



**Kenya Human Rights Commission & 6 others v Independent Electoral and Boundaries Commission & 2 others; Communication Authority Of Kenya & 3 others (Interested Parties) (Petition E306 of 2022) [2022] KEHC 10579 (KLR) (4 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 10579 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
PETITION E306 OF 2022  
M THANDE, J  
AUGUST 4, 2022**

**BETWEEN**

**KENYA HUMAN RIGHTS COMMISSION ..... 1<sup>ST</sup> PETITIONER  
KATIBA INSTITUTE ..... 2<sup>ND</sup> PETITIONER  
KENYA SECTION OF INTERNATIONAL COMMISSION OF JURISTS (ICJ)-  
KENYA ..... 3<sup>RD</sup> PETITIONER  
HAKI YETU ..... 4<sup>TH</sup> PETITIONER  
INUKA KENYA NI SISI LIMITED ..... 5<sup>TH</sup> PETITIONER  
AFRICA CENTRE FOR OPEN GOVERNANCE ..... 6<sup>TH</sup> PETITIONER  
CONSTITUTION AND REFORMS EDUCATION CONSORTIUM .... 7<sup>TH</sup>  
PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT  
NATIONAL RETURNING OFFICER WAFULA WANYONYI  
CHEBUKATI ..... 2<sup>ND</sup> RESPONDENT  
THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**COMMUNICATION AUTHORITY OF KENYA ..... INTERESTED PARTY  
CRAWN TRUST ..... INTERESTED PARTY  
KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .... INTERESTED  
PARTY**



JUDGMENT

1. The Petition before me dated June 21, 2022 arises from a statement made by the 2<sup>nd</sup> Respondent, National Returning Officer, Wafula Wanyonyi Chebukati that the 1<sup>st</sup> Respondent, Independent Electoral and Boundaries Commission (IEBC) shall not use the manual or printed register of voters in the conduct of the forth coming general elections on 9.8.2022 (the General Elections). The statement was made in response to concerns raised with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by Azimio La Umoja One Kenya Coalition Party (Azimio), one of the political formations that has fielded a presidential candidate in the General Elections. The Petitioners are concerned that as a result of the decision made of abandoning the use of the manual register, eligible voters shall be denied their right to vote, on account of lack finger prints or technological failure.
2. The Petition is filed by 7 Petitioners.
3. The 1<sup>st</sup> Petitioner, Kenya Human Rights Commission, is a Non-Governmental Organization registered under the *Non-Governmental Organization Act, 1990* and is devoted to the promotion of Human rights in the country. Its objects include promoting Human Rights, Fundamental Freedoms, Social, Cultural and Economic Rights, Good Governance and Democracy.
4. The 2<sup>nd</sup> Petitioner Katiba Institute is a registered Constitutional Research Policy and Litigation Institute established to further the implementation of the 2010 *Constitution*, and to generally seek the development of a culture of Constitutionalism in Kenya.
5. The 3<sup>rd</sup> Petitioner, Kenyan Section of the International Commission of Jurists, also known as ICJ Kenya, is a Kenyan non-governmental organization, a National Section of the International Commission of Jurists. It is composed of lawyers who work to promote human rights and the rule of law. Its objectives include developing, strengthening, and protecting the principles of the rule of law, enjoyment of human rights, independence of the judiciary and the legal profession, and promotion of the provision of legal services.
6. The 4<sup>th</sup> Petitioner, Haki Yetu is a Human Rights Organization established in 2008 in an informal settlement in Mombasa County, Kenya, with the specific aim of advocating for the rights of marginalized communities living in informal settlements in Mombasa. It has expanded its reach to all coastal counties and its mandate today covers the areas of Land and Housing, Governance and Accountability, Cohesion and Transformation as well as Gender and Law.
7. The 5<sup>th</sup> Petitioner, Inuka Kenya Ni Sisi Limited is an organization born out of an ideology born of hundreds of honest conversations with hundreds of Kenyans across the country. It promotes good governance by urging Kenyans to know that their vote is their choice.
8. The 6<sup>th</sup> Petitioner, Africa Centre and Open Governance (AFRICOG), is an institution committed to addressing the structural causes of the crisis of governance in East Africa.
9. The 7<sup>th</sup> Petitioner, Constitution and Reform Education Consortium (CRECO) is a civil society consortium in Kenya working in the areas of constitutional awareness and reforms, and research, documentation and dissemination.
10. The Petition is supported by the affidavits of Davis Malombe, the Executive Director of the 1<sup>st</sup> Petitioner, sworn on June 21, 2022 and July 15, 2022. The gist of the Petition is that the decision by



the 1<sup>st</sup> and 2<sup>nd</sup> Respondents not to use the print register in the identification of voters at the general elections on August 9, 2022 shall disenfranchise and bar eligible voters from exercising their right to vote either on account of lack of finger prints or technological failure. Citing Section 44A of the *Elections Act* and Regulation 69 of the *Elections (General) Regulations*, the Petitioners contended that the process of voter identification using a manual register is entrenched in our laws and that the 2<sup>nd</sup> Respondent cannot solely make a decision that the Commission shall not use of a manual register of voters. According to the Petitioners, the decision of the 2<sup>nd</sup> Respondent to completely abandon the use of a manual register of voters is contrary to statute and ought to be quashed instant.

11. The Petitioners further contended that the arbitrary decisions and actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contravene the rights of registered voters to vote in the General Elections; the right to legitimate expectation that the General Elections shall be conducted in strict compliance with the electoral law; and the right to free and fair elections as guaranteed under Articles 27, 38, 81 and 83 of /akn/ke/act/2010/constitution the *Constitution}} of Kenya, 2010*, unless urgently redressed by the Honourable court through the orders sought herein.
12. The Petitioners therefore seek the following reliefs:
  - a) An Order of Declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall in the conduct of the general elections on Tuesday August 9, 2022 provide manual register of voters in every polling station in Kenya to be used to identify voters in strict compliance with the provisions of Regulation 69(1) (e) of the *Elections (General) regulations*.
  - b) An Order of Declaration to quash the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents signified by the letter dated June 10, 2022 stating that the 1<sup>st</sup> Respondent shall not use manual register of voters in the general elections on Tuesday August 9, 2022.
  - c) An Order of Declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have a Constitutional mandate to take all the necessary and logical steps to ensure that the Petitioners' and the citizens' rights under Articles 38 as read together with Article 83 (3) of /akn/ke/act/2010/constitution the *Constitution}}* are observed, respected, protected, promoted and fulfilled;
  - d) An Order of Declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have a Constitutional mandate to take all the necessary and logical steps to ensure that administrative arrangements for the registration of voters and the conduct of elections, including the identification of voters during the August 2022 election is designed to facilitate, and not deny, an eligible citizen the right to vote in the election.
  - e) An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to strictly comply with the provisions of the Constitution, statutory Act and subsidiary legislation in the conduct of the general elections on Tuesday August 9, 2022
  - f) Costs
  - g) Such other orders that the Honourable court shall deem just to grant.
13. The Petition is supported by the 3<sup>rd</sup> Respondent, the Attorney General who is the Chief Legal Adviser to the Government. The Petition is also supported by the 3<sup>rd</sup> Interested Party, the Kenya National Commission on Human Rights.
14. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the Petition by a replying affidavit sworn on July 12, 2022 by Chrispine Owiye, the Director of Legal and Public Affairs of the 1<sup>st</sup> Respondent. In summary, it was averred that under Section 44 of the *Elections Act*, the first mode of identification of voters



is electronically, by way of the Kenya Integrated Elections Management System (KIEMS), through the KIEMS Kit. A complementary system for identification of voters is established under Section 44A. The deponent further averred that the Petition is premised upon a hypothetical scenario and a misconception and misapprehension of the role of technology in the identification of voters at the polling station.

15. The deponent further stated that the issue of a complementary system was dealt with by the Court by a 3 Judge bench of the High Court in *National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR (the NASA Case) and by the Court of Appeal in *National Super Alliance (Nasa) Kenya v Independent Electoral & Boundaries Commission & 2 others* [2017] eKLR (the NASA Appeal). It was averred that deployment of the printed voter register in the General Elections can only be in the manner envisaged by law and as interpreted by the Court of Appeal in the said case. Such deployment must be a measure of last resort upon complete failure of the KIEMS Kit. It was further averred that the impugned decision was premised on the need to curb any possibility of misuse of the voter register during elections, thus safeguarding and enhancing the credibility of the process. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents urged that the Petition be dismissed with costs to them.
16. The 4<sup>th</sup> Interested Party filed a replying affidavit sworn on July 27, 2022 by Veronica Maina, its Secretary General, in opposition to the Petition. The 4<sup>th</sup> Interested Party supported the position taken by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. It was averred that the use of technology in voter identification is mandatory by dint of Section 44 of the Act and that Section 44A does not substitute the use of technology but requires that there be a complementary mechanism of identification of voters. It was further averred that each polling station has a truncated manual register which is to be pinned on the entrance of the polling station 7 days to the poll, and which can be used should the KIEMS Kit fail. In the 4<sup>th</sup> Interested Party's view, the Petition calls upon the Court to make a decision the impact of which will overthrow the provisions of Section 44 of the Act. Like the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the 4<sup>th</sup> Interested Party stated that the Petitioners have not demonstrated the probability of failure of the KIEMS Kit and urged that the Petition be dismissed.
17. The 1<sup>st</sup> Interested Party responded to the Petition vide a replying affidavit sworn on July 7, 2022 by its Director General, Ezra Chiloba. It was averred that the 1<sup>st</sup> Interested Party being the regulatory authority of the communications sector has no mandate over the conduct of the elections, which mandate is the preserve of the 1<sup>st</sup> Respondent. It was further averred that the 1<sup>st</sup> Interested Party is neither a proper nor necessary party as no relief has been sought against it. As such, the 1<sup>st</sup> interested Party ought to be discharged from the proceedings herein.
18. Parties filed written submissions and referred to authorities in support of their respective positions, which I have duly considered. I have also considered the oral submissions made by counsel at the hearing. The following issues fall for determination:
  - (a) Whether the 1<sup>st</sup> Respondent's decision not to deploy the printed register of voters at the polling station to identify voters in the General Elections is in compliance with the law.
  - (b) Whether the Court can direct the 1<sup>st</sup> Respondent to deploy the manual register to identify voters in the General Elections.

**Whether the 1<sup>st</sup> Respondent's decision not to deploy the printed register at the polling station to identify voters in the forthcoming general elections is in compliance with the law.**

19. As I consider this issue, it is necessary to reproduce the constitutional and statutory provisions that are relevant herein.



20. The *Constitution* guarantees to every adult citizen, political rights. Article 38(3) provides:  
Every adult citizen has the right, without unreasonable restrictions—
- a. to be registered as a voter;
  - b. to vote by secret ballot in any election or referendum; and
  - c. to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.
21. In order to safeguard every adult citizen’s right to vote, Article 83(3) provides that Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election. To this end, the 1<sup>st</sup> Respondent is enjoined under Article 86(a) to ensure that whatever voting method is used, the system must be simple, accurate, verifiable, secure, accountable and transparent.
22. Section 44 of the *Elections Act* provides for the use of technology in the election process from registration and identification of voters to transmission of results. Subsection (1) provides:
- Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.
23. Technology can and will fail, and did indeed fail in the 2013 general elections. In the *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR, the Supreme Court stated as follows:
- It is common ground that even the best technology can fail; it was also admitted that in the conduct of 2013 general elections it largely failed; it can also be interfered with through criminal and human elements; for these reasons we sought to know, from counsel for the appellant what would happen if technology failed in the process of voter identification and result transmission and it resulted to some voters being disenfranchised. Sadly, counsel did not provide a solution that would be in line with the provisions of Article 83 (3) which provides:
- “Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny an eligible citizen the right to vote or stand for election”.
24. Following the failure of technology during the 2013 general elections and in order to forestall the risks associated with technology hitches in subsequent elections, Parliament enacted Section 44A which provides:
- Notwithstanding the provisions of section 44, the Commission shall put in place a complementary mechanism for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution.
25. Regulations 69 and 83 of the Elections (General) Regulations were promulgated to give effect to Section 44A of the *Elections Act*. Regulation 69 provides for the voting procedure while Regulation 83 makes provision for tallying and announcement of election results.



26. Regulation 69 provides as follows:

- (1) Before issuing a ballot paper to a voter, an election official shall—
  - (a) require the voter to produce an identification document which shall be the same document used at the time of registration as a voter;
  - (b) ascertain that the voter has not voted in that election;
  - (c) call out the number and name of the voter as stated in the polling station register;
  - (d) require the voter to place his or her fingers on the fingerprint scanner and cross out the name of the voter from the printed copy register once the image has been retrieved;
  - (e) in case the electronic voter identification device fails to identify a voter the presiding officer shall—
    - (i) invite the agents and candidates in the station to witness that the voter cannot be identified using the device;
    - (ii) complete verification Form 32A in the presence of agents and candidates;
    - (iii) identify the voter using the printed Register of voters; and
    - (iv) once identified proceed to issue the voter with the ballot paper to vote;
  - (f) ...

27. The foregoing are among the constitutional and statutory provisions that the 1<sup>st</sup> Respondent is required to comply with, in the conduct of the General Elections on August 9, 2022. The overriding objective of the provisions cited, is that the political rights of citizens enshrined in Article 38 of the Constitution, are not violated. This was the finding of the 3 Judge Bench in the NASA Case where it was stated:

Accordingly, our determination on what constitutes the components of the complementary mechanism to be established under section 44A of the Act is: that the mechanism should be separate but which is meant to improve or augment the mechanism already set out in section 44. That mechanism has to be simple, accurate, verifiable, secure, accountable and transparent. It must also comply with Article 38 of the Constitution, that is, it must ensure that every citizen's right to register as a voter, vote at an election or vie for political office is safeguarded.

28. This decision was affirmed by the Court of Appeal in the NASA Appeal.

29. It is necessary to state, at this stage, that this Court will not go into what constitutes a supplementary mechanism, as contemplated in Section 44A of the *Act*. This was extensively considered in 2017 by the 3 Judge bench in the NASA case and by the Court of Appeal in the NASA Appeal.

30. What concerns this Court is the impugned decision and whether it was made within the law. The decision was in response to the following concern raised by Azimio:

Stakeholders are given to understand that the commission does not intend to have hard copies of the voters register at the polling stations. What administrative arrangements has the commission put in place to ensure that all eligible citizens exercise their constitutional



the (sic) right to vote in the event of technology problems and that ineligible individuals do not vote?

31. In response, the 1<sup>st</sup> Respondent in a document titled “Response To Concerns By Azimio La Umoja One Kenya Coalition Party Regarding the General Elections” signed by the 2<sup>nd</sup> Respondent, stated:

The Commission made a decision not to use the printed Register of voters based on the findings of the Post-Election Evaluation Report for the 2017 General Election and Fresh Presidential Elections. It was established that the use of the printed Register of voters provided an avenue for misuse during the voting process.

In an attempt to ensure that such misuse does not occur and to enhance the credibility of the voting process, the Commission decided to bar the use of printed register to ensure that all voters are strictly identified electronically using their captured biometric data and to eliminate the possibility of identification of voters using the printed register.

32. It is this response that provoked the Petition herein.

33. At the hearing, the Petitioners were represented by Mr. Pamba, Mr. Limo and Ms. Maumo, learned Counsel. It is the Petitioners’ case that the decision to abandon the use of printed register of voters in the General Elections, is in contravention of Section 44A and Regulation 69. Further, that Regulation 69(1) is emphatic that there must be a printed register of voters at the polling station during voting. They submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have a constitutional duty under Article 88(4) of the Constitution to ensure that the printed register of voters is part of the election materials deployed to the polling station in the conduct of an election; that the printed register of voters is used both as a complementary mechanism as defined in Regulation 69(1) (e) and also after verification of a voters’ biometrics under Article 69(1)(d). The Petitioners contended that the use of a printed register of voters at the polling station being the law, the same cannot be negated by an administrative decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. It was further submitted that there is reasonable expectation that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall in the conduct of elections, comply with the law. What they have done however, is to make a whimsical decision to ensure that there is no strict compliance with the law.

34. Mr. Osman, learned Counsel for the 3<sup>rd</sup> Interested Party submitted that that under Section 44 of the Act, voter identification shall be electronic. This includes biometric and alphanumeric search. However, Section 44A which was enacted after 2013 is anything but electronic. Counsel further submitted that technology does fail and that the Court of Appeal in the NASA Appeal stated as much. Counsel contended that a report by the 3<sup>rd</sup> Interested Party titled “Mirage at Dusk, A Human Rights Account of the 2017 General Election”, recorded at pages 139-140, incidents of failure of technology in about 11 constituencies. In view of this, counsel contended that while the electronic voter identification is the first port of call, there must also be a manual register.

35. The 3<sup>rd</sup> Respondent was represented by Mr. Weche, learned Counsel, who relied on the written submissions. The 3<sup>rd</sup> Respondent’s submissions are that the decision by the 1<sup>st</sup> Respondent to avoid use of the printed register as a complementary system offends both the spirit and the letter of the Constitution. The 3<sup>rd</sup> Respondent contended that the complementary system, not being expressly defined by statute, then the printed register of voters should be taken as the complementary system as it will best protect the rights of those voters whose details fail to appear or be picked by the KIEMS Kit.

36. Mr. Mukele learned Counsel, represented the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and submitted that the impugned decision was compliant with the law. He submitted that the primary mode of voter identification is by use of biometric data through the KIEMS Kit which does not require network



connectivity as purported by the Petitioners. Further that the complementary mechanism of voter identification is through the alphanumeric search by inputting voter information in the Kiems Kit. Additionally, Counsel submitted that that the printed register can only be deployed and used upon a total failure of the KIEMS Kit, with the approval of the 1<sup>st</sup> Respondent and in accordance with the law, which is in line with the decision in the NASA Appeal.

37. Mr. Mbaja, learned Counsel for the 1<sup>st</sup> Interested Party reiterated the averments in its replying affidavit that it was not a necessary party herein and no relief was sought against it.
38. In his submissions, Mr. Mutuma, learned Counsel for the 4<sup>th</sup> Interested Party introduced the truncated register that would be used in the event of technology failure. This he said was a manual register with the name of the voter but conceals the mobile number and identity card number of the voter. He further submitted that the KIEMS Kit does not need internet and that the preloaded details of a voter can be retrieved with or without internet just like in a phone or a laptop computer.
39. Technology failure is not unheard of. It routinely happens in our everyday lives. The Supreme Court had occasion to speak to the issue of technology failure in elections, in the case of *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR. This is what the Court said:

233. We take judicial notice that, as with all technologies, so it is with electoral technology: it is rarely perfect, and those employing it must remain open to the coming of new and improved technologies. Analogy may be drawn with the traditional refereeing methods in football which, as their defects became apparent, were not altogether abandoned, but were complemented with television-monitoring, which enabled watchers to detect errors in the pitch which had occurred too fast for the referees and linesmen and lineswomen to notice.

234. But as regards the integrity of the election itself, what lawful course could IEBC have taken after the transmission technology failed? There was no option, in our opinion, but to revert to the manual electoral system, as was done.

237. From case law, and from Kenya's electoral history, it is apparent that electronic technology has not provided perfect solutions. Such technology has been inherently undependable, and its adoption and application has been only incremental, over time. It is not surprising that the applicable law has entrusted a discretion to IEBC, on the application of such technology as may be found appropriate. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process.

40. It is common ground that Section 44A of the Act was enacted to address the issue of technology failure in the 2013 general elections. Regulations 69, 82 and 83 were promulgated by the 1<sup>st</sup> Respondent with the Approval of Parliament to give effect to Section 44A to safeguard the electoral process. In the NASA Appeal, the Court stated:

(27) Moving away from the experiences of 2013 general election and in order to improve on electoral process, the Legislature directed under Section 44A of the *Elections Act*, that IEBC do develop a 'complementary mechanism'.



This came in the form of the enactment of Regulations 69, 82, and 83 so as to operationalize the provisions of the said Section 44A which in turn is supposed to give full effect to the provisions of Article 38 (2) (3) and 81, 86 (a) and 87 (1) of the Constitution. There was no allegation that the complementary procedure in the aforesaid regulations contradicted the provisions of the Constitution. Therefore, just like the learned trial judges of the High Court, we dispose of the grounds of appeal challenging the provisions of the aforesaid regulations as a non-starter as the greatest danger lies in withdrawing those regulations that are supposed to back the electronic voter identification and result transmission and thereby leaving IEBC with no alternative fall back system of ensuring the dictates of /akn/ke/act/2010/constitution the Constitution}} are fulfilled in the discharge of its mandate. In so doing, we underscore the fact that the IEBC has a constitutional duty of balancing all the rights and ensuring all voters, especially those whose biometrics are not be picked by KIEMS are accorded an opportunity to vote if they are genuinely registered voters who can be traced from the register of voters and who can be identified by their identification card or passport.

41. The 1<sup>st</sup> Respondent in promulgating Regulation 69 recognized that there will be situations where the Kiems Kit does not identify a voter. In the event this happens, the presiding officer shall invite the agents and candidates in the station to witness that the voter cannot be identified using the device and in their presence, complete verification Form 32A. Thereafter, the voter shall be identified using the printed register of voters and once identified, be issued with the ballot paper to vote.

42. Further, in 2017, the 1<sup>st</sup> Respondent issued an internal memo which was placed before the Court of Appeal in the NASA Appeal. The Court reproduced the memo as follows:

(17) It is important that we reproduce the contents of the Internal Memo stated above for its full effect and import. The same reads as follows:

“internal Memo

FROM: Commission

Secretary/CEO TO: County Election Managers

Constituency Returning Officers

Deputy Returning Officers

County ICT Officers

REF: IEBC/VREO/2/149 DATE: 27th July, 2017

Re: Possible Voter Verification Scenarios And Action To Be Taken By Presiding Officers At The Polling Station

Reference is made to the above subject matter.

The Commission wishes to share the attached scenarios that Presiding Officers, Deputy Presiding Officers and Polling Clerks may encounter while operating KIEMS during verification of voters on Polling Day.

Biometric Verification.



Presiding Officers must ensure that Voters are identified by biometrics upon production of identification document used during Registration. Biometric verification is the primary mode of identifying voters.

#### Complementary Mechanism

Where a voter cannot be identified using biometrics, then the Presiding [officer] shall use a complementary mechanism of alphanumeric search in the presence of agents and the voter shall fill form 32A before being issued with six ballot papers.

#### Use of Printed Register of Voters

The Presiding Officer will resort to the use of printed Register of Voters after approval from the Commission upon confirmation that KIEMS kits has completely failed and that there is no possibility of repair or replacement.

All the possible scenarios and recommended action must be brought to the attention of all of POs, DPOs and Clerks during the cascaded training with immediate effect.

(Signed)

Ezra Chiloba

[18] Attached to the Internal Memo was a two (2) page schedule describing eighteen (18) possible scenarios that Presiding Officers, Deputy Presiding Officers and Polling Clerks may encounter while operating KIEMS during verification of voters on the polling day and the appropriate action required to be taken by the Presiding Officer. Item No 14 of the said Memo provided for a scenario where voter details are missing in KIEMS whether searched by finger print or using alphanumeric method and no voter record is found in the Register of Voters. Such a voter was not to be allowed to vote as he/she could not be identified. However, where a voter identification using the Hard Copy of Register of Voters when KIEMS totally fails and the voter's details match fully as per the identification document (ID/Passport), the voter would be allowed to vote.

43. It is noted that in the internal memo dated 27.7.17, the 1<sup>st</sup> Respondent set out 3 modes of identifying voters; biometric, the complementary mechanism of alphanumeric search and the use of the printed register of voters. The internal memo clearly stated that the presiding officer will resort to the use of the printed register of voters after approval from the Commission, upon confirmation that the KIEMS kit has completely failed and that there is no possibility of repair or replacement. In its decision, Court of Appeal stated that the internal memo provided that a voter not found in the KIEMS Kit through a finger print or alphanumeric search should not be allowed to vote but that a voter should be allowed to vote if their identification document matches the details in the "Hard Copy of the Register of Voters". The Court of Appeal thus recognized that a voter can be identified through the printed register of voters.
44. Notably, Mr. Mukele, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, is of the same view. In his submissions, he agrees that the printed Register of voters can be used. He submitted as follows:

In effect, the Court of Appeal has interpreted regulations 69 and 83 in the context of the Internal Memorandum aforesaid. The Court specifically made a finding that the Internal



Memo issued by the Commission shall be adhered to by all concerned persons in the application of regulations 69 and 83.

In light of the above decision of the Court of Appeal, we submit that the printed register can only be deployed and used with the approval of the commission. This mandate must be exercised in accordance with the law.

45. The submissions by Mr. Mukele in effect affirm that the printed register can be deployed and used with the approval of the 1<sup>st</sup> Respondent. This is the assurance that the 1<sup>st</sup> Respondent ought to have made to Azimio, rather than stating that the printed register of voters will not be used in the General Elections at all.
46. In view of the foregoing, the inevitable finding this Court makes is that the impugned decision by the 1<sup>st</sup> Respondent to abandon the use of the printed register of voters in the identification of voters in the General Elections, is in violation of Articles 38, 83 and 86 of the Constitution, Section 44A of the Act, Regulation 69 of the Elections (General) Regulations.

#### **Whether the Court can direct the 1<sup>st</sup> Respondent to deploy the manual register in identification of voters**

47. In his submissions, Mr. Mukele urged the Court to restrain itself from usurping the role and mandate of the 1<sup>st</sup> Respondent and allow the 1<sup>st</sup> Respondent to exercise its mandate in accordance with its functional and operational independence.
48. The 1<sup>st</sup> Respondent is an independent Commission established under Article 88 of the Constitution. Its mandate is to conduct or supervise referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament. Article 249(2) of the Constitution states as follows regarding independent commissions and offices established under the Constitution:
  - (2) The commissions and the holders of independent offices—
    - (a) are subject only to this Constitution and the law; and
    - (b) are independent and not subject to direction or control by any person or authority.
49. The independence of the 1<sup>st</sup> Respondent is anchored in the Constitution which provides that it is only subject to this Constitution and the law and shall not be subject to direction or control by any person or authority. In view of this, the Court will generally show deference to the independence of the 1<sup>st</sup> Respondent and other independent commissions and offices.
50. In the NASA Appeal, the Court of Appeal had this to say about the independence of institutions such as the 1<sup>st</sup> Respondent:
  - (25) One of the core attributes of functional and operational independence of institutions such as the Judiciary, the Legislature, the Executive and Constitutional Commissions for example the IEBC, is that, their mandate is clothed with discretion and latitude to decide the governance process or procedure to employ, as to how and when to execute their mandate, as long as it is within the law. This operational and functional independence has constitutional underpinning. (emphasis added).



51. As seen from Article 249 of the *Constitution*, all independent commissions, though independent and subject to no direction from any person or authority. This is true of the 1<sup>st</sup> Respondent, which must be given the space to exercise its discretion in the discharge of its mandate. The only caveat is that these commissions are subject to the Constitution and the law and that the exercise of discretion in the discharge of constitutional and statutory mandate by these independent commissions must be within the law. It follows therefore that failure to by the 1<sup>st</sup> Respondent to heed the provisions of the *Constitution* and the *Elections Act* and the Regulations thereunder in making any decision, would render such decision unlawful and open to attack.
52. In the present case, the Court has found that the impugned decision of the 1<sup>st</sup> Respondent to abandon the printed register, violates the clear provisions of Regulation 69(1)(e) which provides that where an electronic voter identification device fails to identify a voter, then such voter will be identified using the printed register. What will happen to a duly registered voter whose details cannot be picked by the KIEMS Kit for want of technology failure or any other reason, in light of the impugned decision? Allowing the impugned decision to remain unchallenged, will result in the violation of such a voter's constitutional right to vote under Article 38. By the impugned decision, the 1<sup>st</sup> Respondent has failed to make administrative arrangements for the conduct of elections designed to facilitate, and not deny, an eligible citizen the right to vote, as required by Article 83(3) of the Constitution.
53. In the NASA Appeal, the Court was clear in its mind that no eligible voter should be disenfranchised through the method used in the voting process employed by the 1<sup>st</sup> Respondent. The Court stated:

Taking the totality of the aforesaid provisions of the Constitution, the *Elections Act* and Regulations, the plain intention of the Legislature was to ensure that every eligible citizen should not be disenfranchised or denied a right to vote; the elections should be free and fair, are by secret ballot, free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner. Further, IEBC that is charged with the mandate of conducting elections is supposed to ensure that whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent. Needless to re-emphasize, conduct of free, fair and transparent elections is an essential prerequisite of a democratic society. As the sovereign will of the people is expressed through the elections, the process must also ensure that no eligible voter is disenfranchised. Therefore the electoral system that is used to identify voters, if it be electronic, must ensure every eligible voter is able to cast their ballot. The elephant in the room was, in the event of failure of technology, how to facilitate the identification of a voter whose biometrics cannot be picked by the KIEMS and also in the event of failure of technology in transmission of Presidential results.

54. Where it is proved as it has in the present case, that an independent commission has deviated from, and acted outside the parameters of the law, the Court will step in. Otieno-Odek, JA in *Law Society of Kenya v Centre for Human Rights and Democracy & 13 others* [2013] eKLR stated:

If it is proved that the tribunal, person or authority has deviated from the established and set beacons or pathway or legal criteria as delineated and demarcated for it and has run wild and amok, and at worst has gone on a frolic of its own, become an unruly horse and engaged in caprice, malice, witch-hunting and a wild goose chase running helter-skelter, it is the duty of the High Court through its supervisory jurisdiction to pull the leash and firmly point the delineated legal path that the tribunal, person or authority is enjoined by law to tread and to follow. The supervisory jurisdiction of the High Court is the leash and bridle that affirm and ensures that all tribunals, persons or authority are subject to the Constitution,



rule of law, natural justice and good governance. It ensures that there is no trampling and aberration of the fundamental rights of the citizen. The supervisory jurisdiction is an in-built internal check and balance within the judicial system. It is the king pin upon which the cog and wheels of justice revolve and without it, untrammelled exercise of discretion reigns supreme – this is not what the people of Kenya intended when they promulgated the 2010 Constitution. The people of Kenya intended to have a country governed by the Constitution and the rule of law, not an unchecked exercise of judicial and quasi-judicial power by any person or authority.

55. Although the 1<sup>st</sup> Respondent has not acted as an unruly horse and engaged in caprice or malice, it has made a decision that is in violation of the Constitution and the law and indeed its own internal memo. As a result of 1<sup>st</sup> Respondent's decision not to use the printed register of voters, there is a real risk of disenfranchising eligible voters as demonstrated herein. This Court must therefore step in through its supervisory jurisdiction under Article 165 to ensure that the 1<sup>st</sup> Respondent, though independent, operates subject to the Constitution and the law. This Court must ensure that there is no trampling and aberration of the fundamental rights of the eligible voter, through the 1<sup>st</sup> Respondent's administrative arrangements for the conduct of the General Elections.
56. In its answer to Azimio, the 1<sup>st</sup> Respondent did not make any room or allowance for failure of technology. It was submitted that the KIEMS Kit does not require internet connectivity for purposes of identification of voters. This may very well be true. However, it is common knowledge that data in devices such as mobile phones and computers which is accessible without internet does get lost or corrupted or interfered with through criminal and human elements. The technology used in the voting process is no exception. This was recognised by the Supreme Court in the Raila case (supra).
57. The 1<sup>st</sup> Respondent's stated reason for abandoning the printed register to identify voters is to ensure that the same is not misused as happened in the 2017 general elections. All systems, whether manual or electronic, that are handled by human beings, are susceptible to manipulation. Indeed, the electronic system can also be misused as the printed register was, in 2017. Abandoning the use of the printed register is a drastic measure. It is throwing the baby out with the bath water. Rather than abandon the manual register altogether, the 1<sup>st</sup> Respondent ought to engage officers of integrity and ensure that they do the right thing and comply with Section 55A of the Act.
58. Article 23 of the Constitution provides that in proceedings such as the case herein, the Court may grant appropriate relief. In Republic v Public Procurement Administrative Review Board; Principal Secretary, State Department of Interior, Ministry of Interior and Co-ordination of National Government (Interested Party); Ex Parte Applicant CMC Motors Group Limited [2020] eKLR, Mativo, J (as he then was) defined appropriate relief provided for in Article 23 of the Constitution as follows: .

Perhaps the most precise definition of "appropriate relief" is the one given by the South African Constitutional Court in *Minister of Health & Others v Treatment Action Campaign & Others* thus:-

"...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 court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in



this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."

59. Having found as I have that the 1<sup>st</sup> Respondent has acted in contravention of the Constitution and the law, then this is a proper case for this Court to fashion appropriate reliefs to ensure that the rights enshrined in the Constitution are protected and enforced.
60. In view of the foregoing analysis of the law, facts and authorities enumerated above, I allow the Petition. The following are the final orders of the Court:
- a. A declaration is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have a constitutional mandate to take all the necessary and logical steps to ensure that the Petitioners' and citizens' rights under Article 38 as read together with Article 83(3) of the Constitution of Kenya, 2010 are observed, respected, protected, promoted and fulfilled.
  - b. A declaration is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have a constitutional mandate to take all the necessary and logical steps to ensure that administrative arrangements for the registration of voters and the conduct of election, including the identification of voters during the August 2022 elections are designed to facilitate, and not deny, an eligible citizen the right to vote in the election.
  - c. A declaration is hereby issued that the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents signified by the letter dated June 10, 2022 stating that the 1<sup>st</sup> Respondent shall not use manual register of voters in the General Elections on Tuesday August 9, 2022 is unconstitutional and the said decision is hereby quashed.
  - d. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall in the conduct of the general elections comply with the provisions of Regulation 69 of the Elections (General) Regulations, 2012.
  - e. The Petition having been filed in the public interest, I decline to award costs.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF AUGUST 2022**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

- ..... **for the Petitioners**
- ..... **for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents**
- .....**for the 3<sup>rd</sup> Respondent**
- .....**for the 1<sup>st</sup> Interested Party**
- .....**for the 2<sup>nd</sup> Interested Party**
- ..... **for the 3<sup>rd</sup> Interested Party**
- .....**for the 4<sup>th</sup> Interested Party**
- ..... **Court Assistant**

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