



**Sumba & 4 others v Independent Electoral & Boundaries Commission &
another (Constitutional Petition E435 of 2022) [2022] KEHC 13196 (KLR)
(Constitutional and Human Rights) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13196 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E435 OF 2022**

AC MRIMA, J

SEPTEMBER 30, 2022

BETWEEN

**CHARLES MAKOKHA SUMBA 1ST PETITIONER
ABDIFATAH ALI MAALIM 2ND PETITIONER
WILSON SHIKOTI 3RD PETITIONER
EDWARD MWANGI 4TH PETITIONER
HALIMA NJERI ABDI 5TH PETITIONER**

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT**

THE HON ATTORNEY GENERAL 2ND RESPONDENT

Consent of the IEBC was a prerequisite for effecting a voter's transfer of registration.

Reported by John Ribia

***Statutes** – interpretation of statutes – subsidiary legislation – where a subsidiary legislation was in conflict with the parent Act - regulation 13C of the Elections (Registration of Voters), Regulations, 2012 vis-à-vis section 7 of the Elections Act - whether regulation 13C of the Elections (Registration of Voters) Regulations, 2012 which called for a voter to make a formal application for transfer of registration was in violation the Elections Act which only called for such a voter to notify the IEBC - Elections Act, Cap 7, section 7; Elections (Registration of Voters), Regulations, 2012, regulation 13C.*

***Constitutional Law** – fundamental rights and freedoms - enforcement of fundamental rights and freedoms - right to equality and freedom from discrimination – political rights - right of a voter to transfer their vote to a different polling station - whether regulation 13C of the Elections (Registration of Voters), Regulations,*



2012 which called for a voter to make a formal application for transfer of registration was in violation of the Constitution for unreasonably restricting voters' right to transfer their votes freely – Constitution of Kenya articles 27 and 38; Elections Act, Cap 7, section 7; Elections (Registration of Voters), Regulations, 2012, regulation 13C

Constitutional Law – national values and principles – public participation – necessity of conducting public participation before effecting a new law - whether regulation 13C of the Elections (Registration of Voters) Regulations, 2012, which called for a voter to make a formal application for transfer of registration was in violation of the Constitution for want of public participation and fair administrative procedures – Constitution of Kenya, 2010, articles 10 and 47; Interpretation and General Provisions Act, Cap 2 section 5; Elections (Registration of Voters), Regulations, 2012, regulation 13C.

Statutes – interpretation of statutes – rules and principles of interpretation - what principles did the courts consider in interpreting the Constitution, interpreting statute, interpreting statute vis-à-vis statute, determining if a limitation on a right or fundamental freedom was justified - what were the available remedies that a court could give when a subsidiary legislation was inconsistent with the parent Act.

Words and Phrases – apply – definition of - to make a formal request or motion - Black's Law Dictionary, 10th Edition.

Words and Phrases – notify – definition of - to inform (a person or group) in writing or by any method that is understood: to give notice of; to make known - Black's Law Dictionary, 10th Edition.

Brief facts

The petition sought to scrutinize the constitutionality of the statutory requirements in transfer of registration by voters. The 1st to 5th petitioners desired to transfer their voter registration from their previous polling stations as registered in the general election of 2017 to other polling stations. The petitioners were, however, turned down by the respective registration clerks and instead, were asked to lodge their applications before the 1st respondent's (Independent Electoral and Boundaries Commission (IEBC)) constituency offices. It was contended that the registration centers were only registering new voters and could not handle voter transfers. The petitioners contended that they were called upon to comply with regulation 13C of the Elections (Voter Registration of Voters) Regulations 2012, (the impugned regulation). Aggrieved the petitioners filed the instant petition. They contended that the impugned regulation unreasonably disenfranchised them and other eligible voters in the mass registration, hence, unconstitutional.

Issues

- i. What principles should the courts consider when:
 1. interpreting the Constitution;
 2. interpreting statute;
 3. interpreting statute vis-à-vis statute; and
 4. determining if a limitation on a right or fundamental freedom was justified.
- ii. Whether the consent of the IEBC was a prerequisite for effecting a voter's transfer of registration.
- iii. Whether regulation 13C of the Elections (Registration of Voters) Regulations, 2012 which called for a voter to make a formal application for transfer of registration was in violation of section 7 of the Elections Act which only called for such a voter to notify the IEBC.
- iv. Whether regulation 13C of the Elections (Registration of Voters) Regulations, 2012 was in violation of articles 27 and 38 of the Constitution for unreasonably restricting voters' right to transfer their votes freely.
- v. Whether regulation 13C of the Elections (Registration of Voters) Regulations, 2012 was in violation of articles 10 and 47 of the Constitution for want of public participation and fair administrative procedures.

Relevant provisions of the Law

Constitution of Kenya, 2010



Article 38 - Political rights

(1) Every citizen is free to make political choices, which includes the right—

- (a) to form, or participate in forming, a political party;*
- (b) to participate in the activities of, or recruit members for, a political party; or*
- (c) to campaign for a political party or cause.*

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

- (a) any elective public body or office established under this Constitution; or*
- (b) any office of any political party of which the citizen is a member.*

(3) 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.*

Elections Act, No. 24 of 2011

Section 7 - Transfer of registration

(1) Where a voter wishes to transfer the voter's registration to an electoral area other than the one the voter is registered in, the voter shall notify the Commission, in the prescribed manner, of the intention to transfer the registration to the preferred electoral area not less than ninety days preceding an election.

(2) Upon receipt of the notification referred to in subsection (1), the Commission shall transfer the voter's registration particulars to the register of the preferred constituency not later than sixty days preceding the election.

Elections (Registration of Voters) Regulations, 2012

Regulation 13C - Transfer of registration:

A voter is not qualified to transfer his or her registration unless at the date of his or her application to be transferred he or she was ordinarily resident in that constituency six months immediately preceding the date of his or her application for transfer.

Held

1. Articles 20(4) and 259(1) of the Constitution of Kenya, 2010 (the Constitution) gave guidelines on how the Constitution was to be interpreted. The Constitution should be interpreted in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms and in a manner that contributed to good governance.
2. The Constitution should be interpreted in a holistic manner, within its context, and in its spirit. The approach to interpret the Constitution should be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution.
3. Courts utilized a three-pronged criteria in determining whether a fundamental right or freedom could be justified.
 1. The objective test established that a limit was reasonable and demonstrably justified in a free and democratic society, the objective, which the measures responsible for a limit on a charter right or freedom were designed to serve, had to be of sufficient importance to warrant overriding a constitutionally protected right or freedom.
 2. The proportionality test where once a sufficiently significant objective was recognized, then the party invoking had to show that the means chosen were reasonable and demonstrably justified.



That involved a form of proportionality test. A proportionality test had three important components:

- i. the measures adopted had to be carefully designed to achieve the objective in question. They were not to be arbitrary, unfair or based on irrational considerations. They had to be rationally connected to the objective.
 - ii. The means, even if rationally connected to the objective in the first sense, should impair as little as possible the right or freedom in question.
 - iii. There had to be a proportionality between the effects of the measures which were responsible for limiting the Charter right or freedom, and the objective which had been identified as of sufficient importance.
4. The impugned regulation, section 7 of the Elections Act and article 38 of the Constitution made provisions which had a bearing on the transfer of registration by voters. The Constitution, unlike the Elections Act and the impugned regulation, did not make express provisions on the transfer of registration. However, the provisions of the Elections Act and the impugned regulation in a way impacted upon article 38.
 5. On one hand, the Elections Act spoke of the IEBC to be notified by a registered voter of the voter's intention to transfer the registration. On the other hand, the impugned regulation spoke of making of an application to the IEBC for transfer of registration. Application meant to make a formal request or motion. Notify meant to inform (a person or group) in writing or by any method that was understood or to give notice of; to make known. In applying one made a formal request to the IEBC for the IEBC's permission or consent to effect the transfer. It, therefore, meant that if the IEBC declined the application then that was the end of the road for the voter. The consent of the IEBC was a prerequisite for effecting the transfer of registration.
 6. A voter was just required to inform the IEBC of the intention to transfer the registration. Once the IEBC received the notification, then it had to make the changes. No permission of the IEBC was required in the case of a party notifying the IEBC.
 7. Section 7 of the Elections Act was different from that of the impugned regulation. The application requirement under the impugned regulation overrode the notification called under the Elections Act. Therefore, the impugned regulation was in conflict with the Elections Act.
 8. The Elections Act was a substantive Act of Parliament. It was a parent Act. It made provision for the IEBC to make subsidiary legislation under section 109. The Elections (Registration of Voters) Regulations, 2012 which derived life from the Elections Act, was a subsidiary legislation or delegated legislation. The subsidiary legislation was in contrast with the parent Act. That called for reconciliation by the court.
 9. Sections 2, 29 and 31(b) of the Interpretation and General Provisions Act amplified the need for harmony in meanings between the parent Act and a subsidiary legislation. The law abhorred inconsistencies. The only instance where the law allowed any variance was where the parent Act expressly stated that the subsidiary legislation was to provide to the contrary. No subsidiary legislation shall be inconsistent with an Act of Parliament.
 10. Before the court decided that a particular instrument or subsidiary legislation was inconsistent with the Act, it had to be satisfied that the two provisions could not stand together. What the court was required to do was to construe the instrument with the necessary alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Act. It was only when the instrument could not, despite such construction, conform to the Act that the court would be entitled to nullify the instrument. If the choice was between two strongly competing interpretations, the advantage could lie with that which produced the fairer and more convenient operation so long as it conformed to the legislative intention.



11. The impugned regulation which called for a voter to make a formal application for transfer of registration could not be read into section 7 of the Elections Act which only called for such a voter to just notify the Commission. The two requirements were worlds apart. The Elections Act made no provision or intention for a contrary meaning of section 7 in the subsidiary legislation. The impugned regulation was irredeemably inconsistent with section 7 of the Elections Act and as such, the impugned regulation had to give way to the parent Act.
12. Whereas the impugned regulation seemed to be aimed at curtailing the commission of some election offences, there was a law in place dealing with all forms of electoral offences and malpractices. The Elections Act and other regulations made thereunder had provisions on when voter registration and transfer was suspended. Further, the Constitution and the Elections Act put a lot of premium on avoiding unreasonable restrictions in voter registration and voting. The objective of the impugned regulation could not relate to concerns which were pressing and substantial in a free and democratic society.
13. The impugned regulation could not be characterized as sufficiently important to limit a right. The impugned regulation could not be proportional to the alleged mischief. The mischief, if any, was already and sufficiently taken care of by other existing laws.
14. The impugned regulation had the effect of constricting the right to register as a voter rather than creating an enabling environment for the greater realization of the right. The impugned regulation did not stand the threshold in article 24 of the Constitution to limit the right of a voter to transfer registration. In essence, the impugned regulation was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
15. The impugned regulation infringed on article 38 of the Constitution to the extent that it curtailed a voter's right to freely make political choices and to transfer registration. Likewise, the impugned regulation infringed on article 27(1) and (2) of the Constitution to the extent that it did not accord a voter the right to equal protection and benefit of the law. The impugned regulation contravened articles 27(1) and (2) and 38 of the Constitution.
16. The amendments that brought forth the impugned regulation were originated by the IEBC. The amendments were made pursuant to section 109 of the Elections Act. The provision granted power to IEBC to make regulations generally for the better carrying out of the purposes and provisions of the Act. The Elections (Registration of Voters) (Amendment) Regulations, 2017, was, hence, a subsidiary legislation. As such, it had to strictly comply with the Constitution and the Statutory Instruments Act.
17. There was need for all persons, State organs and public bodies to undertake public participation in appropriate cases for their actions or decisions to gain constitutional validity. Whereas an allegation of lack of public participation did not automatically vitiate the process. The allegations had to be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation was to be determined on a case to case basis.
18. The impugned regulation was so germane that it went into root of *inter alia* the political rights of citizens. As such, it was a matter that called for appropriate engagement especially on the clarity of the subject matter for the public to understand, the medium of engagement ought to have been clear and simple; there ought to be an opportunity for balanced influence from the public in general; the commitment to the process could not be overemphasized; inclusive and effective representation was necessary; the integrity and transparency of the process was to be guaranteed; the capacity to engage on the part of the public was cardinal, including that the public must be first sensitized on the subject matter. The IEBC was under a duty to satisfy the court that the above had been undertaken. That called for evidence. However there was no such evidence tendered. The hollow averments could only amount to hearsay.
19. Given the effect of the impugned regulation on the general public, it was incumbent upon the IEBC to undertake a robust public engagement, a duty which IEBC failed to discharge. The lack of engagement



ran contra articles 10 and 47 of the Constitution as well as the Statutory Instruments Act and the Fair Administrative Actions Act for want of public participation and fair administrative procedures.

Petition allowed.

Orders

- i. *Declaration issued that regulation 13C of the Elections (Registration of Voters) Regulations, 2012 was in violation of article 38 of the Constitution to the extent that it curtailed a voter's right to freely make political choices and to transfer registration, hence, unconstitutional.*
- ii. *Declaration issued that regulation 13C of the Elections (Registration of Voters) Regulations, 2012 infringed article 27(1) and (2) of the Constitution to the extent that it did not accord a voter the right to equal protection and benefit of the law and further infringes articles 10 and 47 of the Constitution as well as the Statutory Instruments Act and the Fair Administrative Actions Act for want of public participation and fair administrative procedures, hence, unconstitutional.*
- iii. *The petitioners were at liberty to transfer their registrations once the registration of voters' resumed.*
- iv. *Each party was to bear its own costs.*

Citations

Cases

Kenya

1. *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)* Petition 5 of 2017; [2019] KESC 15 (KLR) - (Explained)
2. *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 101 (KLR) - (Explained)
3. *Chege, Sabina v Independent Electoral & Boundaries Commission* Constitutional Petition E073 of 2022; [2022] KEHC 239 (KLR) - (Explained)
4. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR) - (Explained)
5. *In the Matter of Kenya National Commission on Human Rights* Reference 1 of 2014; [2014] KESC 33 (KLR); [2014] 2 KLR 356 - (Explained)
6. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] 2 KLR 32 - (Explained)
7. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR); [2012] 3 KLR 718 - (Explained)
8. *Katiba Institute & 3 others v Independent Electoral Boundaries Commission & 3 others; Law Society of Kenya & another (Interested parties)* Constitutional Petitions No E540 & E546 of 2021; [2022] eKLR - (Explained)
9. *Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others* Petition 1174 of 2007; [2013] KEHC 6747 (KLR) - (Explained)
10. *Law Society of Kenya v Attorney General & another* Petition E327 of 2020; [2020] eKLR - (Explained)
11. *Mugenda, Olive Mwihaki & another v Okiya Omtatah Okoiti & 4 others* Civil Appeal 3 & 11 of 2016; [2016] KECA 663 (KLR) - (Explained)
12. *Okoiti, Okiya Omtatah v Kenya University Teaching, Referral & Research Hospital & 2 others; Kenyatta University Council & 2 others (Interested Parties)* Constitutional Petition 401 of 2019; [2019] KEHC 2658 (KLR) - (Explained)
13. *Okoiti, Okiya Omtatah v Public Service Commission & 73 others* Constitutional Petitions No 33 and 42 of 2018; [2021] KEHC 464 (KLR) - (Explained)



14. *Republic v Ministry of Health & 5 others ex parte Pius Wanjala & 2 others* Miscellaneous Civil Application 159 of 2016; [2017] KEHC 8577 (KLR) - (Explained)

Uganda

Tinyefuza v Attorney General [1997] UGCC 3 - (Explained)

South Africa

1. *Poverty alleviation Network & others v President of the Republic of South Africa & 19 others* (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010) - (Explained)
2. *S v Zuma & others* [1995] ZACC 1; 1995 (4) BCLR 401 (SA); [1996] 2 CHRLD 244 - (Explained)

United Kingdom

Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319 (PC) - (Explained)

Canada

1. *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 - (Explained)
2. *R v Oakes* [1986] 1 SCR 103 - (Explained)

Texts

Garner, BA., (Ed) (2014), *Black's Law Dictionary* St Paul Minnesota: Thomson Reuters 10th Edn

Statutes

Kenya

1. Constitution of Kenya articles 10(2); 20(4); 24; 27; 38(2)(a),(3); 47; 83(1)(3); 88(4); 94; 259(1) - (Interpreted)
2. Elections (General) (Amendment) Act, 2017 (cap 7 Sub Leg) In general - (Cited)
3. Elections (Registration of Voters) (Amendment) Regulations, 2017 (cap 7 Sub Leg) -In general (Cited)
4. Elections (Voter Registration of Voters) Regulations, 2011 (cap 7 Sub Leg) regulation 13C - (Unconstitutional)
5. Elections Act (cap 7) sections 7, 109 - (Interpreted)
6. Fair Administrative Actions Act (cap 7L) In general - (Cited)
7. Interpretation and General Provisions Act (cap 2) sections 29, 31(b) - (Interpreted)
8. Statutory Instruments Act, 2013 (cap 2A) sections 2, 5 - (Interpreted)
9. Supreme Court Act (cap 9B) In general - (Cited)

Advocates

Miss Gisebe for the petitioners

Miss Cheronno for the 1st respondent

Miss Omuom for the 2nd respondent

JUDGMENT

Background

1. The petition before this court presents an opportunity to scrutinize the constitutionality of the statutory requirements in transfer of registration by voters.
2. Charles Makokha Sumba, Abdifatah Ali Maalim, Wilson Shikoti, Edward Mwangi and Halima Njeri Abdi, the 1st to 5th petitioners herein respectively, desired to transfer their voter registration from their previous polling stations as registered in the general election of 2017 to other polling stations.
3. The petitioners attributed their need to transfer their voter registration to include change in various circumstances of life including job opportunities.



4. They contended that they will not be able to travel to their previous registration centres and even if they had to, it would impose an unreasonable and unnecessary burden upon them, hence, the need to transfer the registration.
5. On the foregoing factual background, the petitioners, during the mass voter registration conducted between October 4, 2021 and November 4, 2021, presented their requests for transfer to the Independent Electoral and Boundaries Commission, (hereinafter referred to as ‘the 1st respondent’ or ‘the IEBC’ or ‘the Commission’) at the various registration centres.
6. The petitioners were, however, turned down by the respective registration Clerks and instead, were asked to lodge their applications before the 1st respondent’s Constituency Offices. It was contended that the registration centres were only registering new voters and could not handle voter transfers.
7. Armed with the foregoing information, the petitioners proceeded to IEBC’s Constituency Offices and presented their respective requests.
8. The petitioners contended that they were called upon to comply with regulation 13C of the *Elections (Voter Registration of Voters) Regulations 2012*, (hereinafter referred to as ‘the impugned regulation’).
9. The provision called upon the petitioners to formally apply for the transfer in ‘Form C’ and present evidence of proof of being residents for the last 6 months prior to the application for transfer.
10. The petitioners, in accordance to the impugned regulation, were additionally required to furnish evidence of utility bills, tenancy agreements and or leases and letters from the Area Chiefs.
11. It was the petitioners’ case that in view of their informal settlement status, availing the such information was impossible. Further, they asserted that the requirement to obtain letters from local administration confirming their residence and adduce utility bills or tenancy agreements was unachievable for people of their calibre.
12. The petitioners claimed that they had no utility bills or lease agreements given the fact that some lived with their guardians or used alternative sources of energy and that lease agreements were unknown in informal settlements.
13. As a result of failure to meet the requirements associated with the impugned regulation, IEBC declined to transfer the Petitioners’ registration, hence, the filing of the petition herein.
14. The petitioners, therefore, contended that the impugned regulation unreasonably disenfranchised them and other eligible voters in the mass registration, hence, unconstitutional.

The Petition

15. Through the petition dated October 18, 2021 and supported by the affidavits of Charles Makokha, Abdifatah Ali, Wilson Shikoti, Edward Mwangi and Halima Njeri Abdi, all deposed to on October 19, 2021, the petitioners approached this court in contest of the impugned regulation.
16. Contemporaneously with the filing of the petition was the filing of an application by way of Notice of Motion dated October 18, 2021. The application was supported by affidavits of the petitioners, all deposed to on October 19, 2021.
17. By the directions of this court issued on October 26, 2021 both the main petition and the application were to be heard together.



18. In demonstrating the difficulty in complying with the impugned regulation especially by persons living in the informal settlements, the petitioners referred to three reports being the Ministry of Foreign Affairs Report, The Ministry of Labour and Social Protection's Report on National Census of Street Families and the one on Accounting for Pastoralists in Kenya, all speaking variously to intricacies of informal settlement and difficulty they experience on getting documentation proving residence.
19. The petitioners, hence, averred that the effect of the impugned regulation was essentially that persons living in informal settlements cannot transfer their votes.
20. The petitioners averred that the impugned regulation was a violation of their political rights under article 38 of the Constitution as read alongside article 83(1) of the Constitution on the qualifications for one to be registered as a voter.
21. The petitioners further stated that the requirements were a derogation of article 83(3) of the Constitution which forbids placing unreasonable restrictions on the right to vote.
22. The petitioners also averred that the requirement for voter transfer is as stipulated in section 7 of The Elections Act only required voters wishing to transfer their registration to just notify the Commission in the prescribed manner, not less than ninety days preceding an election upon which the Commission must effect such transfer not less than sixty days preceding the election.
23. On the foregoing, the petitioners asserted that both the Constitution and the Elections Act do not impose any conditions and or qualifications on the right to transfer a vote save for a notification to the 1st respondent.
24. It was the petitioners' case that the impugned regulation contradicted with the parent statute and the Constitution.
25. Separately, the petitioners averred that Legal Notice No 73 of 2017 dated May 2, 2017 that introduced The Elections (Registration of Voters) (Amendment) Regulations, 2017 which amended the Elections (Registration of Voters) Regulations, 2012 was published without public participation.
26. It was the petitioners case that the refusal by the 1st respondent to transfer their votes violation of articles 10, 24, 27 and 38(3) of the Constitution.
27. They claimed that the impugned regulation was unconstitutional to the extent that it imposes proof of residence for a period of 6 months prior to date of application.
28. On the basis of the foregoing, the petitioners prayed for the following orders in the application: -
 1. Spent
 2. That the honourable court be pleased to issue conservatory order staying and or suspending further implementation, application and or enforcement of regulation 13C of the Elections (Registration of Voters) Regulations 2012 as amended by the Elections (Registration of Voters) (Amendment) Regulations, 2017 pending the hearing and determination of this application and the petition.
 3. That the honourable court be pleased to issue a temporary order of injunction suspending the 1st respondent's mass voter registration that commenced on October 4, 2021 and scheduled to be finalized on November 4, 2021 pending the hearing and determination of this application and the petition herein.



4. That in the alternative to 3 above, this court be pleased to order that the 1st respondent opens up voter transfer to be carried alongside and or simultaneously with the mass voter registration by the 1st respondent's clerks conducting the mass voter registration at the ward level pending the hearing and determination of this application and the petition on the account of the limited number of days remaining for the exercise.
 5. That the cost of this applying be borne by the respondents.
29. In the main petition, the following remedies were sought: -
- i. A declaration be and is hereby issued that regulation 13C of the *Election (registration of Voters) Regulations* 2012 is unconstitutional, null and void for restricting, encumbering and qualifying a voters right to transfer their vote freely.
 - ii. That a declaration be and is hereby issued that the respondent has contravened the petitioners' right in so far as it has declined to transfer their votes in the wards it is conducting, and using the same resources it has deployed, in mass registration.
 - iii. An injunctive order of mandamus be and is hereby issued compelling the 1st respondent to facilitate the transfer of the petitioner and other eligible voters who wish to transfer their votes within the wards where it is conducting the mass voter registration and using the same resources it has deployed for the exercise of mass voter registration.
 - iv. An injunctive order of mandamus be and is hereby issued compelling the 1st respondent to facilitate the registration of the petitioners and any other eligible Kenyan who wishes to transfer their vote to be transferred in the remaining days and in the same places the respondent is conducting mass voter registration.
 - v. Any other reliefs that the court may deem fit and just to grant.

The Submissions:

30. The petitioners further urged their case through written submission dated May 25, 2022.
31. They identified two issues being the constitutionality of the impugned regulation and whether the 1st respondent violated their rights in the refusal to effect the transfers.
32. On the first issue, the petitioners reiterated that the right to vote is a constitutional right that is inherent in every citizen who has attained the age of the majority and must be facilitated without unreasonable restriction.
33. It was their case that while they recognized that the right is not absolute, the limitation attached to it must be by law, justifiable and proportionate, in line with article 24 of the *Constitution*.
34. They contended that the limitation was not justifiable and illegal for failing to be subjected to public participation and, hence, unconstitutional.
35. They also contended that there was no evidence of public participation despite its importance in article 10 of the *Constitution* and as demonstrated in *Poverty alleviation Network & others v President of the Republic of South Africa & 19 others*, CCT 86/08 {2010} ZACC 5 as cited by *Kenya Small scale farmers Forum & 6 others v The Republic of Kenya & 2 others* (2013) where it was observed that: -

Engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community express its concerns, fears and even to make



demands. In any democratic state public participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.

36. In further impugning the regulation, it was submitted that delegated legislation is not an unrestricted venture and that an authority legislating through delegated legislative powers cannot rewrite the Constitution.
37. In reference to section 31 of the Interpretation and General Provisions Act, it was the Petitioners' case that the delegated legislation cannot override enlarge, abridge or modify a substantive right.
38. The petitioner pointed to article 38(3) and 83(3) of the Constitution as read with section 7 of the Elections Act and submitted that the voters right to vote cannot be isolated from a voter's right to transfer their vote.
39. It was their case that the impugned regulation was taking away the facilitative and unrestrictive language of the Constitution and the Elections Act in section 109 hence unconstitutional.
40. On the second issue regarding violation of their rights by the refusal to effect the transfers, the petitioners submitted that the right to vote and right to be transferred are indivisible and interrelated. It was their case that both rights are facilitative of the right to vote.
41. In the end, they submitted that they had sufficiently demonstrated unconstitutionality of the impugned regulation and urged the court to allow the petition.
42. The petition was opposed by both respondents.

The 1st Respondent's Case

43. The Commission opposed the application and the Petition through grounds of opposition dated December 6, 2021 and the replying affidavit of Chrispine Owiye deposed to on March 7, 2022 respectively.
44. In the grounds of opposition, it was its case that the application is an abuse of the court process since the registration process was concluded on 5th november, 2021 and as such, the orders sought have been overtaken by events.
45. It further stated that according to article 88(4) of the Constitution the 1st respondent is an independent institution, therefore, it ought not to be the subject of control of any person.
46. It was its case that the application did not disclose any real or imminent or immediate threat to the Constitution to necessitate the granting of the orders sought.
47. The 1st respondent stated that the applicant failed to demonstrate unfair administrative action contrary to article 47 of the Constitution and that the orders sought were not in tandem with public interest.
48. It was urged that the application had not attained the threshold of establishing a prima facie case necessitating the granting of conservatory orders.
49. In the replying affidavit, Mr Owiye defended the Elections (Registration of Voters) Regulation, 2017 stating that the regulation for 2012 did not set out the application procedure for transfer of a voter's registration status.
50. He deposed that prior to issuance of the said regulations, the 1st respondent consulted stake holders which gave views on the issue of transfer of voters.



51. It was his case that one of the issues raised was illegal transfer and or importation of voters by politicians from one electoral area to another, an election malpractice that may compromise elections.
52. As a result, the 1st respondent in consultation with Parliament and pursuant to section 109 of the [Elections Act](#) and article 249(1) of the [Constitution](#) amended the principal regulation by inserting Regulation 13C.
53. He further deposed that the Principal Regulations were amended by inserting regulation 14A which provides that an application for a change of the electoral area or polling station at which the person is registered to vote is to be made in Form C to the Registration Officer for the Constituency in which the applicant wishes to be registered.
54. It was his case that regulation 13C is not in conflict with section 7 of the [Elections Act](#) since the said section does not provide the manner in which an application for transfer is undertaken.
55. The 1st respondent defended propriety of the impugned regulation by deposing that proof of residency of six months immediately prior to the application is not only reasonable but also necessary for the protection of the rights of the ordinary residents of the electoral area in question as guaranteed under article 38(2)(a) of the [Constitution](#) and to safeguard against illegal transfer of voters.
56. It was his case that out the of utility bills, tenancy agreements or letter from the chief, only one of the documents was necessary to prove residency.
57. It was his case that the list of documents required is comprehensive to ensure that Kenyans can obtain at least one without difficulty.
58. He deposed that all the petitioners deposed to being able to obtain letters from chiefs of the electoral areas for purposes of the transfer which they produced.
59. On the foregoing, it was his case that the claim that the 1st respondent was arbitrary was misleading.
60. He further deposed that for students, the 1st respondent facilitated their registration at various institutions of Huduma Centres across the country to ensure that their studies are not affected.
61. It was, therefore, his case that the allegation that transfer of registration was being undertaken for students at Huduma Centres across the Country was untrue, unsubstantiated and only meant to mislead the court.
62. He urged the court to dismiss the petition with costs.

The Submissions

63. The 1st respondent further urged its case through written submission dated June 27, 2022.
64. In rebutting the claim that the petitioners were entitled to the prayers sought, it was its case that court orders cannot be issued in vain since the subject of the petition was long concluded in November 2021. To that end they placed reliance in [Olive Muihaki Mugenda & another v Okiya Omtatah Okoiti & 4 others](#) [2016] eKLR.
65. On the substance of the petition, the 1st respondent reiterated that the impugned regulation was not inconsistent with the [Elections Act](#) because section 7 of the said Act did not provide for the manner of application for transfer of registration.
66. It was submitted that the impugned regulation was enacted pursuant to section 109 of the [Elections Act](#) in order to ensure the better carrying out of the provisions of section 7 of the [Elections Act](#) by



prescribing the manner in which a voter who wishes to transfer their registration from one electoral area to another.

67. It was the 1st respondent's case that the issuance of the *Elections (Registration of Voters) (Amendment) Regulations, 2017* was to ensure that universal suffrage based on fair representation and equality of vote under article 88(d) is achieved and every citizen's right to fair representation and equality of the vote is guaranteed.
68. On the foregoing, it maintained that the impugned regulation as introduced by the *Elections (Registration of Voters) Amendment Regulations, 2017* is reasonable, justifiable and necessary in the circumstances and consistent with article 24 of the *Constitution*.
69. The claim of overburdening the petitioners was countered by the submission that in their depositions they were able to obtain letters from the Chiefs of the electoral areas that they wish to transfer their registration to and even produced the said letters.
70. The 1st respondent stated that the process of enacting the impugned regulations were compliant with section 109 of the *Election Act*, the empowering section. It was their submission that the National Assembly was a crucial party for purposes of ascertaining the process leading up to the approval of the impugned regulations including whether the 1st respondent undertook public participation.
71. To buttress propriety of the process reliance was placed in Petition No E073 of 2022 *Hon Sabina Chege v Independent Electoral & Boundaries Commission* [2022] KEHC 239 (KLR) where it was observed that: -
 124. The basis of the Rules of Procedure is section 109 of the *Elections Act* which accords the respondent the power to make regulations. The rules of Procedure are, hence, a subsidiary legislation or a statutory instrument.
72. The 1st respondent asserted further that compliance of the impugned regulation with the *Statutory instruments Act* was the responsibility of the National Assembly and as such, it was a necessary party for purposes of ascertaining the contested issue of whether it undertook public participation.
73. It was its case that the court cannot therefore make any adverse finding on the issue of public participation in absence of the National Assembly.
74. It submitted further that the petitioner had not sought any relief on the failure to undertake public participation and an adverse finding ought not be made to that end.
75. In the end, the Commission urged the court to dismiss the petition with costs.

The 2nd Respondent's Case

76. The honourable Attorney General opposed the petition through grounds of opposition dated October 26, 2021.
77. At the outset, it was its case that the orders sought in the application could not be granted in the interim because they were similar to those sought in the Petition.
78. The 2nd respondent then stated that the petitioners have misapprehended the responsibilities of the respondents since all they do is apply and enforce the law as passed by Parliament under its delegated powers as provided for under article 94 of the *Constitution*.
79. It was its case that the impugned regulations enjoy presumption of constitutionality having been passed in accordance with the law.



80. The 2nd respondent accused the petitioner of laches for bringing the petition very late in the day whereas the impugned legislation was passed in 2017. Reference to that end was made to *Okiya Omtatah Okoiti v Kenya University Teaching, Referral & Research Hospital & 2 others; Kenyatta University Council & 2 others (Interested Parties)* {2019} eKLR).
81. It was their case that there were no cogent reasons provided by the petitioners to interfere with the immediate mass voter registration exercise scheduled to be concluded on November 4, 2021 as the law provides for continuous voter registration.
82. It further claimed that the petitioners have failed to demonstrate any imminent danger of violation of their rights requiring the immediate intervention of the court at this stage.
83. In conclusion, the 2nd respondent maintained the position that the petition was contrary to public interest and ought not to be allowed.
84. The 2nd respondent did not file written submissions.

Issues for Determinations

85. From the reading of the material before court, the following issues arise for discussion: -
- i. The principles of constitutional and statutory interpretation.
 - ii. Whether regulation 13C of the *Elections (Registration of Voters) Regulations*, 2012 is in violation of articles 27 and 38 of the *Constitution* for unreasonably restricting voters' right to transfer their votes freely.
 - iii. Whether regulation 13C of the *Elections (Registration of Voters) Regulations*, 2012 is in violation of articles 10 and 47 of the *Constitution* for want of public participation and fair administrative procedures.
86. I will hence deal with the issues sequentially.

Analysis and Determinations

a. The principles of constitutional and statutory interpretation

87. This court has been called upon to interpret the *Constitution* and to further interrogate the constitutionality of the impugned regulation. As such, it is in order to briefly deal with the manner in which the *Constitution* and statutes ought to be interpreted.
88. This court dealt with the manner the *Constitution* ought to be interpreted in Nairobi High Court Constitutional Petitions No 33 and 42 of 2018 (Consolidated) *Okiya Omtatah Okoiti v Public Service Commission & 73 Others* (unreported). The court rendered itself as follows: -
54. As regards the interpretation of the *Constitution*, suffice to say that the *Constitution* itself gives guidelines on how it ought to be interpreted. That is in articles 20(4) and 259(1).
 55. Article 20(4) requires courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) commands courts to interpret the in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.



56. Courts have also rendered how the Constitution ought to be interpreted. The Supreme Court in a ruling rendered on 21st December, 2011 in In the Matter of Interim Independent Electoral Commission [2011] eKLR discussed the need for courts, while interpreting the Constitution, to favour a purposive approach as opposed to formalism. The court stated as under: -
- (86) 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.
- (87) In Article 259(1) the Constitution lays down the rule of interpretation as follows: “This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.” Article 20 requires the courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.
- (88) Article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.
- (89) 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.
57. On the principle of holistic interpretation of the Constitution, the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] eKLR affirmed the holistic interpretation principle by stating that:
- This court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.
58. The meaning of holistic interpretation of the Constitution was addressed by the Supreme Court in In the Matter of the Kenya National Human Rights Commission, Sup Ct Advisory Opinion Reference No 1 of 2012; [2014] eKLR. The court at paragraph 26 stated as follows: -
- ...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.

59. In a Ugandan case in *Tinyefuza v Attorney General*, [1997] UGCC 3 (25 April 1997) the court was of the firm position that the Constitution should be read as an integrated whole. The court observed as follows: -

... the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.....

60. In *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR, the Court of Appeal summarized the various principles of constitutional interpretation as follows:

(21) Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus: -

- that as provided by article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.
- that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.
- that the Constitution must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.
- that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court



as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.

61. In Advisory Opinion Application No 2 of 2012, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR, the Supreme Court spoke to purposive interpretation of the Constitution. It had the following to say: -
...The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution.
62. The court went ahead and gave further meaning of the term purposive by making reference to the decision in the Supreme Court of Canada in R v Drug Mart (1985) when it made the following remarks: -
The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.
63. The Supreme Court, while referring to the South African Constitutional decision in Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319 (PC), went further and stated that a purposive approach is ‘a generous interpretation... suitable to give individuals the full measure of the fundamental rights and freedoms referred to.’
64. The learned judges of the Supreme Court further agreed with the South African Constitutional Court in S v Zuma (CCT5/94) 1995 when it stated that in taking a purposive approach in interpretation, regard must be paid to the legal history, traditions and usages of the country concerned.
65. The Supreme Court embellished the need to pay attention to legal history while interpreting not only the Constitution but also statutes. It observed as follows: -
8.11 This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting the Constitution, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself.
66. The Court of Appeal while dealing with holistic interpretation of the Constitution in Civil Appeal 74 & 82 of 2012, Centre for Rights Education and Awareness & Another v John Harun Mwau & 6 others [2012] eKLR stated that the entire Constitution must be read as an integrated whole and no one particular provision destroying the other so as to effectuate harmonization principle.
89. Turning on to the applicable criterion in determining whether a statute is constitutional, this court discussed three guiding principles in Nairobi High Court Petition No E327 of 2020 Law Society of Kenya v Attorney General & another (2021) eKLR as follows: -
104. I will also look at the decision in R v Oakes. The brief facts are that the respondent, David Edwin Oakes, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s 4(2) of the Narcotic Control Act, but was convicted only of unlawful possession. After the trial judge made a finding that it was beyond a reasonable doubt that the



respondent was in possession of a narcotic, the respondent brought a motion challenging the constitutional validity of s 8 of the Narcotic Control Act. That section provides that if the court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he or she must be convicted of trafficking. The Ontario Court of Appeal, on an appeal brought by the Crown, found that this provision constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence now entrenched in s 11(d) of the Canadian Charter of Rights and Freedoms. The Crown appealed and a constitutional question was stated as to whether s 8 of the Narcotic Control Act violated s 11(d) of the Charter and was therefore of no force and effect. Inherent in this question, given a finding that s 11(d) of the Charter had been violated, was the issue of whether or not s 8 of the Narcotic Control Act was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of s 1 of the Charter.

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



108. On the third test, that is the effect of the limitation, the Supreme Court stated that: -

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

90. With the foregoing basis, this court will now deal with the rest of the issues.

b. Whether regulation 13C of the *Elections (Registration of Voters) Regulations, 2012* is in violation of articles 27 and 38 of the *Constitution* for unreasonably restricting voters' right to transfer their votes freely:

91. Regulation 13C of the *Elections (Registration of Voters) Regulations, 2012* (earlier on stated to be referred to as 'the impugned regulation') was enacted in 2017 *vide* an amendment through regulation 9 of the *Elections (Registration of Voters) (Amendment) Regulations, 2017* through Legal Notice No 73 of 2017.

92. The impugned regulation states as follows: -

13C. Transfer of registration:

A voter is not qualified to transfer his or her registration unless at the date of his or her application to be transferred he or she was ordinarily resident in that constituency six months immediately preceding the date of his or her application for transfer.

93. The *Constitution* and the *Elections Act, No 24 of 2011* also makes provisions which have a bearing on the transfer of registration by voters.

94. Article 38 of the *Constitution* is on political rights. It states as follows: -

38. Political rights:

(1) Every citizen is free to make political choices, which includes the right—

- (a) to form, or participate in forming, a political party;
- (b) to participate in the activities of, or recruit members for, a political party; or
- (c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

- (a) any elective public body or office established under this Constitution; or
- (b) any office of any political party of which the citizen is a member.



- (3) 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.

95. Section 7 of the *Elections Act* provides as follows: -

7. Transfer of registration:

- (1) Where a voter wishes to transfer the voter's registration to an electoral area other than the one the voter is registered in, the voter shall notify the Commission, in the prescribed manner, of the intention to transfer the registration to the preferred electoral area not less than ninety days preceding an election.
- (2) Upon receipt of the notification referred to in subsection (1), the Commission shall transfer the voter's registration particulars to the register of the preferred constituency not later than sixty days preceding the election.

96. The *Constitution*, unlike the *Elections Act* and the impugned regulation, does not make express provisions on the transfer of registration. However, as said, the provisions of the *Elections Act* and the impugned regulation in a way impact upon article 38 of the *Constitution*.

97. Therefore, in order to ascertain if the impugned regulation is constitutional, the starting point is to find out if the impugned provision is in line with Section 7 of the *Elections Act*.

98. A close look at the two provisions reveals an interesting aspect. On one hand, the *Elections Act* speaks of the Commission to be notified by a registered voter of the voter's intention to transfer the registration. On the other hand, the impugned regulation speaks of making of an application to the Commission for transfer of registration. As a result, there is need to look at the meaning of the words 'apply' and 'notify' so as to be certain whether the two requirements mean the same and if not, how this court is to deal further.

99. The *Black's Law Dictionary*, 10th Edition, defines the two words as follows: -

'apply' means to make a formal request or motion.

'notify' 1. To inform (a person or group) in writing or by any method that is understood.

2. To give notice of; to make known.

100. From the above definitions, the plain and ordinary meaning of the words are clear. In applying one makes a formal request to the Commission for the Commission's permission or consent to effect the transfer. It, therefore, means that if the Commission declines the application then that is the end of the road for the voter. In other words, the consent of the Commission is a prerequisite for effecting the transfer of registration.

101. Notification has a different meaning altogether. In this case, a voter is just required to inform the Commission of the intention to transfer the registration and that is it. Once the Commission receives the notification, then it must make the changes. No permission of the Commission is required in the case of a party notifying the Commission.



102. It now turns out that the meaning of section 7 of the *Elections Act* is different from that of the impugned regulation. The application requirement under the impugned regulation seems to override the notification called under the *Elections Act*. Therefore, the impugned regulation is in conflict with the *Elections Act*.
103. The *Elections Act* is a substantive Act of Parliament. It is a parent Act. It makes provision for the IEBC to make subsidiary legislation under section 109 thereof. As a result, the *Elections (Registration of Voters) Regulations*, 2012 which derive life from the *Elections Act*, is a subsidiary legislation or delegated legislation courtesy of the *Elections Act*. (See Nairobi High Court Constitutional Petitions No E540 & E546 of 2021 *Katiba Institute & others v Independent Electoral and Boundaries Commission & others* (2022) eKLR).
104. The position in this matter is, hence, that the subsidiary legislation is in contrast with the parent Act. That calls for reconciliation by the court.
105. The *Interpretation and General Provisions Act*, cap 2 of the Laws of Kenya makes provisions on subsidiary legislation. It defines ‘subsidiary legislation’ to mean ‘any legislative provision (including a transfer or delegation of powers or duties) made in exercise of a power in that behalf conferred by a written law, by way of by-law, notice, order, proclamation, regulation, rule, rule of court or other instrument’
106. Section 29 deals with the construction of subsidiary legislation. It provides as follows: -
29. Construction of subsidiary legislation:
- Where an Act confers power to make subsidiary legislation, expressions used in the subsidiary legislation shall, except where a contrary intention appears, have the same respective meanings as in the Act conferring the power, and a reference in the subsidiary legislation to “the Act” shall mean the Act conferring the power to make the subsidiary legislation.
107. Further, section 31(b) of the *Interpretation and General Provisions Act* which provides as follows: -
31. General provisions with respect to power to make subsidiary legislation:
- Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation—
- (a)
- (b) no subsidiary legislation shall be inconsistent with the provisions of an Act;
108. The above provision amplifies the need for harmony in meanings between the parent Act and a subsidiary legislation. The law abhors inconsistencies. The only instance where the law allows any variance is where the parent Act expressly states that the subsidiary legislation shall provide to the contrary.
109. Courts have also dealt with instances where a subsidiary legislation is at variance with a parent Act. Accordingly, the general legal principle seems to be that no subsidiary legislation shall be inconsistent with an Act of Parliament.
110. The court in Miscellaneous Civil Application 159 of 2016, *Republic v Ministry of Health & 5 others ex-parte Pius Wanjala & 2 others* [2017] eKLR implored courts to, in the first instance, scrutinize an Act of Parliament and the subsidiary legislation and be satisfied that the two cannot co-exist before it pronounces any inconsistency. This is what the court said: -



103. However, before the court finds that a particular instrument or subsidiary legislation is inconsistent with the Act, it must be satisfied that the two provisions cannot stand together. What the court is required to do is to construe the instrument with the necessary alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Act. It is only when the instrument cannot, despite such construction, conform to the Act that the court would be entitled to nullify the instrument. In other words, the court ought to, as was held in *David Sejjaka Nalima vs. Rebecca Musoke* Civil Appeal No 12 of 1985 ask itself whether the two instruments can stand together, so that if the provisions are not wholly inconsistent in their application to particular cases, then to that extent the provisions of the former Act are exempted or their operation is excluded with respect to cases falling within the provisions of the Act. In my view, it is in these circumstances that the court is empowered to “read in” certain stipulations in a statute in order to give meaning to it rather than opt for the drastic remedy of nullifying an otherwise useful provision. This, in my view is the position of *Cooper Brookes (Wollongong) PTY Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 where it was held that:
- “If the choice is between two strongly competing interpretations...the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention.”
111. This court agrees with the approach adopted by the court in the above matter.
112. In this matter, the impugned regulation which calls for a voter to make a formal application for transfer of registration cannot be read into section 7 of the [Elections Act](#) which only calls for such a voter to just notify the Commission. The two requirements are worlds apart.
113. It is also the case that the [Elections Act](#) makes no provision or intention for a contrary meaning of section 7 in the subsidiary legislation. This court will, however, deal with the effect of the variance later.
114. It is, therefore, the finding and holding of this court that the impugned regulation is irredeemably inconsistent with section 7 of the [Elections Act](#) and as such, the impugned regulation must give way to the parent Act.
115. Having so found, the next consideration is whether the impugned regulation impugns the [Constitution](#) in any way. This court has already endeavoured a detailed discussion on how to ascertain if a statute or subsidiary legislation is in contravention with the [Constitution](#).
116. The court will now apply the three-point criteria laid in the [R v Oakes](#) case (*supra*) to the facts in this case.
117. The Commission averred that the objective of the impugned regulation was to forestall any massive transfer of voter registrations closer to an election. Whereas the impugned regulation may seem to be aimed at curtailing the commission of some election offences, there is a law in place dealing with all forms of electoral offences and malpractices. It is also the case that the [Elections Act](#) and other regulations made thereunder have provisions on when voter registration and transfer is suspended. That law is current. Further, the [Constitution](#) and the [Elections Act](#) puts a lot of premium on avoiding unreasonable restrictions in voter registration and voting.
118. The objective of the impugned regulation cannot be said to relate to concerns which are pressing and substantial in a free and democratic society. The impugned regulation cannot, therefore, be characterized as sufficiently important to limit a right.



119. It also goes that the impugned regulation cannot be said to be proportional to the alleged mischief. I say so since the mischief, if any, is already and sufficiently taken care of by other existing laws.
120. On the effect of the impugned regulation, it is inescapable that the impugned regulation has the effect of constricting the right to register as a voter rather than creating an enabling environment for the greater realization of the right.
121. The net effect of the impugned regulation is that it does not stand the threshold in article 24 of the Constitution to limit the right of a voter to transfer registration. In essence, the impugned regulation is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
122. To that end, the impugned regulation infringes on article 38 of the Constitution to the extent that it curtails a voter's right to freely make political choices and to transfer registration. Likewise, the impugned regulation infringes article 27(1) and (2) of the Constitution to the extent that it does not accord a voter the right to equal protection and benefit of the law.
123. In sum, the impugned regulation contravenes articles 27(1) and (2) and 38 of the Constitution.
- (c) Whether regulation 13C of the Elections (Registration of Voters) Regulations, 2012 is in violation of articles 10 and 47 of the Constitution for want of public participation and fair administrative procedures:
124. In answer to the allegation that the Commission did not carry out any public engagement in coming up with the impugned regulation, the Commission posited that the amendments that came up with the impugned regulation were a product of consultation with the public and stakeholders as well as with Parliament, hence, complied with the need for consultation.
125. The Commission further posited that it could not be faulted on the issue since Parliament was not a party in the proceedings.
126. This court has carefully considered the Elections (Registration of Voters) (Amendment) Regulations, 2017 that brought in the impugned regulation. The preamble to the regulations states as follows: -
In exercise of the powers conferred by section 109 of the Elections Act, 2011, the Independent Electoral and Boundaries Commission makes the following regulations: -
Elections (Registration of Voters) (Amendment) Regulations, 2017
127. The amendments were, therefore, originated by the Commission.
128. According to the Elections (Registration of Voters) (Amendment) Regulations, 2017, the amendments were made pursuant to section 109 of the Elections Act. The provision grants power to IEBC to make regulations generally for the better carrying out of the purposes and provisions of the Act.
129. The Elections (Registration of Voters) (Amendment) Regulations, 2017, was, hence, a subsidiary legislation. As such, it had to strictly comply with the Constitution and the Statutory Instruments Act, No 23 of 2013.
130. Section 5 of the Statutory Instruments Act calls upon the regulatory-making authority to carry out public engagement prior to forwarding the instrument to Parliament for scrutiny. Section 2 defines 'the regulatory-making authority' to mean 'any authority authorized by an Act of Parliament to make statutory instruments'. In this case, the regulatory-making authority was the IEBC.



131. A perusal of the replying affidavit sworn by one Chrispine Owiye on behalf of the IEBC, reveal a concerted effort to indicate that IEBC carried out public participation and stakeholder’s engagement. However, it just needed at that. There was no iota of evidence to confirm the time, the manner and the persons on whom the consultations were undertaken.
132. The importance of public participation in the new constitutional dispensation cannot be over emphasized. There is a long line of authorities from superior courts all speaking to the indispensable need for all persons, state organs and public bodies to undertake public participation in appropriate cases for their actions or decisions to gain constitutional validity.
133. In Petition No. 5 of 2017, *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, the Supreme Court aptly summarized the whole concept of public participation and its significance in the facilitation and preservation of constitutionalism. It observed as follows:
- (85) “Public participation has been entrenched in our Constitution as a national value and a principle of governance under article 10 of the Constitution and is binding on all State organs, State officers, public officers and all persons whenever any of them: (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. As aptly stated by the appellate court, public participation is anchored on the principle of the 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”.
- (86) Article 118 of the Constitution provides for public participation in the legislation making process, as follows:
- “ Public access and participation
- (1) Parliament shall-
- (a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and
- (b) Facilitate public participation and involvement in the legislative and other business of Parliament and its committees”.
- Therefore, while the legislative mandate is delegated to Parliament, it must facilitate public participation as the onus of ensuring public participation rests with it.
- (87) Since the promulgation of the Constitution 2010, the question of the rationale, scope and application of public participation as a principle of governance has been subject of numerous decisions by the courts. The High Court in this matter appraised itself of the various decisions on the same, which appraisal the Court of Appeal readily endorsed. In the Matter of the National Land Commission, the Supreme Court placed the principle of public participation at the core of the concept of checks and balances in governance in the execution of their functions by the various arms of government, when we stated:
- “[308] The conditioning medium within which these functions have to be conducted, is constituted by the national values and principles outlined in article 10 of the Constitution:



in particular, the rule of law; participation of the people; equity; inclusiveness; human rights; non-discrimination; good governance; integrity; transparency and accountability. It is to be noted that, the very essence of checks-and-balances touches on the principles of public participation, inclusiveness, integrity, accountability and transparency; and the performance of the constitutional and statutory functions is to be in line with values of integrity, transparency, good governance and accountability...”

- (88) The Retired Chief Justice, Dr. Willy Mutunga, in his concurring opinion expounded on the principle and traced the place of the People in the Constitution making process thus:

“[320] In the entire history of constitution-making in Kenya, the participation of the people was a fundamental pillar. That is why it has been argued that the making of Kenya’s Constitution of 2010 is a story of ordinary citizens striving to overthrow, and succeeding in overthrowing the existing social order, and then defining a new social, economic, political, and cultural order for themselves. It is, indeed, a story of the rejection of 200 Parliamentary amendments by the Kenyan elite that sought to subvert the sovereign will of the Kenyan population. Public participation is, therefore, a major pillar, and bedrock of our democracy and good governance. It is the basis for changing the content of the State, envisioned by the Constitution, so that the citizens have a major voice and impact on the equitable distribution of political power and resources. With devolution being implemented under the Constitution, the participation of the people in governance will make the State, its organs and institutions accountable, thus making the country more progressive and stable. The role of the courts, whose judicial authority is derived from the people of Kenya, is the indestructible fidelity to the value and principle of public participation.

- (89) The Rtd Chief Justice drew from caselaw on the principles for public participation in various court decisions including *Speaker of the Senate & another v Attorney General & 4 others* Sup Ct Advisory Opinion No 2 of 2013; [2013] eKLR; *Thuku Kirori & 4 others v County Government of Murang’a* Petition No 1 of 2014; [2014] eKLR; *Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others* Petition No 418 of 2013; [2013] eKLR; and *Robert N Gakuru & others v Governor Kiambu County & 3 others*, Petition No 532 of 2013 consolidated with Petition Nos 12 of 2014, 35, 36 of 2014, 42 of 2014, & 72 of 2014 and Judicial Review Miscellaneous Application No 61 of 2014; [2014] eKLR [*Robert Gakuru* case](Most of these cases were also referred to by the High Court in this matter). He also referred to the jurisprudence from the South African Constitutional Court decision, *Doctors for Life International v Speaker of the National Assembly and others* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) which also considered the role of the public in the law-making process. It in part stated as follows:

“The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those



who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.

116. Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy”

[90] Earlier on, the Supreme Court had reiterated the centrality of public participation as regards the issue of digital migration, in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, [2014] eKLR. We stated *inter alia*:

“Public participation is the cornerstone of sustainable development and it is so provided in the [Constitution](#)...

[381]Public participation calls for the appreciation by State, Government and all stakeholders implicated in this appeal that the Kenyan citizenry is adult enough to understand what its rights are under article 34. In the cases of establishment, licensing, promotion and protection of media freedom, public participation ensures that private “sweet heart” deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of the [Constitution](#) would both be subverted.”

(92) In *Republic v Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 others* Judicial Review No 378 of 2017; [2017] eKLR among the issues for consideration before the High Court was whether the IEBC was constitutionally obliged to facilitate public participation as part of the tendering process. The High Court allowed the Petition and quashed the award of the tender for lack of public participation. It ordered that the procurement process begin de novo in accordance with the [Constitution](#). IEBC appealed to the Court of Appeal. In upholding the appeal, setting aside the High Court decision, the Court of Appeal considered the big issue of justifiability and enforceability of article 10 of the [Constitution](#), which encompasses the principle of public participation. The appellate court in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others*, Civil Appeal No 224 of 2017; [2017] eKLR held that article 10(2) and the principles therein are for immediate realization, thus:

“ 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.

We agree with this pronouncement and reiterate that the principle of public participation as anchored in article 10 of the [Constitution](#) is alive and the same is equally justiciable before our courts.

(93) While the Court of Appeal in the above matter was dealing, particularly, with the question of the place of public participation in procurement, its pronouncement is illuminating on the



principle of public participation in general. Having appraised several decisions on the issue, the appellate court stated thus:

“ 164. Our analysis of the emerging jurisprudence from the Supreme Court and other superior courts as well as the reading of the express provisions of section 3 of the Public Procurement and Asset Disposal Act, 2015 as read with articles 10 (2) (b) and 227 of the Constitution lead us to find that as a general principle (subject to limited exceptions) public participation is a requirement in all procurement by a public entity. The jurisprudence also reveals that allegation of lack of public participation must be considered in the peculiar circumstances of each case. The mode, degree, scope and extent of public participation is to be determined on a case by case basis.

165. What is critical is a reasonable notice and reasonable opportunity for public participation. In determining what is reasonable notice, a realistic time frame for public participation should be given. In addition, the purposes and level of public participation should be indicated. Reasonableness is also to be determined from the nature and importance of legislation or decision to be made, and the intensity of the impact of the legislation or decision on the public. The length of consultation during public participation should be given and the issues for consultation. Mechanisms to enable the widest reach to members of public should be put in place; and if the matter is urgent the urgency should be explained.”
- (94) Finally, the Court of Appeal found that subject to a few stated exceptions, public participation was a mandatory requirement in all procurement done by a public entity. As regards lack of a framework on how to achieve public participation the court observed:

[189]. We have considered this submission in light of the provisions of article 10 (2) of the Constitution and other relevant articles where public participation is constitutionally required. In our considered view, the absence of a legal framework for public participation is not an excuse for a procuring entity or a State organ to fail to undertake public participation if required by the Constitution or law. A State organ or procuring entity is expected to give effect to constitutional principles relating to public participation in a manner that satisfies the values and principles of the Constitution.

- (95) Indeed the High Court, Odunga J, in *Robert N Gakuru & others v Governor Kiambu County & 3 others* [2014] eKLR, in which case the Learned Judge extensively borrowed from the South African jurisprudence in *Doctors for Life International v Speaker of the National Assembly and others*, illuminated the law of public participation. He emphasized on the seriousness with which public participation should be undertaken:

“ 75. In my view 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. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County



Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.”

- (96) From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while courts have pronounced themselves on this issue, in line with this court’s mandate under section 3 of the Supreme Court Act, we would like to delimit the following framework for public participation:”
134. Upon making the foregoing compelling findings of the significance of public participation The learned apex judges crystallized the guiding principles for public participation as follows;
- (i) As a constitutional principle under article 10(2) of the Constitution, public participation applies to all aspects of governance.
 - (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
 - (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
 - (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfil’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
 - (v) Public participation is not an abstract notion; it must be purposive and meaningful.
 - (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
 - (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
 - (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
 - (ix) Components of meaningful public participation include the following:
 - a. clarity of the subject matter for the public to understand;
 - b. structures and processes (medium of engagement) of participation that are clear and simple;
 - c. opportunity for balanced influence from the public in general;
 - d. commitment to the process;
 - e. inclusive and effective representation;



- f. integrity and transparency of the process;
- g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.

135. The foregoing is the law on public participation.
136. As rightly decreed above by the Supreme Court ‘whereas an allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.’
137. In this case, the impugned regulation was so germane that it went into root of inter alia the political rights of citizens. As such, it was a matter that called for appropriate engagement especially on the clarity of the subject matter for the public to understand, the medium of engagement ought to have been clear and simple; there ought to be an opportunity for balanced influence from the public in general; the commitment to the process cannot be overemphasized; inclusive and effective representation was necessary; the integrity and transparency of the process was to be guaranteed; the capacity to engage on the part of the public was cardinal, including that the public must be first sensitized on the subject matter.
138. The IEBC was, hence, under a duty to satisfy the court that the above had been undertaken. That called for evidence. However, as said, there was no such evidence tendered. The hollow averments can only amount to hearsay.
139. Coming to the end, this court must emphasize that given the effect of the impugned regulation on the general public, it was incumbent upon the IEBC to undertake a robust public engagement, a duty which IEBC failed to discharge.
140. Given the lack of engagement, the scenario ran contra articles 10 and 47 of the Constitution as well as the Statutory Instruments Act and the Fair Administrative Actions Act.
141. Without much ado, the upshot is that the impugned regulation is in violation of articles 10 and 47 of the Constitution as well as the Statutory Instruments Act and the Fair Administrative Actions Act for want of public participation and fair administrative procedures.

(d) Disposition

142. The above discourse yields that the petition is successful. However, this court will not issue the orders of mandamus sought by the petitioners to compel the IEBC to transfer their registrations since voter registration is currently suspended courtesy of section 5 of the Elections Act.
143. In the end, the petition and the notice of motion dated October 18, 2021 are determined as follows: -
- a. A declaration hereby issues that regulation 13C of the Elections (Registration of Voters) Regulations, 2012 is in violation of article 38 of the Constitution to the extent that it curtails a voter’s right to freely make political choices and to transfer registration, hence, unconstitutional.
 - b. A declaration hereby issues that regulation 13C of the Elections (Registration of Voters) Regulations, 2012 infringes article 27(1) and (2) of the Constitution to the extent that it does not accord a voter the right to equal protection and benefit of the law and further infringes articles 10 and 47 of the Constitution as well as the Statutory Instruments Act and



the Fair Administrative Actions Act for want of public participation and fair administrative procedures, hence, unconstitutional.

c. The petitioners herein shall be at liberty to transfer their registrations once the registration of voters' resume.

d. Each party shall bear its own costs of the petition since this is a public interest litigation.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF SEPTEMBER, 2022.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss. Gisebe, Counsel for the Petitioners.

Miss. Cheron, Counsel for the 1st Respondent.

Miss. Omuom, Counsel for the 2nd Respondent.

Kirong/Benard – Court Assistant

