruments – definition of statutory instruments – classification of a statutory instrument under the Statutory Instruments Act - Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 - whether the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022, having been made in exercise of the powers conferred upon the Supreme Court directly by the Constitution, were statutory instruments within the meaning of the Statutory Instruments Act – ; .*

Constitutional Law *– arms of government – separation of powers – mandate of the Judiciary vis-à-vis mandate of the Legislature – power of the Supreme Court to draft the rules governing the Supreme Court – where the Supreme Court promulgated the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 to make provisions that had the force of law and were enforceable by the court through penal provisions - whether the Supreme Court usurped the role of Parliament in promulgating the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 –); ; .*

Brief facts

The petitioner challenged the constitutionality and legality of the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 (the impugned Rules). The petitioner challenged the process through which the impugned Rules were promulgated. The petitioner contended that the impugned Rules were a statutory instrument within the meaning of the Statutory Instruments Act. The petitioner also contended that the Supreme Court breached the principle of separation of powers by promulgating the impugned Rules, a role set aside for the Legislature. Lastly the petitioner contended that the impugned Rules were promulgated without public participation and thus were null and void.

Issues

i. Whether the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022, having been made in exercise of the powers conferred upon the Supreme Court directly by the Constitution, were statutory instruments within the meaning of the Statutory Instruments Act.

ii. Whether the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 were unconstitutional for want of public participation.

iii. Whether the Supreme Court usurped the role of Parliament in promulgating the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 that had the force of law and were enforceable by the court through penal provisions.

Relevant provisions of the Law

Sections 2 and 5A

Section 2

2. Interpretation

In this Act, unless the context otherwise requires—

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

Section 5A

5A. Explanatory memorandum

(1) Every statutory instrument shall be accompanied by an explanatory memorandum which shall contain—

(a) a statement on the proof and demonstration that sufficient public consultation was conducted as required under Articles 10 and 118 of the Constitution;

(b) a brief statement of all the consultations undertaken before the statutory instrument was made;

(c) a brief statement of the way the consultation was carried consultation;

(d) an outline of the results of the consultation;

(e) a brief explanation of any changes made to the legislation as a result of the consultation.

(2) Where no such consultations are undertaken as contemplated in subsection (1), the regulation-making authority shall explain why no such consultation was undertaken.

(3) The explanatory memorandum shall contain such other information in the manner specified in the Schedule and may be accompanied by the regulatory impact statement prepared for the statutory instrument.

Section 31

31. Rules

Without limiting the generality of Article 163(8) of the Constitution, the rules made by the Supreme Court under that Article may make provision for—

(a) regulating the sittings of the Supreme Court and the selection of judges for any particular purpose;

(b) regulating the right of any person other than an advocate of the High Court of Kenya to practise before the Supreme Court and the representation of persons concerned in any proceedings in the Supreme Court;

(c) prescribing forms and fees in respect of proceedings in the Supreme Court and regulating the costs of and incidental to any such proceedings;

(d) prescribing the time within which any requirement of the rules shall be complied with;

(e) empowering the Registrar, in order to promote access to justice, to waive, reduce, or postpone the payment of a fee required in connection with a proceeding or intended proceeding, or to refund, in whole or in part, such a fee that has already been paid, if satisfied on the basis of criteria prescribed under paragraph (f) that—

(i) the person otherwise responsible for payment of the fee is unable to pay or absorb the fee in whole or in part; or

(ii) unless one or more of those powers are exercised in respect of a proceeding that concerns a matter of genuine public interest, the proceeding is unlikely to be commenced or continued;

(f) prescribing, for the purposes of the exercise of a power under paragraph (e), the criteria—

(i) for assessing a person's ability to pay a fee; and

(ii) for identifying proceedings that concern matters of genuine public interest; and

(g) any other matter required under the Constitution, this Act or any other written law

Held

1. Article 259(1) of the Constitution commanded the Court to take a purposive approach when interpreting the Constitution. Courts were to exercise caution not to give constitutional provisions rigid and artificial interpretation. The court had a duty to give full life to the Constitution by giving effect to the Constitution as a whole.
2. Section 5A of the Statutory Instruments Act (SIA) required that every statutory instrument was to be accompanied by an explanatory memorandum demonstrating that sufficient public consultation was conducted and if not, the reasons. The impugned rules were expressed to be made by the Supreme Court in exercise of the powers conferred by article 163(8) of the Constitution and section 31 of the Supreme Court Act. The power of the Supreme Court to make rules for the exercise of its jurisdiction was conferred upon it by the Constitution. The provisions of section 31 of the Supreme Court Act could not take away or limit what had already been given by the Constitution.
3. When enacting section 31 of the Supreme Court Act, Parliament was alive to the fact that no provision in the Act could limit the power already conferred upon the Supreme Court by the Constitution, hence the wording of section 31. The provision simply restated the Supreme Court's powers under the Constitution to make rules, so that even supposing section 31 were not in the Act, the Supreme Court would be able to make its own Rules by invoking the provisions of article 163(8) of the Constitution.
4. Constitutional instruments were not ordinary statutory instruments. They derived their legitimacy not from statute, but directly from the people of Kenya through the Constitution. Such instruments

were not subject to the rigours of the law-making processes as provided for in the Constitution and the law. The impugned rules which were made in exercise of the powers conferred upon the Supreme Court by the Constitution were a constitutional instrument and not a statutory instrument.

5. The power of the Supreme Court to make rules was conferred upon it by the Constitution under article 163(8). The Constitution was the supreme law of the land and any power that flowed therefrom could not be limited by any statute, including the Supreme Court Act. Section 2 of the Supreme Court Act stated that rules meant the Rules of the Supreme Court made pursuant to article 163 (8) of the Constitution.
6. The power of the Supreme Court to make rules under article 163(8) of the Constitution was akin to the power conferred upon the Chief Justice to make rules under article 22(3). When the Chief Justice made the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, (*Mutunga* Rules*)* they were not subjected to parliamentary approval. That was because the power flowed straight from the Constitution and there was no provision that required that the rules be subjected to parliamentary approval. Similarly, the impugned Rules which were made pursuant to power flowing directly from the Constitution were not subject to the rigours of the law-making processes as provided for in the Constitution and the law.
7. The impugned Rules were not a ruling in respect of which the rule of *stare decisis* (to stand by things decided) could be invoked. The binding effect of a decision of the Supreme Court as a court of final judicial authority, would only apply to decisions made in judicial proceedings. The impugned Rules and indeed any rules made by the Supreme Court under article 163(8) of the Constitution were not a decision as contemplated in article 163(7) which provided that all courts, other than the Supreme Court, were bound by its decisions.
8. The impugned Rules having been made in exercise of the powers conferred upon the Supreme Court directly by the Constitution, were not statutory instruments within the meaning of SIA. While exercising its constitutional power to make the impugned Rules, the Supreme Court was not subject to the provisions of SIA.
9. The content and the manner in which legislation was adopted had to conform to the Constitution. National values and principles of governance were binding on all State organs, State officers, public officers and all persons whenever any of them applied or interpreted the Constitution, enacted, applied or interpreted any law, or made or implemented public policy decisions. Public participation was a constitutional imperative, which played a central role in legislative, policy and executive functions of Government. It informed stakeholders and the public of what was intended and afforded them an opportunity to express, and had their views taken into account.
10. Public participation bound all state organs, including the Supreme Court when, *inter alia* enacting law. Regardless of the nature of the impugned Rules and the fact that the power to make them flowed directly from the Constitution, the letter and spirit of the Constitution had to be upheld in the process of enactment. Any rules made by any entity had to be in conformity with the Constitution.
11. In promulgating the impugned Rules, the Supreme Court had a duty to facilitate meaningful engagement with the public in a manner that accorded with the nature of the impugned Rules. Such engagement should have included access to and dissemination of relevant information, providing reasonable opportunity to the public and all interested parties to know about the impugned Rules and to sufficiently ventilate the same even if no guarantee was given that each individual's views would be taken.
12. Whenever a challenge was raised, every agency was required to demonstrate what it had done in compliance with its duty to facilitate public participation in a given case.
13. The respondent's position from the outset had been that given that the impugned Rules were a constitutional instrument, public participation was not necessary, in effect conceding that the rules were not subjected to public participation. To require the petitioner to prove that public participation

was not done was at best to prove the obvious and at worst to prove the negative. Upon the petitioner stating that there was no public participation before the impugned Rules were promulgated, the burden of proof shifted to the respondents to demonstrate that there was.

14. The Supreme Court did not conduct public participation in any form or shape, before the promulgation of the impugned Rules. That was contrary to the requirement under articles 10 and 232 of the Constitution, to afford reasonable opportunity to persons likely to be affected by the impugned Rules, such as litigants in presidential petitions, advocates and the public, to voice and perhaps have incorporated in the decision making, their concerns, needs and values. It was immaterial that previous rules and amendments had been made without public participation. Any rules made by the court had to always accord with the Constitution, failing which they could not stand. There was no exemption given under the Constitution, to the Supreme Court, from complying with the provisions of article 10(1).

15. Participation of the people was not a progressive right to be realised sometime in the future. It was enforceable immediately. Any laws or rules made pursuant to constitutional or statutory provisions, had taken that into account. The decision by the Supreme Court to exclude the participatory rights of the people before promulgation of the impugned Rules, was unlawful and unconstitutional.

16. Section 28 of the Supreme Court Act had made provision for contempt of court. If there was need to expand the instances of contempt of court to include that which was contained in the impugned provisions, then the Supreme Court ought to have deferred to Parliament which had the constitutional mandate to undertake such exercise under article 94(5) of the Constitution. Legislative authority was derived from the people of Kenya and was vested in and exercised by Parliament at the national level. It was only Parliament that had the power to make provision that had the force of law. Any other person or body could only do so under authority of the Constitution or statute. The impugned Rules purported to make provision that had the force of law and enforceable by the court through penal provisions. The Supreme Court went overboard. Such provision could only be made by Parliament or with its approval. More so because the provision had the effect of taking away rights.

17. While the Supreme Court should be given the leeway and space to exercise the powers conferred upon it by the Constitution, such power had to be exercised within the Constitution and without usurping the powers of other constitutional entities. In making the impugned Rules which contained a penal provision that was enforceable by the Court, the Supreme Court went beyond its authority and usurped the law-making role of Parliament. The making of the impugned Rules, offended the Constitution and the doctrine of separation of powers which required each of the 3 arms of government to stick to its lane.

Petition partly allowed.

Orders

i. *Declaration issued that the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 were not a statutory instrument within the meaning of the Statutory Instruments Act.*

ii. *Declaration issued, that the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 were unconstitutional for want of public participation.*

iii. *Declaration issued that the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 were unconstitutional for usurping the legislative power of Parliament.*

iv. *Order of certiorari issued that quashed the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022.*

v. *No order as to costs.*

Citations

Cases

1. Abe Semi Bvere v County Assembly of Tana River & Speaker of the County Assembly of Tana River; Speaker of the National Assembly & Speaker of the Senate (Interested Parties) (Constitutional Petition E001 of 2021; [2021] KEHC 8558 (KLR)) — Mentioned
2. Attorney General v Ndii & 73 others; Dixon & 2 others (Amicus Curiae) (Petition E016 of 2021; [2021] KESC 19 (KLR)) — Explained
3. British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health,Tobacco Control Board & Attorney General;Kenya Tobacco Control Alliance & Consumer Information Network (Interested Parties);Mastermind Tobacco Kenya Limited (The Affected Party) (Petition 5 of 2017; [2019] KESC 15 (KLR)) — Explained
4. British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health, Tobacco Control Board, Attorney General, Kenya Tobacco Control Alliance, Consumer Information Network & Mastermind Tobacco (K) Limited (Civil Appeal 112 of 2016; [2017] KECA 763 (KLR)) — Explained
5. CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW), CAUCUS FOR WOMEN'S LEADERSHIP (CAUCUS), TOMORROWS CHILD INITIATIVE (TCI), WOMEN IN LAW AND DEVELOPMENT (K), DEVELOPMENT THROUGH MEDIA (DTM), COALITION OF VIOLENCE AGAINST WOMEN (COVAW), YOUNG W (Petition 16 of 2011; [2011] KEHC 4223 (KLR)) — Followed
6. Chege v Independent Electoral & Boundaries Commission (Constitutional Petition E073 of 2022; [2022] KEHC 239 (KLR)) — Explained
7. Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya, Al Ghurair Printing and Publishing Llc, Attorney General, Jubilee Party, Ekuru Aukot &Thirdwayalliance;, Samuel Waweru & Stephen Owoko Oganga (Civil Appeal 224 of 2017; [2017] KECA 436 (KLR)) — Explained
8. In the Matter of Interim Independent Electoral Commission (Constitutional Application 2 of 2011; [2011] KESC 3 (KLR)) — Explained
9. In the Matter of Kenya National Commission on Human Rights (Reference 1 of 2012; [2014] eKLR)
10. Law Society of Kenya v Attorney General & Central Organisation of Trade Unions (Application 4 of 2019; [2019] KESC 30 (KLR)) — Explained
11. Names Expunged (suing on their behalf and on behalf of the Mui Coal Basin Local Community), Eric Mutua, Titus Kivaa P.M, Paul Mumo Kisau, Gideon Wathe Nzau, Florence Mutwali Kitonga, Particia Kisio Kimanzi, Joseph Muthui Nzuni, Margaret Munyoki, Solomon Kimanzi Kivoto, Eunice Keli Wambua, David Kilonzo Maweu, John Kimakio Mutia, Nzomo Mulatia, Mui Coal Project Blocks C and D Liason Committee & Munywoki Mutunga Malombe & others v Permanent Secretary Ministry of Energy, Attorney General, Principal Secretary Ministry of Energy and Petroleum, Principal Secretary Ministry of Mining, Principal Secretary Ministry of Lands Housing and Urban Development, Fenxi Mining Industry Company Limited, Fenxi Mui Mining Corporation Limited & Cabinet Secretary Ministry of Mining (Constitutional Petition 305 of 2012; [2015] KEHC 473 (KLR)) — Mentioned
12. Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority, Cabinet Secretary, National Treasury & SICPA Securities SOL. SA (Petition 532 of 2017; [2018] KEHC 8263 (KLR)) — Explained
13. Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae) (Petition 229 of 2012; [2012] KEHC 2480 (KLR)) — Explained
14. Government of Republic of Namibia v Cultura 2000 (1994(1) SA 407) — Explained
15. Doctors for Life International v Speaker of the National Assembly & Others ([2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006))

16. Poverty Alleviation Network & Others vs. President of the Republic of South Africa & 19 Others ((CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010)) — Explained

Statutes

1. Constitution of Kenya, 2010 — Article 1,1(4); 10; 22(3); 24; 32; 33; 34; 47; 59(4); 94; 94(5); 159;163(7); 163(8); 232; 259(1); Chapter 10 — Interpreted
2. Interpretation And General Provisions Act — In general — Cited
3. Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya, 2010 Sub Leg) — In general — Cited
4. Statutory Instruments Act (No. 23 of 2013) — Section 5,5A — Interpreted
5. Supreme Court Act (No. 7 of 2011) — Section 2,28,31 — Interpreted
6. Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 (Act No 7 of 2011 Sub Leg) — Rule 56-58 — Interpreted
7. Supreme Court (Presidential Election Petition) Rules, 2013 (Act No 7 of 2011 Sub Leg) — In general — Cited
8. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) — Rule 18 — Interpreted

Advocates

None mentioned

JUDGMENT

1. By a petition dated May 25, 2022 the petitioner, an advocate of the High Court of Kenya, challenges the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 (the impugned rules) which were published on May 20, 2022 in Legal Notice No 79 of 2022 in Kenya Gazette Supplement No 77. The petitioner challenges the process through which the impugned rules were conceived and imposed as well as the contents thereof. His view is that the impugned rules pose a grave threat to public confidence in the judiciary, enjoyment of fundamental rights and freedoms as well as accountability of judges and judicial officers.

2. The petition is supported by the affidavits of the petitioner sworn on May 25, 2022 and on July 15, 2022 It is the petitioner's case that the impugned rules are statutory instruments within the meaning of the *Statutory Instruments Act* (SIA). The petitioner terms the impugned rules as irregular, unreasonable and unconstitutional, in that they were made in violation of the SIA and articles 10 and 232 of *the Constitution* of Kenya, 2010, in that there was no public participation; article 24 in that they unjustifiably limit fundamental rights and freedom including the freedom of expression, conscience, opinion and belief, right to privacy, access to information, inherent dignity and fair administrative action, freedom of the media and freedom from discrimination. The Petitioner further contends that the impugned Rules are vague unreasonable, irrational and lack proportionality.

3. The petitioner further stated that the powers set out in article 163(8) of *the Constitution* and section 31 of the Supreme Court Act do not confer upon the 1st respondent a carte blanche to do as she pleases and that it is immaterial that previous rules have been made in the same fashion. Further, the Supreme Court does not have any power to codify or make provisions having the force of law and penal in nature, which is the preserve of Parliament.

4. The petitioner seeks the following orders:

I. A declaration be; and is hereby issued, that, the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 – LN No 79 are a Statutory Instrument within the meaning of the *Statutory Instruments Act*.

II. A declaration be; and is hereby issued, that, the issuance of the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 – LN No 79 was contrary to the *Statutory Instruments Act*.

III. A declaration be; and is hereby issued, that, the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 – LN No 79 are unconstitutional for want of public participation.

IV. A declaration be; and is hereby issued, that, the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 – LN No 79 unjustifiably limit/violate or threaten with violation, the following human rights and fundamental freedoms: freedom of expression, conscience, opinion & belief, right to privacy, freedom of the media and the freedom from discrimination.

V. A declaration be; and is hereby issued, that, the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 – LN No 79amounted to an unfair administrative action.

VI. A declaration be; and is hereby issued, that, the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 – LN No 79 are constitutionally infirm on account of their vagueness.

VII. A declaration be; and is hereby issued, that, the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 – LN No 79 are unreasonable, irrational and disproportionate.

VIII. An order of *certiorari* be, and is hereby issued, calling into this honourable Court the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 – LN No 79, for the purposes of their being quashed, and by the same writ they subsequently be quashed.

IX. Any other order the court deems fit for purposes of administering justice to the case.

X. Costs be provided for.

5. The 1st interested party is a constitutional commission established under article 59(4) of *the Constitution* and its core mandate is to ensure the promotion and protection of human rights in Kenya and to secure observance by all state organs, of democratic values and principles and to promote constitutionalism. The 1st interested party filed an affidavit sworn by Dr Bernard Mogusu, its Chief Executive Officer/Secretary, in support of the petition. It is the position of the 1st interested party that the impugned rules are general and overboard in nature and have the deleterious effect of curtailing basic fundamental rights and freedoms guaranteed under articles 32 and 33 of *the Constitution*. Further that the impugned rules are unreasonable, unjustifiable and go beyond the constitutionally permissible limitations. Additionally, it is contended that the impugned rules contravene without justification, article 10 that requires public participation, article 47 on fair administrative action, article 34 on freedom of the media. In sum, the 1st interested party stated that the impugned rules are inconsistent with the spirit and letter of *the Constitution*.

6. The petition is opposed by the 1st respondent by a replying affidavit sworn on July 8, 2022 by Bernard Kasavuli, the Deputy Registrar of the Supreme Court. It was averred that it is incumbent upon the 1st respondent, as the head of the judiciary, chair of the Judicial Service Commission and President of the Supreme Court, to protect the independence and integrity of the Judiciary. Further, the initial rules of the court governing the presidential election petition, *Supreme Court (Presidential Election Petition) Rules*, 2013, were published in Legal Notice No 15 of 2013. The same were revoked and the *Supreme*

Court (Presidential Election Petition) Rules, 2017 came into force vide Legal Notice No 113 of 2017. The court then amended the 2017 Rules through the impugned rules. All these rules followed a similar process. The 1st respondent contended that the power of the Supreme Court to make rules is derived, not from statute, but from article 163(8) of *the Constitution* and therefore, the impugned rules are not statutory instruments.

7. It was further averred that the intention of the impugned rules was to codify the traditional legal practice on *sub-judice*. The *sub-judice* rule is meant to protect judges from external influence and interference and being influenced by discussions outside the courtroom hence infringing on the independence of the court. The 1st respondent referred to the Supreme court case of The Hon *Attorney General & 2 others v David Ndii & 88 others* and stated that counsel who appeared before the court in that case proceeded to hurl unnecessary diatribe, insults and speculations on a pending judgment. This led the court to make a finding that those acts amounted to unethical conduct on the part of the counsel concerned. It was further deponed that advocates play an indispensable role in the administration of justice and to ensure that the dignity and respect of the court is maintained. As such, they must avoid commentary that offends their duty as officers of the court. The 1st respondent stated that the impugned rules were only intended to ensure that the dignity and independence of the court is maintained and urged that the petition be dismissed with costs.

8. In grounds of opposition dated 27th, June 2022, the 2nd respondent contended that the impugned rules are not a statutory instrument subject to the SIA. This, the 2nd respondent says, is because the power of the Supreme Court to make rules for the exercise of its jurisdiction stems directly from *the Constitution* and is not conferred by statute. The power of the Supreme Court to hold a party in contempt is an inherent power and the impugned rules are intended to protect the integrity of active proceedings. Further, the impugned rules are limited to parties and their legal representatives, are not vague, unreasonable, illicit or unreasonable. According to the 2nd respondent, the impugned rules do not disclose any violation of fundamental rights nor do they create any new obligation upon the parties as the Supreme Court.

9. After considering the petition, responses, written and oral submissions by parties, as well as the cited authorities, the following issues emerge for determination:

    i. Whether the impugned rules are a statutory instrument within the meaning of the *Statutory Instruments Act*.

    ii. Whether the impugned rules are unconstitutional for want of public participation.

    iii. Whether the Supreme Court usurped the role of Parliament in promulgating the impugned rules.

10. In considering these issues, the court is called upon to interpret the provisions of *the Constitution* and must therefore be guided by article 259(1) which provides:

    1. This Constitution shall be interpreted in a manner that—

        a. promotes its purposes, values and principles;

        b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights

        c. permits the development of the law; and

        d. contributes to good governance.

11. Additionally, clause (3) of the article requires that *the Constitution* be construed according to the doctrine of interpretation that the law is always speaking.

12. Article 259(1) commands the court to take a purposive approach in interpreting *the Constitution* which is a transformative charter. In this regard, the Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR stated:

> 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 other 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.

13. The court went on to state:

> It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting *the Constitution*, is a task distinct from interpreting the ordinary law. The very style of *the Constitution* compels a broad and flexible approach to interpretation.

14. And in *In the Matter of Kenya National Commission on Human Rights* [2014] eKLR the same court stated:

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

15. Similar sentiments were expressed in *Government of Republic of Namibia v Cultura 2000*, 1994(1) SA 407 by Chief Justice Mahomed who cautioned against giving to Constitutional provisions rigid and artificial interpretation thus:

> A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation.

16. This court further has a duty to give full life to *the Constitution* by giving effect to *the Constitution* as a whole. In this regard I fully adopt the principle of harmonization set out in the case of *Centre for Rights*

Education and Awareness (CREAW) & 7 others v Attorney General [2011] eKLR where Musinga, J (as he then was) stated:

> In interpreting *the Constitution*, the letter and the spirit of the supreme law must be respected. Various provisions of *the Constitution* must be read together in order to get a proper interpretation.

17. It is on the basis of this background that I now proceed to consider the issues as framed for determination.

Whether the Impugned Rules are Statutory Instruments within the Meaning of the *Statutory Instruments Act*

18. It is necessary at the outset to reproduce the relevant parts of the impugned rules as follows:

> 1. These rules may be cited as the *Supreme Court (Presidential Election Petition)(Amendment) Rules, 2022.*
>
> 2. Rule 18 of the *Supreme Court (Presidential Election Petition) (Amendment) Rules, 2017*, is amended by adding the following new sub-rules immediately after sub-rule (3) -
>
> (4) Upon commencement of the hearing of the petition by the court, litigants, their advocates and advocates' agents shall refrain from expressing their opinion on merit, demerit or predict the outcome of the petition in any manner that would prejudice or impede court proceedings, until judgement is delivered.
>
> (5) A breach of sub-rule (4) shall amount to contempt of court under the Act and the rules made thereunder.

19. The petitioner through Mr Ogada and Mr Onderi, learned counsel, submitted that the impugned rules are a statutory instrument within the meaning of the SIA and thus subject to that Act. The impugned rules being part of the election code cannot be said to be issued on the sole basis of article 163(8). Counsel contended that LN. 113/17 was made under statute and that so long as the impugned rules are an amendment and not a repeal of the 2017 rules, they are statutory instruments. Counsel further argued that whereas article 163(8) of *the Constitution* empowers the Supreme Court to make rules for the exercise of its jurisdiction, sub-article (9) stipulates that 'an Act of Parliament may make further provision for the operation of the Supreme Court.' This is the *Supreme Court Act,* 2011.

20. The petitioners relied on the case of *Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others* [2018] eKLR, Milimani HC Pet 532 of 2017 in which the High Court summarized the requirements of the SIA as follows:

> " 91. Statutory Instruments are prepared by the Cabinet Secretary or a body with powers to make them, eg a Commission, authority or a Board. Statutory Instruments must conform to *the Constitution*, *Interpretation and General Provisions Act*,[65] The Parent Act, The *Statutory Instruments Act*[66] in that the Act requires:- (a) Consultation with stakeholders, (b) preparation of regulatory Impact Statement,[67] preparation of explanation memorandum, tabling of statutory instrument in the House,[68] consideration of the statutory instrument by the National Assembly,[69] Committee on Delegated Legislation.

92. Section 13 of the Act provides for guidelines for the committee. These guidelines focus on the principles of good governance; the Rule of Law and the Committee considers whether the Statutory Instrument conforms with *the Constitution*; the parent Act or other written laws; whether it infringes the Bill of Rights or contains a matter that ought to be dealt with by an act of Parliament, and whether it contains taxation; directly or indirectly bars the jurisdiction of the courts; gives retrospective effect to any of the provisions in respect of which *the Constitution* or the Act does not expressly give any such power; involves expenditure from the Consolidated Fund or other public revenues; is defective in its drafting or for any reason the form or purport of the statutory instrument calls for any elucidation; appears to make some unusual or unexpected use of the powers conferred by *the Constitution* or the Act pursuant to which it is made; appears to have had unjustifiable delay in its publication or laying before Parliament; makes rights liberties or obligations unduly dependent upon non-reviewable decisions; makes rights liberties or obligations unduly dependent insufficiently defined administrative powers; inappropriately delegates legislative powers; imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation; appears for any reason to infringe on the rule of law; inadequately subjects the exercise of legislative power to parliamentary scrutiny; and accords to any other reason that the Committee considers fit to examine.

21. According to the petitioner, the impugned rules are unlawful and void, for want of compliance with the SIA.

22. The 1st interested party represented by Mr Osman, learned counsel, was of a similar view. It was submitted that whereas rules made under article 163(8) are constitutional instruments, and not subject to the SIA, those made under statutory instruments are. The *Supreme Court Act* was enacted pursuant to article 163(9) to make further provision for the operation of the Supreme Court. It was therefore argued that because the impugned Rules were made under section 31 of the *Supreme Court Act,* they are statutory instruments and subject to the strict provisions of the Act.

23. The 2nd interested party supported the respondents' position that the impugned rules are constitutional and not statutory instruments. Reliance was placed on article 163(8) of *the Constitution* which confers upon the Supreme Court the powers to make rules. Also relied upon is section 2 of the Supreme Court Act which defines rules as the rules of the court made pursuant to article 163 (8) of *the Constitution*. The 2nd interested party also relied on the case of *Chege v Independent Electoral & Boundaries Commission* (Constitutional Petition E073 of 2022) [2022] KEHC 239 (KLR) (Constitutional and Human Rights) (4 April 2022) (Judgment), where Mrima, J stated that constitutional instruments are a special kind that derive their basis and legitimacy from *the Constitution* and not statute.

24. In its submissions, the 3rd interested party represented by Ms Angawa learned counsel, contended that the impugned rules are statutory instruments as they were made pursuant to the Supreme Court Act in addition to *the Constitution*.

25. The 1st respondent was represented by Mr Kanjama and Ms Owano, learned counsel. It was submitted that the impugned rules are constitutional instruments and not statutory instruments. Under chapter 10 of *the Constitution*, the Supreme Court is the only court that has been given constitutional authority

to govern its operations. In making rules under article 163(8), the Supreme Court does so as an independent arm of government under article 159 and 163 with power directly from the people.

26. The 2nd respondent represented by Mr Bitta, leaned counsel reiterated its position that the authority of the Supreme Court to make rules flows from *the Constitution* and not statute. The fact that the Supreme Court Act mirrors the constitutional provisions by expressly providing for the court to make rules does not take away the fact that such power springs from *the Constitution* and not statute. Counsel further submitted that the impugned rules are binding on this court under the principle of stare decisis. According to the 2nd respondent, the fact that the rules are binding obviates the necessity for public participation. Counsel further contended that the impugned rules are sound public policy aimed at protecting the integrity of pending proceedings and the rights of the parties so that justice may not only be done but be seen to be done.

27. The SIA defines a statutory instrument as follows:

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

28. Section 5 of SIA requires that there be consultation before making statutory instruments as follows:

> 1. Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—
>
> a. have a direct, or a substantial indirect effect on business; or
>
> b. restrict competition;
>
> the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.
>
> 2. In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—
>
> a. drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and
>
> b. ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.
>
> 3. Without limiting by implication the form that consultation referred to in subsection (1) might take, the consultation shall—
>
> a. involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or
>
> b. invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

29. Section 5A requires that every statutory instrument shall be accompanied by an explanatory memorandum demonstrating that sufficient public consultation was conducted and if not, the reasons.

30. I have looked at the impugned rules. They are expressed to be made by the Supreme Court in exercise of the powers conferred by article 163(8) of *the Constitution* and section 31 of the *Supreme Court Act.* Article 163(8) provides that the Supreme Court shall make rules for the exercise of its jurisdiction.

31. Section 31 of the Supreme Court Act provides:

> Without limiting the generality of article 163(8) of *the Constitution*, the rules made by the Supreme Court under that article may make provision for—
>
> a. regulating the sittings of the Supreme Court and the selection of judges for any particular purpose;
>
> b. regulating the right of any person other than an advocate of the High Court of Kenya to practise before the Supreme Court and the representation of persons concerned in any proceedings in the Supreme Court;
>
> c. prescribing forms and fees in respect of proceedings in the Supreme Court and regulating the costs of and incidental to any such proceedings;
>
> d. prescribing the time within which any requirement of the rules shall be complied with;
>
> e. empowering the Registrar, in order to promote access to justice, to waive, reduce, or postpone the payment of a fee required in connection with a proceeding or intended proceeding, or to refund, in whole or in part, such a fee that has already been paid, if satisfied on the basis of criteria prescribed under paragraph (f) that—
>
> i. the person otherwise responsible for payment of the fee is unable to pay or absorb the fee in whole or in part; or
>
> i. unless one or more of those powers are exercised in respect of a proceeding that concerns a matter of genuine public interest, the proceeding is unlikely to be commenced or continued;
>
> f. prescribing, for the purposes of the exercise of a power under paragraph (e), the criteria—
>
> i. for assessing a person's ability to pay a fee; and
>
> ii. for identifying proceedings that concern matters of genuine public interest; and
>
> f. any other matter required under *the Constitution*, this Act or any other written law.

32. The power of the Supreme Court to make rules for the exercise of its jurisdiction is conferred upon it by *the Constitution*. The provisions of section 31 of the *Supreme Court Act* cannot take away or limit what has already been given by *the Constitution*. The wording of the provision is instructive:

> Without limiting the generality of article 163(8) of *the Constitution*, the rules made by the Supreme Court under that article may make provision for—

33. When enacting this provision, it is clear that Parliament was alive to the fact that no provision in the Act could limit the power already conferred upon the Supreme Court by *the Constitution*, hence the wording of section 31. This provision simply restates the Supreme Court's powers under *the Constitution* to make rules, so that even supposing section 31 were not in the Act, the Supreme Court would still be able to make its own rules by invoking the provisions of article 163(8) of *the Constitution*.

34. In the case of *Chege v Independent Electoral & Boundaries Commission* (Constitutional Petition E073 of 2022) [2022] KEHC 239 (KLR) (Constitutional and Human Rights) (4 April 2022) (Judgment), Mrima, J drew a distinction between constitutional instruments and statutory instruments as follows:

> " 84. The term 'constitutional instruments' is neither provided for nor defined in *the Constitution* and the law. It is a term which this court has crafted for purposes of identifying such instruments which have the force of law, but do not include *the Constitution* per se, the legislations passed by Parliament or County Assemblies, the statutory instruments or subsidiary legislation, international instruments, common law or customary law.
>
> 85. In a general sense, constitutional instruments may be described as special kind of instruments which directly derive their basis and legitimacy from *the Constitution* and not from a statute.

35. What I understand the learned Judge to be saying is that constitutional instruments are not ordinary statutory instruments. They derive their legitimacy not from statute, but directly from the people of Kenya through *the Constitution*. This being the case, such instruments are not subject to the rigours of the law-making processes as provided for in *the Constitution* and the law. The impugned rules which were made in exercise of the powers conferred upon the Supreme Court by *the Constitution* are therefore a constitutional instrument and not a statutory instrument.

36. The Learned Judge went on to say:

> " 88. In Kenya, *the Constitution* makes provision for constitutional instruments. An example is in article 22(3) which provides as follows: -The Chief Justice shall make rules providing for the court proceedings referred to in this article, which shall satisfy the criteria that—(a)the rights of standing provided for in clause (2) are fully facilitated;(b)formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;(c)no fee may be charged for commencing the proceedings;(d)the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and(e)an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

89. The above provision specifically mandates the Hon Chief Justice to make certain rules. In coming up the said rules, the Hon Chief Justice is, for instance, not called upon to subject the rules to parliamentary approval. Article 22(3) of *the Constitution* grants the Hon Chief Justice the power to directly come up with the rules.

37. As repeatedly stated herein, the power of the Supreme Court to make rules is conferred upon it by *the Constitution* under article 163(8). *The Constitution* is the supreme law of the land and any power that flows therefrom cannot be limited by any statute, including the Supreme Court Act. Indeed section 2 of the *Supreme Court Act* states that "rules" mean the rules of the Supreme Court made pursuant to article 163 (8) of *the Constitution*.

38. The power of the Supreme Court to make rules under article 163(8) is akin to the power conferred upon the Chief Justice to make rules under article 22(3). When the Chief Justice made *the Constitution* of *Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules,* 2013, which were published in Legal Notice No 117 of 2013, the same were not subjected to parliamentary approval. This is because the power flows straight from *the Constitution* and there is no provision requiring that the rules be subjected to parliamentary approval. Similarly, the impugned rules which were made pursuant to power flowing directly from *the Constitution* were not subject to the rigours of the law-making processes as provided for in *the Constitution* and the law.

39. On the contention by the 2nd respondent that the impugned rules are binding because they were made by the Supreme Court, I agree with counsel for the petitioner that the impugned rules are not a ruling in respect of which the rule of stare decisis may be invoked. The binding effect of a decision of the Supreme Court as a court of final judicial authority, will only apply to decisions made in judicial proceedings. The impugned rules and indeed any rules made by the Supreme Court under article 163(8) are not a decision as contemplated in article 163(7) of *the Constitution*, which provides that all courts, other than the Supreme Court, are bound by its decisions.

40. In view of the foregoing, I find and hold that the impugned rules having been made in exercise of the powers conferred upon the Supreme Court directly by *the Constitution*, are not statutory instruments within the meaning of SIA. It follows therefore that while exercising its constitutional power to make the impugned rules, the Supreme Court was not subject to the provisions of SIA.

Whether the impugned Rules are unconstitutional for want of public participation

41. It was submitted for the petitioner and the interested parties that articles 10 and 232 of *the Constitution* recognise the crucial role played by public participation in both government and public service. Counsel argued that these provisions are binding on all persons whenever they enact, apply or interpret the law. As such, the 1st respondent was bound, prior to the issuance of the impugned rules, to conduct public participation and engage stakeholders including litigants in presidential elections, advocates, and the general public. The petitioner urged the court to adopt the test for public participation set out in the case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR.

42. The 1st interested party submitted that public participation is a national value and principle of governance enshrined in *the Constitution*. It is a sacred expression of the sovereignty of the people as articulated in article 1 of *the Constitution* and a sacred thread running throughout *the Constitution*. The 1st Interested Party cited the case of *British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others* [2017] eKLR where the Court of Appeal stated that It is clear that

since the promulgation of *the Constitution* of Kenya 2010, the concept of public participation and consultation has been entrenched. Indeed, the concept is consistent with the principle of sovereignty of the people that permeates *the Constitution* and in accordance with article 1(4) of *the Constitution* is exercised at both national and county levels. The 1st Interested party contended that there was blatant disregard of the law in making the impugned rules for failure to inform and accord the public, an opportunity to participate by giving submissions thereon. It was further submitted that the nature of the impugned rules notwithstanding, the letter and spirit of *the Constitution* must be upheld in the process of enactment. Reliance was placed on the cases of *Abe Semi Bvere v County Assembly of Tana River & another; Speaker of the National Assembly & another (interested parties)* [2021] eKLR and *Doctors for Life International v Speaker of the National Assembly & others* (CCT12/05) [2006] ZACC 11. The 1st interested party concluded by asserting that for failure to conduct public participation, the impugned rules were unconstitutional, null and void.

43. On the issue of public participation, the 2nd interested party submitted that the court in the *Chege* case (supra) maintained that the holders of the powers to formulate such instruments are usually not called upon to comply with the legislative processes provided in *the Constitution* and the law, but the resultant instrument must measure to the expected constitutional parameters and must embrace the spirit of *the Constitution*. In this regard, it was submitted that the petitioner was entitled to query the constitutionality of the impugned rules on procedural and substantive compliance. The 2nd interested party asserted that lack of public participation is a serious issue as it touches on the people's sovereignty

44. Similarly, for the 3rd interested party, it was submitted that as a state organ, the Supreme Court is bound by the constitutional requirement under article 10(2) of *the Constitution* to conduct public participation.

45. The position held by the 1st respondent on this matter is that the impugned rules are not unconstitutional for want of public participation. It was submitted that the Supreme Court had previously amended its rules in a similar manner as the impugned rules, without consulting presidential candidates or their advocates. According to the 1st respondent, the impugned rules not being statutory instruments did not require the normal legislative processes including mandatory public participation. Reliance was placed on the finding of Mrima, J in the *Chege* case. Further, the 1st respondent contended that the petitioner had not proved that there was no public participation prior to the enactment of the impugned rules. A similar view is held by the 2nd respondent who contended that the content of the impugned rules does not require public participation be fore enactment.

46. It is trite that the content and the manner in which legislation is adopted must conform to *the Constitution*. Article 10 of *the Constitution* as follows:

(1) The national values and principles of governance in this article bind all State organs, State officers, public officers and all persons whenever any of them––

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

2) The national values and principles of governance include––

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and;

(d) sustainable development.

47. Under article 10 of *the Constitution*, the national values and principles of governance are binding on all State organs, State officers, public officers and all persons whenever any of them applies or interprets *the Constitution*, enacts, applies or interprets any law, or makes or implements public policy decisions. Public participation is a constitutional imperative, which plays a central role in legislative, policy and executive functions of Government. It informs stakeholders and the public of what is intended and affords them an opportunity to express, and have their views taken into account. In the oft cited South African case of *Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others* CCT 86/08 [2010] ZACC 5, the court captured the essence of public participation thus:

> [E]ngagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.

48. Public participation has been entrenched in our Constitution as one of the national values and principles of governance that binds all state organs, including the Supreme Court when, *inter alia* enacting law. In *Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others* [2018] eKLR, Mativo, J (as he then was) stated:

> 49. In a recent decision of this court, I observed that "my analysis of the Constitutional provisions yields a clear finding that public participation plays a central role in legislative, policy as well as executive functions of the Government." Both local and foreign jurisprudence are awash with decisions holding that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. Any decision to exclude or limit fundamental participatory rights must be proportionate in order to be lawful.

49. Similarly, the Supreme Court in the case of *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties);Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR stated:

> (96) From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments.

50. Regardless of the nature of the impugned rules and the fact that the power to make them flows directly from *the Constitution*, the letter and spirit of *the Constitution* must be upheld in the process of enactment. Indeed, in the *Chege* case, Mrima, J stated:

> 86. The power to make such instruments is usually, directly conferred to a person or entity by *the Constitution*. The instruments are also not subject to the

rigours of the law-making processes as provided for in *the Constitution* and the law.

87. The holders of the powers to formulate such instruments are usually not called upon to comply with the legislative processes provided in *the Constitution* and the law, but the resultant instrument must measure to the expected constitutional parameters and must embrace the spirit of *the Constitution*...

89. above provision specifically mandates the Hon Chief Justice to make certain rules. In coming up the said rules, the Hon Chief Justice is, for instance, not called upon to subject the rules to parliamentary approval. Article 22(3) of *the Constitution* grants the Hon Chief Justice the power to directly come up with the rules.

90. In the process of coming up with rules, the Hon Chief Justice must, however, be alive to the calling that the rules must be within *the Constitution*. For example, the rules cannot make provisions which are in conflict with the national values and principles of governance or run contra the Bill of Rights or even usurp the powers of other constitutional entities.

51. The emphasis here is that the any rules made by any entity must be in conformity with *the Constitution*.

52. In the case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, cited by the petitioner, a 3 judge bench of this court after analyzing case law, international law and comparative law, set out the following principles that public participation entails:

a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J of the South African Constitutional Court stated this principle quite concisely thus:

> "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (*Minister of Health and another v New Clicks South Africa (Pty) Ltd and others* 2006 (2) SA 311 (CC))"

c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic v The Attorney General & another ex parte*

Hon Francis Chachu Ganya (JR Misc App No 374 of 2012). In relevant portion, the court stated:

> "Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."

In the instant case, environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment – as we will point out below.

d. Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e. Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

52. In promulgating the impugned rules, the Supreme Court had a duty to facilitate meaningful engagement with the public in a manner that that accords with the nature of the impugned rules. Such engagement should have included access to and dissemination of relevant information, providing reasonable opportunity to the public and all interested parties to know about the impugned rules and to sufficiently ventilate the same even if no guarantee is given that each individual's views will be taken.

53. Further, whenever a challenge is raised, every agency is required to demonstrate what it has done in compliance with its duty to facilitate public participation in a given case. This was the holding in the case of *Doctors for Life International v Speaker of the National Assembly & Others* (CCT12/05) [2006] ZACC 11, where the court stated:

> In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances.

54. The 1st respondent contended that the petitioner did not place any evidence before the court to support his claim that public participation did not in fact take place. Further that it was upon the petitioner to

prove that the public participation done before promulgation of the impugned rules was inadequate and the necessity for public participation.

55. To begin with, the respondents position from the outset has been that given that the impugned rules were a constitutional instrument, public participation was not necessary, in effect conceding that the rules were not subjected to public participation. To require the petitioner to prove that public participation was not done is at best to prove the obvious and at worst to prove the negative. Upon the petitioner stating that there was no public participation before the impugned rules were promulgated, the burden of proof shifted to the respondents to demonstrate that there was. In so finding, I am guided by the holding in *Law Society of Kenya v Attorney General & 2 others* [2019] eKLR, where the Court of Appeal stated:

> From the finding above, the learned judge ought to have found in favour of the appellant based on the claim made on the lack of public participation. It was an error for the learned judge to require the appellant to prove the negative, for once it states there was no public participation, the burden shifted to the respondents to show that there was.

56. In the present case, it is quite evident from the material before the court, including the respondents' own admission, that the Supreme Court did not conduct public participation in any form or shape, before the promulgation of the impugned rules. This is contrary to the requirement under articles 10 and 232 of *the Constitution*, to afford reasonable opportunity to persons likely to be affected by the impugned rules, such as litigants in presidential petitions, advocates and the public, to voice and perhaps have incorporated in the decision making, their concerns, needs and values. It is immaterial that previous rules and amendments thereto have been made without public participation. It is noted that the 1st respondent stated that "it is the custom and practice of the court to amend its rules as and when need arises to align the same with *the Constitution*, statutes and the court's jurisprudence." (emphasis added). Any rules made by the court must always accord with *the Constitution*, failing which the same cannot stand. Further, there is no exemption given under *the Constitution*, to the Supreme Court, from complying with the provisions of article 10(1).

57. In *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR, the Court of Appeal had this to say about the importance of national values and principles of governance set out in article 10(2) of *the Constitution*:

> 80. In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that article 10(2) of *the Constitution* is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in article 10(2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by article 259(1)(a) which enjoins all persons to interpret *the Constitution* in a manner that promotes its values and principles.

58. Participation of the people is not a progressive right to be realised sometime in the future. It is enforceable immediately. Any laws or rules made pursuant to constitutional or statutory provisions, must take this into account. Accordingly, and applying the above considerations, the inevitable conclusion that can be drawn is that the decision by the Supreme Court to exclude the participatory rights of the people before promulgation of the impugned rules, is unlawful and unconstitutional.

Whether the Supreme Court usurped the role of Parliament in promulgating the impugned Rules

59. Mr Ogada, counsel for the petitioner submitted that in promulgating the impugned rules, the Supreme Court exercised authority it did not have. Citing article 94 of *the Constitution*, the petitioner contended that legislative authority vests in and is exercised by Parliament.

60. Counsel further argued that the 1st respondent's plea that the impugned rules were intended to codify the legal principle of *sub-judice*, was misguided. Additionally, counsel contended that in so far as the impugned rules purported to publish/codify legal principles not provided for in the statute books and that the rules would take effect upon the commencement of hearing of a presidential petition, the 1st respondent purported to make provision having the force of law, which is prohibited by article 94(5) of *the Constitution*. It was further submitted that by imposing the impugned rules and expanding the recognised contemptuous acts stipulated in section 28 of the Supreme Court Act and declaring that the same amount to contempt of court, the 1st respondent purported to legislate, acted *ultra vires* and violated article 94(5) of *the Constitution*. The petitioner thus urged that the impugned rules be declared unconstitutional.

61. Mr Kanjama for the 1st respondent submitted that there is already a statutory framework for contempt of court in the Penal Code. Further, section 28 of the Supreme Court Act provides the court with general power to punish for contempt in specific instances listed therein and inherent power to do so, in any other case. Counsel further submitted that although article 94(5) prohibits other bodies and persons from making provision that has the force of law, there is an exception in that such bodies and persons may make provision that has the force of law if authorised by *the Constitution* or statute.

62. The impugned rules which have been reproduced elsewhere in this judgment amend the *Supreme Court (Presidential Election Petition) Rules,* 2017, to add new sub-rules (4) and (5) to rule 18 thereof. Sub-rule (4) forbids litigants, their advocates and advocates' agents, to during presidential petition proceedings, express their opinion on merit, demerit or to predict the outcome of the petition in any manner that would prejudice or impede court proceedings. Sub-rule (5) then proceeds to declare that any breach of sub-rule (4) shall amount to contempt of court under the Act and the rules made thereunder.

63. It is common ground that the *Supreme Court Act* already makes provision for contempt of court. Section 28 provides:

> Contempt of court
>
> 1. A person who—
>
> a. assaults, threatens, intimidates, or wilfully insults a judge of the Supreme Court, the Registrar of the court, a Deputy Registrar or officer of the court, or a witness, during a sitting or attendance in court, or in going to or returning from the court; or
>
> b. willfully interrupts or obstructs the proceedings of the Supreme Court, in the court; or

c. willfully and without lawful excuse disobeys an order or direction of the Supreme Court in the course of the hearing of a proceeding, commits an offence.

2. A police officer, with or without the assistance of any other person, may, by order of a judge of the Supreme Court, take into custody and detain a person who commits an offence under sub section (1) until the rising of the court.

3. The Supreme Court may sentence a person who commits an offence under sub section (1) to imprisonment for a period not exceeding six months, or to pay a fine not exceeding one million shillings, or to both, for every offence.

4. For avoidance of doubt, the court has inherent powers to punish any person for contempt, in any other case to which this section does not apply.

5. The court shall not initiate any contempt of court proceedings on its own motion after expiry of twelve months from the date on which the contempt is alleged to have been committed.

6. The court may make an order denying audience to the contemnor for any period, as the court may deem fit, but not exceeding eighteen months.

64. It is evident that in section 28 of the Act, Parliament already made provision for instances of contempt of court including penal provisions. Sub-section (4) reaffirms the inherent power of the court to punish for contempt, any offence not listed in sub-section (1). Rules 56-58 of The Supreme Court Rules, 2020 contain the procedural provisions in respect of contempt of court. Parliament having made provision for contempt of court including penal provisions and the procedure in the Supreme Court Act and rules, it is not clear why the promulgation of the impugned rules was necessary.

65. If indeed there was need to expand the instances of contempt of court to include that which is contained in sub-rule (4) and the penal provisions in sub-rule (5) of rule 18, then the Supreme Court ought to have deferred to Parliament which has the constitutional mandate to undertake such exercise under article 94(5) of *the Constitution* which provides:

> No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

66. Article 94(1) provides that legislative authority is derived from the people of Kenya and is vested in and exercised by Parliament at the national level. It is only Parliament that has the power to make provision that has the force of law. Any other person or body may only do so under authority of *the Constitution* or statute. The impugned rules purport to make provision that has the force of law and enforceable by the court through penal provisions. To this extent, I find that the Supreme Court went overboard. Such provision can only be made by Parliament or with its approval. More so because the provision has the effect of taking away rights.

67. While it is accepted that the Supreme Court should be given the leeway and space to exercise the powers conferred upon it by *the Constitution*, such power must be exercised within the four corners of *the Constitution* and without usurping the powers of other constitutional entities. I find that in making the impugned rules which contain a penal provision that is enforceable by the court, the Supreme

Court went beyond its authority and usurped the law-making role of Parliament. This is what Mrima, J cautioned against in the *Chege* case:

> In the process of coming up with rules, the Hon Chief Justice must, however, be alive to the calling that the rules must be within *the Constitution*. For example, the rules cannot make provisions which are in conflict with the national values and principles of governance or run contra the Bill of Rights or even usurp the powers of other constitutional entities.

68. The making of the impugned rules, offended *the Constitution* and the doctrine of separation of powers which requires each of the 3 arms of government to stick to its lane. *In Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (amicus curiae)* (Petition 229 of 2012) [2012] KEHC 2480 (KLR) (Constitutional and Human Rights) (20 September 2012) (Judgment) a 3-judge bench of this court considered the principle of separation of powers in relation to the judiciary and the legislature, observed as follows:

> 63. In answering these constitutional questions, it is imperative that we begin by re-stating that the doctrine of separation of powers is alive and well in Kenya. Among other pragmatic manifestations of the doctrine, it means that when a matter is textually committed to one of the coordinate arms of government, the courts must defer to the decisions made by those other coordinate branches of government. Like many modern democratic Constitutions, the New Kenyan Constitution consciously distributes power among the three co-equal branches of government to ensure that power is not concentrated in a single branch. This design is fundamental to our system of government. It ensures that none of the three branches of government usurps the authority and functions of the others.

70. The court went on to say:

> 64. Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuan influence is palpable throughout the foundational document, *the Constitution*, regarding the necessity of separating the governmental functions. *The Constitution* consciously delegates the sovereign power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two. We readily agree with the respondents that this must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent.

71. The petitioners have submitted that the impugned rules limit, violate and threaten with violation fundamental rights and freedoms contained in the Bill of Rights, including right to privacy, inherent dignity, fair administrative action and access to information, freedom of the media, thought, expression and conscience and freedom from discrimination. In view of the finding that the impugned rules are unconstitutional for want of public participation and further for the reason that in promulgating the said rules, the Supreme Court usurped the legislative powers of Parliament, the same cannot stand. Accordingly, it will not be necessary to delve into the whether the impugned rules limit, violate or threatened with violation, the listed fundamental rights and freedoms.

72. Having considered the petition, the rival submissions and applied my mind to *the Constitution*, the law and the authorities cited, I make the following orders and declarations:

i. A declaration be and is hereby issued, that, the *Supreme Court (Presidential Election Petition) (Amendment) Rules*, 2022 are not a statutory instrument within the meaning of the *Statutory Instruments Act*.

ii. A declaration be and is hereby issued, that, the *Supreme Court (Presidential Election Petition) (Amendment) Rules*, 2022 are unconstitutional for want of public participation.

iii. A declaration be and is hereby issued, that, the *Supreme Court (Presidential Election Petition) (Amendment) Rules*, 2022 are unconstitutional for usurping the legislative power of Parliament.

iv. An order of *certiorari* be, and is hereby issued, calling into this honourable court the *Supreme Court (Presidential Election Petition) (Amendment) Rules,* 2022, for the purposes of their being quashed, and the same are hereby quashed.

v. No order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF AUGUST 2022

M. THANDE

JUDGE

In the presence of: -

.....for the Petitioner

.....for the 1st Respondent

.....for the 2nd Respondent

.....for the 1st Interested Party

.....for the 2nd Interested Party

.....for the 3rd Interested Party

.....Court Assistant