REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E291 OF 2020

(CONSOLIDATED WITH PETITION NOS. E300 OF 2020; E302 OF 2020; E305 OF 2020; E314 OF 2020; E317 OF 2020; E337 OF 2020; 228 OF 2020; 229 OF 2020 AND JR E1108 OF 2020)

LEINA KONCHELLAH & OTHERS...APPLICANTS

VERSUS

CHIEF JUSTICE & PRESIDENT OF THE

SUPREME COURT OF KENYA & OTHERS......................................RESPONDENTS

AND

SPEAKER OF THE NATIONAL ASSEMBLY &

OTHERS..INTERESTED PARTIES

RULING

Background

1. On the 21st day of September 2020, the then Chief Justice of the Republic of Kenya, His Lordship Hon. David K. Maraga (Retired), in exercise of powers donated by **Article 261(7)** of the Constitution, issued an Advice to the President (hereinafter referred to as "The Advice") to dissolve Parliament. This action was precipitated by six petitions that urged the Chief Justice to exercise his mandate under Article 261(7) of the Constitution. These petitions were: Petition No. 1 of 2019 by Margaret Toili dated 12th April, 2019; Petition No. 2 of 2019 by Fredrick Gichanga Mbugua dated 7th May, 2019; Petition No. 3 of 2019 by Stephen Owoko and John Wangai dated 20th November, 2018; Petition No. 4 of 2019 by Aoko Bernard dated 18th June, 2019; Petition No. 5 of 2019 by Hon. David Sudi dated 10th July, 2019 and Petition No. 1 of 2020 by the Law Society of Kenya dated 20th July, 2020.

2. The petitions were based on grounds that despite four court orders compelling Parliament to enact legislation required to implement the two-thirds gender rule in accordance with **Article 27(3)**, as read together with **Articles 81(b)** and **100** of the Constitution, Parliament had blatantly failed, refused and or neglected to do so.

3. The Advice provoked the filing of ten Petitions before the High Court. The said ten Petitions were referred to the Chief Justice for the constitution of a bench of an uneven number of judges, on grounds that the petitions raised substantial questions of law.

4. The Deputy Chief Justice in directions dated 8th October, 2020, 14th October, 2020, 21st October, 2020 and 28th October, 2020 respectively, appointed the present bench to hear and determine all the ten Petitions. Consequently, the National Assembly and the Senate, the Petitioners in Petition No. E300/2020, filed a Notice of Motion dated 16th October, 2020, while Leina Konchella and Mohsen Abdul Munasar, the Petitioners in Petition No. E291/2020, filed a Preliminary Objection dated 19th October, 2020 both objecting to the empanelment of the bench by the Deputy Chief Justice.

5. Upon hearing preliminary arguments, the ten petitions herein were consolidated and various Interested Parties enjoined only for purposes of hearing the objections. This ruling therefore disposes of the Preliminary Objection and the Notice of motion.

The Objections

The Preliminary Objection

6. Leina Konchellah and Mohsen Abdul Munasar, the Petitioners in Petition No. E291/2020, filed a Preliminary Objection dated 19th October, 2020 predicated on the grounds that:

> *a. Article 165(4) of the Constitution of Kenya, 2010 confers on the Chief Justice the power, function, and authority to assign the hearing of any matter certified by the High Court as raising a substantial question of law under Article 165(3)(b) or (d) to a Bench of an uneven number of Judges, being not less than three.*
>
> *b. The Office of the Chief Justice is established under Article 161(2)(a) of the Constitution of Kenya, 2010.*
>
> *c. The Office of the Chief Justice on 14th October, 2020 was and continues without interregnum to be substantively occupied by the Honourable David K. Maraga.*
>
> *d. The Office of the Deputy Chief Justice is established under Article 161(2)(b) of the Constitution of Kenya, 2010.*
>
> *e. The Office of the Deputy Chief Justice on 14th October, 2020 was and continues to be substantively occupied by the Honourable Philomena Mwilu.*
>
> *f. The Office of the Deputy Chief Justice cannot exercise suo moto the power, authority, mandate or function conferred on the Office of the Chief Justice under Article 165(4) of the Constitution of Kenya, 2010.*
>
> *g. The reported and confirmed action by the Deputy Chief Justice on 14th October, 2020 in the assignation of the Honourable Justices Lydia Achode, Pauline Nyamweya, George Odunga, James Makau and Anthony Ndung'u as the Bench of an uneven number of Judges herein pursuant to Article 165(4) of the Constitution of Kenya, 2010 is ultra vires the guidance under Articles 259(3)(a) and 259(3)(b) of the Constitution of Kenya, 2010.*
>
> *h. The administrative action of the Chief Justice, the 1st Respondent herein, through the Deputy Chief Justice on 14th October, 2020 in the assignation of the Honourable Justices Lydia Achode, Pauline Nyamweya, George Odunga, James Makau and Anthony Ndung'u as the Bench of an uneven number of Judges herein pursuant to Article 165(4) of the Constitution of Kenya, 2010, offends the legal principle of nemo debet esse judex in propia causa.*

7. The Petitioners in Petition No. E291/2020 filed written submissions dated 8th December, 2020 through M/s Muturi Mwangi & Associates Advocates. They submitted that, first, the objection they raised is one of procedural defect in the assignation of the present bench to determine the consolidated Petitions pursuant to **Article 165(4)** of the Constitution. Second, that since the directions from the High Court referred the matter to the Chief Justice, the Chief Justice could not refer the matter to the Deputy Chief Justice *suo moto*. Third, that **Article 165(4)** is literal, clear, unambiguous and unequivocal concerning in whom the state authority therein reposes, namely the Chief Justice. Further, that the Article does not allow for the assignment required therein to be performed by any other person. Therefore, the Deputy Chief Justice cannot in law or fact purport *suo moto* to exercise the power and authority under **Article 165(4)**. Fourth, **Article 165(4)** does not allow for the delegation by the Chief Justice of the assignment required therein to any other person, and the Deputy Chief Justice was at the material time not the holder of the office of the Chief Justice.

8. In addition, they asserted that the office of the Deputy Chief Justice is a constitutional office that is separate and distinct from that of the Chief Justice. Reliance was in this respect placed on **Article 161(2)(a)** and **(b)** of the Constitution and on the decisions in **Apollo Mboya vs. Attorney General and 2 Others [2018] eKLR** and **Council of Governors vs. Attorney General & 7 others [2019] eKLR** and on the guiding principles of **Article 259** of the **Constitution**.

9. They submitted that it is trite law that judicial officers and juridical entities must be clothed with jurisdiction to determine an inquiry into their competence and relied on the principle of *kompetenz kompetenz*.

The Notice of Motion application

10. The Notice of Motion application dated 16th October, 2020 in Petition No. E300/2020 seeks a substantive prayer that the court set aside the order of the Honourable Deputy Chief Justice of 8th October, 2020. It is premised on the grounds on the face thereof and supported by affidavits sworn by Hon. Justin Muturi, the speaker of the National Assembly and Hon. Kenneth Lusaka, the speaker of the Senate respectively on 19th October, 2020.

11. The Petitioners' case is that under **Article 165(4)**, it is only the Chief Justice who can appoint a Bench to hear and determine a Petition that has been certified as one raising a substantial question of law. They contended that the Constitution does not envisage a scenario where such duty is to be performed by any person other than the Chief Justice. Thus, they asserted, the action of the appointment of the present bench by the Deputy Chief Justice offends the provisions of the Constitution and amounts to usurpation of constitutional powers that rest only with the Chief Justice. They urged that to allow the Chief Justice to delegate such power to the Deputy Chief Justice is unconstitutional, a blatant illegality, and should not stand.

12. M/s AhmedNassir, Abdikadir Advocates filed written submissions dated 8th December, 2020 and supplementary submissions dated 8th January, 2021 on behalf of the Petitioners. They urged the Court to grant the prayers sought in the Notice of Motion application and refer the matter to the Chief Justice for the empanelment of a new bench as provided under **Article 165(4)**.

13. The Petitioners emphasized that the High Court has jurisdiction to hear this matter and that their application was not one seeking to disqualify the Bench empanelled to hear the Petitions. They clarified that the application questions the decision of the Deputy Chief Justice to appoint a Five-Judge bench of the High Court to hear the consolidated Petitions, and therefore raised a question of the constitutional legitimacy of the present Bench.

14. The Petitioners contended that the Notice of Motion application raises a fundamental issue, namely, whether the conduct of the Deputy Chief Justice to empanel the present Bench is an exercise of legitimate constitutional power or a breath-taking illegitimate exercise of constitutional powers. Further, that it raises the question of the powers that the Deputy Chief Justice exercised in empanelling the Bench in light of the express and plain text of the Constitution under **Article 165(4)** thereof. In the Petitioners' view, the exercise of appointing the present Bench, on the part of the Deputy Chief Justice, is an unprecedented usurpation of constitutional power through judicial fiat and is therefore contra-constitution and illegal *ab initio.*

15. According to the Petitioners, the Notice of Motion application calls on this Bench to interpret the provisions of **Article 165(4)** and implores the court to adopt the plain text of the Constitution to this end. The Petitioners were of the opinion that a plain meaning of **Article 165(4)** is that first, certain matters that raise substantial questions of constitutional law are flagged for special consideration and adjudication by the courts. Second, the Constitution fixes the number of Judges that hear such substantial questions to be a bench of three or more Judges. Third and last, the Chief Justice assigns the Judges to hear such cases.

16. The Petitioners argued that had the Constitution intended to have the Chief Justice delegate his judicial functions to the Deputy Chief Justice, it would have explicitly provided thus. They asserted that this is evident under **Article 144(4)** and **Article 148(4)** where there are express provisions for delegation of the Chief Justice's powers to appoint a tribunal and swear in a Deputy President to the Deputy Chief Justice. They urged that in the same breath, the Constitution is clear in its intention that the functions under **Article 165(4)** are not delegable to the Deputy Chief Justice. They asserted that constitutional power or function can only be delegated or assigned expressly by the Constitution and submitted that implied power is a heresy. The Petitioners pointed out that the transmission of the file from the Chief Justice to the Deputy Chief Justice was not explained in a reasoned ruling or in any way captured, nor reasons given to the parties.

17. It was the Petitioners' submission that the most important rule in constitutional interpretation is the rule of plain language interpretation. To buttress this, they relied on excerpts of a book titled '**The Judge in a Democracy**' by Aharon Barak, former Chief Justice of Israel. At page 127 thereof, where he writes thus:

> *"In interpreting a constitution, as in interpreting every other legal text, a judge extracts the legal meaning along the range of the text's various semantic meanings. One should not give the constitution a meaning that its express or implied language cannot sustain. The express language conveys to the reader the dictionary meaning of the language. It is a language written in invisible ink, between the lines, and derived from the structure of the constitution. Any interpretation of the constitution must be grounded in its own language."*

18. Reliance was also placed on various authorities: **Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others (1987) 1 SCC 424**; **In the matter of Zuma and Two Others vs. The State CCT/5/94**; **David King, Et Al vs. Sylvia Burwell, Secretary of Health and Human Resources, Et Al 576 U.S. (2015)**; **Re Wakim (1999) 198 CLR**; **Attorney General (CTH) ex rel. Mckinlay vs. The Commonwealth (1975)**; **Theophanous vs. The Herald and Weekly Times Limited and Another (1994) 182 CLR 104**.

19. The Petitioners confirmed that **Article 259** of the Constitution enumerates interpretation techniques but stated that the techniques are meant to expound, explain and clothe the text of the Constitution and not to expand or deviate from it as argued by the Respondents. They asserted that the true essence of **Article 259** was captured by Mativo, J in **Apollo Mboya vs. Attorney General & 2 others** (*supra*). The Petitioners were however of the opinion that the learned Judge did not go far enough to elucidate that **Article 259** entails a contextual rather than abstract interpretation.

20. In the **Apollo Mboya Case** (*supra*), the learned Judge stated that Courts are constrained by the language used and may not impose a meaning that the text is not reasonably capable of bearing. In other words, interpretation should not be "unduly strained" it should avoid "excessive peering at the language to be interpreted".

21. Reliance was also placed on the American case of **Connecticut National Bank vs. Germain, 503 U.S. 24, 253-54 (1992)** where the court in quoting how legislation should be interpreted, stated that courts must presume that a legislature says in a statute what it means and means in a statute what it says. In this regard, emphasis was also placed on the South African case of **Zuma and 2 others vs. the State CCT/5/94**.

The Responses

22. All the responses filed were opposing the Preliminary Objection and Notice of Motion application.

23. The Chief Justice and the Deputy Chief Justice, who are the 1st Respondent and the Interested Party respectively in Petition No. E300/2020, filed grounds of opposition dated 18th November, 2020 against the Notice of Motion application. It was their contention that the Petitioners are attempting to challenge the validity or legality of the provisions of the Constitution on the powers and functions of the Chief Justice and the Deputy Chief Justice as the Head and Deputy Head of the Judiciary.

24. Counsel submitted that the administration of the Judiciary is a function and/or power shared by the office of the Chief Justice as Head of the Judiciary, the office of the Deputy Chief Justice as the Deputy Head of the Judiciary, the Chief Registrar of the Judiciary as the Chief Administrator and the Accounting Officer of the Judiciary, the President of the Court of Appeal, the Principal Judge of the High Court and the Presiding Judges of the courts of equal status as the High Court. Further, that pursuant to **section 5(2)** of the Judicial Service Act, the

Chief Justice may assign duties to the Deputy Chief Justice who under **section 5(3)**, is answerable to the Chief Justice in execution of those functions and duties.

25. It was contended that **section 5(4)** contemplates a situation where the Deputy Chief Justice discharges the duties of the office of the Chief Justice for six months pending the appointment of a new Chief Justice and it is therefore a fallacy that the administrative powers of the Chief Justice are non-delegable to the Deputy Chief Justice. Further, where there is a vacancy in the Office of the Chief Justice and/or the Deputy Chief Justice or where they are unable to act, **section 5(5)** delegates the administrative duties of the Chief Justice to the most senior Judge of the Supreme Court to act as the Chief Justice until the position(s) are filled. Further, that the administrative power to constitute benches for each superior court is shared by the Office of the Chief Justice or the Deputy Chief Justice, the President of the Court of Appeal and the Principal Judge of the High Court pursuant to **Article 165(4)** of the **Constitution**; **section 6** of the **Supreme Court Act No. 7 of 2011**; **sections 7(1)** and **13(1)** of the **Court of Appeal (Organization and Administration) Act No. 28 of 2015** and **section 6** of the **High Court (Organization and Administration) Act No. 27 of 2015**.

26. According to the 1st Respondent and the Interested Party, the constitution of benches contemplated under **Article 165(4)** is an administrative duty of the Chief Justice which may be delegated or exercised by either the Deputy Chief Justice or in her absence, the most senior Judge of the Supreme Court as contemplated in **section 5(2)(a)**, **5(4)** and **5(5)** of the Judicial Service Act and it cannot be that the power to constitute benches reposes solely on the individual person of the Chief Justice. It was further submitted that in exercising his constitutional duties under **Article 165(4)**, the Chief Justice is bound by the national values and principles of governance embodied in **Article 10**.

27. Further, it was contended that given that the Chief Justice is a substantive Respondent to the various Petitions challenging the constitutionality of his Advice to the President under **Article 261(7)** of the Constitution, the Chief Justice could not be seen to be fair to the Petitioners by constituting the impugned bench personally. It was asserted that it was incumbent upon the Deputy Chief Justice to exercise the administrative power of the Chief Justice pursuant to **Article 259(3)(a)** and **(b)** of the Constitution as read with **section 5(4)** and **(5)** of the Judicial Service Act to constitute the Five-Judge bench to hear and determine the instant Petitions. They urged that the entire application is inimical to the overriding objectives in **Articles 48**, **159(2)(a)**, **(b)** and **(e)**, and **259(1)** of the Constitution, **sections 1A**, **1B** and **3A** of the Civil Procedure Act and **Rule 3(2)** as read together with **Rules 3(3)**, **3(4)** and **3(5)** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and urged that the application be dismissed with costs.

28. M/s Triple O K Law LLP Advocates filed written submissions dated 15th December, 2020 on behalf of the Chief Justice and the Deputy Chief Justice, the 1st Respondent and the Interested Party respectively. Counsel urged that the court is required to interpret the Constitution, particularly the provisions establishing the offices of the Chief Justice and the Deputy Chief Justice, the provisions vesting powers and functions in those offices as well as the limits, if any, imposed by the Constitution on those powers and functions. Further, that the court should be guided by the cannons of constitutional and statutory interpretation as embodied in **Article 259(1)** and judicial precedent in its interpretation of the powers and functions of the two offices.

29. It was urged that the court is required to promote the spirit, purpose, values and principles of the Constitution, advance the rule of law, and give an interpretation that contributes to good governance. That in so doing, the court ought to consider the purpose, context and language of the particular provision, always keeping in mind that all related constitutional provisions ought to be construed as an integrated or cohesive whole complementing each other. The court must also avoid rigid, literal and narrow interpretation of its provisions, always ensuring that the law is always speaking as required under **Article 259(3)**. Our attention was drawn to the decision in **Reserve Bank of India vs. Peerless General Finance and others [1987] AIR 1023** to this end.

30. On the issue whether the administrative authority to constitute a bench of an uneven number of Judges under **Article 165(4)** is exclusively vested in the Chief Justice and cannot be delegated, Counsel cited **Article 163(1)(b)** of the Constitution as read with **section 5** of the Judicial Service Act and **Article 259(1)** of the Constitution. To buttress this argument, Counsel cited the cases of **Apollo Mboya vs. Attorney General & 2 Others** (*supra*), **Council of Governors vs. Attorney General & 7 Others (2018) eKLR, Mugambi Imanyara & Anor vs. Attorney General & 7 Others (2017) eKLR, Reserve Bank of India vs. Peerless General Finance & Others** (*supra*) and **Multichoice (Kenya) Ltd vs. Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR.**

31. Alluding to the history underpinning the creation of the offices of the Chief Justice and the Deputy Chief Justice under the current Constitution, it was argued that the office of the Deputy Chief Justice was not in the retired Constitution of Kenya, 1963 (as amended). However, the people of Kenya deemed it fit to have the offices of the Chief Justice and the Deputy Chief Justice provided for, with both discharging their duties as Head and Deputy Head of the Judiciary of Kenya respectively. Specifically, the Constitution of Kenya established the principle that the Deputy Chief Justice be the Deputy Head of the Judiciary, Vice President of the Supreme Court and the principal assistant to the Chief Justice.

32. In regard to the functions and powers of the Deputy Chief Justice, the 1st Respondent and the Interested Party reiterated their averments in the grounds of opposition, specifically placing reliance on the provisions of **section 5** of the Judicial Service Act. It was asserted that the administration of the Judiciary is shared responsibility between the office of the Chief Justice as the Head of the Judiciary and the Deputy Chief Justice as the Deputy Head of the Judiciary. Further that the administrative powers of the Chief Justice, including the power to constitute Benches, being a shared responsibility, is delegable to the Deputy Chief Justice under the Constitution or the Judicial Service Act. It was urged that the constitution of a Bench of three or more Judges is an administrative function vested upon the Chief Justice and can be delegated or exercised by the Deputy Chief Justice. We were referred to the decision in **Multichoice (Kenya) Ltd vs. Wananchi Group (Kenya) Ltd & 2 others** (*supra*) as an authority for this proposition.

33. According to the 1st Respondent and the Interested Party, the interpretation of **Article 165(4)** by the Petitioners is narrow and restrictive. In their view, the constitutional provisions regarding the functions of the Deputy Chief Justice ought to be construed in a manner that completes, integrates and gives purpose to the office rather than whittle it down. In support of this submission, they relied on the case of **Paul Ssemogerere and others vs. Attorney General [2004] 2 EA 276** and **South Dakota vs. North Carolina 192 US 268 (1940)**.

34. On the question whether in the circumstances of this case the Chief Justice was unable to act in the empanelment of the Bench, it is submitted that the Chief Justice is the substantive Respondent in this matter and it was therefore not right for the Chief Justice to personally constitute the Five Judge Bench. In support of this proposition, a letter by the Advocate for the Petitioners in Petition No. E300/2020 dated 16th October, 2020 annexed to the supporting affidavit of the Speaker of the Senate as annexure JM-04 was brought to our attention. It was asserted that the same position is taken under ground number 8 of the Preliminary Objection by the Petitioners in Petition No. E291/2020.

35. In a nutshell, it was submitted that the Petitioners acknowledge that the Chief Justice is a Respondent in this matter, and it is also conceded that he has an interest in the outcome of this matter. Further, that the Petitioners accuse the Chief Justice of being biased, being a Judge in his own cause, and of trying to rig and appoint a Bench that will have a favourable predisposition to uphold the decision embodied in The Advice to the President.

36. It was further submitted that the Chief Justice is a state officer and is bound by the national values and principles of governance embodied in **Article 10** of the Constitution which include rule of law, democracy, equity, social justice, equality, human rights, good governance, integrity, transparency and accountability. These principles, it was urged, demand fairness in the exercise of the powers and functions of the Chief Justice including under **Article 165(4)**.

37. The 1st Respondent and the Interested Party contended that the Chief Justice, being a substantive Respondent in this matter, could not contravene the provisions of **Article 25(c)** and **50(1)** of the Constitution which demand fairness and equality of litigants before a court and the right to a fair trial. In this regard, they relied on the decision in **Pinnacle Projects Limited vs. Presbyterian Church of East Africa, Ngong Parish & another [2019] eKLR** where it was held that the right to a fair trial in civil cases includes the right of access to a court, the right to be heard by a competent, independent and impartial tribunal and the right to equality of arms. That it was therefore necessary in the circumstances, for the Deputy Chief Justice to exercise the administrative power of the Chief Justice pursuant to **Article 259(3)(b)** of the Constitution as read with **section 5(4)** and **5(5)** of the Judicial Service Act to constitute the Five-Judge Bench. In their view, granting the orders sought in the application and the preliminary objection would be in vain in light of the fact that the Chief Justice has retired and the Deputy Chief Justice is the acting Chief Justice.

38. The Petitioner in Petition No. E302/2020, Thirdway Alliance Kenya, filed written submissions dated 15th December, 2020 through M/s Mutuma Gichuru & Associates. On jurisdiction, counsel argued that a party cannot initiate the interpretational jurisdiction of the High Court by way of a mere Notice of Motion or Preliminary Objection and the only available procedure is to file a substantive petition. Counsel premised this argument on the fact that interpretational jurisdiction is not a light process that can be dispensed with vide an interlocutory process for the consequences of any decisions emanating thereof has a binding effect on the application of the Constitution.

39. It was further submitted that the constitution of the present Bench was done in accordance with the law and the Applicants have failed to demonstrate whether the Deputy Chief Justice acted *ultra vires*. Counsel contended that in exercise of the administrative role of the office of the Chief Justice and to prevent possible bias, the Deputy Chief Justice adhered to the rules of natural justice. To that end, Counsel cited Mativo, J in **Ernst & Young LLP vs. Capital Markets Authority & Another [2017] eKLR**. On the legality of the actions of the Deputy Chief Justice, Counsel cited the case of **Gibb Africa Limited vs. Kenya Revenue Authority [2017] eKLR** and submitted that the Deputy Chief Justice upheld the principle of legality in the absence of evidence to the contrary. Counsel urged that the application and the Preliminary Objection threaten the independence of the Judiciary and the Preliminary Objection falls below the threshold of a preliminary objection as set out in **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696** and ought to be dismissed.

40. The Centre for Rights Education Awareness (CREAW Kenya) and Community Advocacy and Awareness Trust, the 1st and 2nd Petitioners respectively in Petition No. E337 of 2020, filed written submissions dated 15th December, 2020 through M/s Lempaa Suyianka Advocate. Counsel argued, firstly, that the decision under the various Petitions was made by the Chief Justice and the Objectors are entitled to a fair hearing before an independent and impartial court. Secondly, pursuant to **Article 161(2)(b)** and **163(1)(b)** of the Constitution and **section 5** of the Judicial Service Act, the Deputy Chief Justice deputizes the Chief Justice and can appoint the bench on the delegation of the Chief Justice. Thirdly, that the challenge is fundamentally frivolous, a waste of judicial resources and ought to be dismissed on the basis that the Deputy Chief Justice is presently the acting Chief Justice. Therefore, if the application is allowed, and it is directed that a new Bench be appointed, the Deputy Chief Justice will have to make those appointments and could appoint the same Bench.

41. The National Equality and Gender Commission, the 3rd Petitioner in Petition No. E337/2020 filed grounds of opposition dated 14th December, 2020 to the Preliminary Objection as follows:

> *a. The purported Preliminary Objection is, in fact, not a Preliminary Objection within the meaning of Mukisa Biscuit Manufacturers Limited vs. West End Distributors Limited.*
>
> *b. The Preliminary Objection and the Notice of Motion application are premised on a misapprehension of the constitutional powers and functions of the Deputy Chief Justice under the Constitution and in particular the following prayers and functions:*
>
> > *i. Article 161(2)(b) of the Constitution which designates the Deputy Chief Justice as the Deputy Head of the Judiciary;*
> >
> > *ii. Article 163(1)(b) which designates the Deputy Chief Justice to deputize for the Chief Justice.*
>
> *c. The Preliminary Objection and the Notice of Motion application are calculated to advance a reading of the Constitution that results into absurd outcomes hence they offend Article 259 of the Constitution.*

42. The 3rd Petitioner filed written submissions dated 14th December, 2020 through M/s Ongoya & Wambola Advocates in which they urged the court to dismiss the Notice of Motion and Preliminary Objection. Counsel submitted that what constitutes a Preliminary Objection was set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd** (*supra*). Counsel contended that since the

arguments raised in the Notice of Preliminary Objection and the Notice of Motion have no capacity to dispose of the consolidated cases, the same fail the test of a proper preliminary objection.

43. Counsel pointed out that the Chief Justice has been named as a Respondent in a multiplicity of the consolidated petitions and the cause of action in the petitions is in respect of his Advice to the President to dissolve Parliament. Further, they urged that the Chief Justice had proceeded on terminal leave pending retirement and handed over his day to day functions to the Deputy Chief Justice. Counsel asserted that in circumstances such as the present one where the Chief Justice is the substantive Respondent, the Deputy Chief Justice discharges the functions of the Chief Justice pursuant to **Article 161(2)(b)** as read with **Article 163(1)(b)**. Counsel urged that **Article 259** gives the *"constant north"* and must guide the process of interpretation of the constitution.

44. The Kenya Human Rights Commission, who was joined as the 10th Interested Party in Petition No. E291/2020 filed written submissions dated 8th December, 2020. Counsel submitted that a restrictive reading of the mandate under **Article 165(4)**, would create a conflict of interest urging that an empanelment of a bench by the Honourable Chief Justice, a party and subject in issue in these matters, would offend the maxim that one cannot be a judge in their own cause. To buttress his arguments, Counsel cited the common law requirement for independence of the Judiciary, principles of fair hearing and impartiality, the doctrine of necessity, **Bangalore Principles of Judicial Conduct**, the **1985 United Nations Basic Principles of the Independence of the Judiciary** and the case of **Francis Kaai M'rintuara & another vs. Samson Mworia Rukwaru [2018] eKLR**.

45. The Federation of Women Lawyers (FIDA), the 11th Interested Party in Petition No. E291/2020, filed a replying affidavit sworn on 3rd December, 2020 by Ann W. Ireri, the Chief Executive Officer, in opposition to the Notice of Motion application. The deponent asserted that for the Chief Justice to appoint a Bench to hear and determine the consolidated petitions, when he is a Respondent in these proceedings, would fly in the face of the principles of natural justice. The deponent urged that the principle of *nemo debet esse judex in propria causa* stipulates that a judge deciding a case must be impartial and neutral to all the parties. That it is on this premise that the Deputy Chief Justice appointed the Bench herein as is currently constituted.

46. The 11th Interested Party filed written submissions dated 16th December, 2020 through M/s Lumallas Achieng' & Kavere Advocates. Counsel reiterated their averments in the replying affidavit about the impartiality of the administrative and adjudicatory processes, and cited the cases of **R vs. Sussex; R vs. Bow Street Metropolitan Stipendiary Magistrate Ex Parte Pinochet Ugarte (200) 1 AC, Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge Civil Appeal No. 79 of 1998 (1995-1998) 1 EA 134** in support of this argument.

47. Counsel submitted that in empanelling the Bench, the Chief Justice exercises his administrative powers as the Head of the Judiciary and in doing so, he is assisted by the Deputy Chief Justice. Further, that the Deputy Chief Justice deputises the Chief Justice and can perform the administrative and judicial functions of the Chief Justice in the absence of the Chief Justice, or as directed by the Chief Justice, or as circumstances may necessitate, such as in the present case where the Chief Justice is the substantive Respondent in the consolidated Petitions.

<u>Issues for determination</u>

48. We take the view that the following issues arise for determination:

> *a. Whether the objection by the Petitioners in Petition No. E291/2020 meets the threshold of a proper preliminary objection;*
>
> *b. Whether the Deputy Chief Justice can exercise the powers of assigning of Judges under Article 165(4) of the Constitution;*
>
> *c. If so, whether in the circumstances of the consolidated petitions herein, the assigning of judges by the Deputy Chief Justice was proper and lawful;*

49. Before we deal with the issues, we wish to restate the guiding principles on constitutional and statutory interpretation in light of the submissions made thereon by the parties herein.

50. The special place of a Constitution of a country was stated in the Namibian case of **S vs. Acheson 1991 (2) SA 805** thus:

> ***"The constitution of a nation is not simply a statute which mechanically defines the structure of government and the relationship between the government and the governed. It is a 'mirror reflecting the national soul'; the identification of ideals and aspiration of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion."***

51. In this instance, we are called to interpret the provisions of **Article 161(2), 163(1)**, and **165(4)** of the Constitution as well as **section 5** of the Judicial Service Act, and consider whether it was lawful for the Deputy Chief Justice to exercise the power of assignment of Judges under **Article 165(4)**. In doing so, we are guided by the provisions of **Article 259** as well as various judicial authorities on constitutional interpretation.

52. Article 259 of the Constitution provides:

> ***"(1) This Constitution shall be interpreted in a manner that—***
>
> > ***(a) promotes its purposes, values and principles;***

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and contributes to good governance.

(2) If there is a conflict between different language versions of this Constitution, the English language version prevails.

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things—

(a) a function or power conferred by this Constitution on an office may be performed or exercised as occasion requires, by the person holding the office;

(b) any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;"

53. Article 259 which is the bedrock of our constitutional interpretation therefore requires that the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance. This means that the Constitution should be given a purposive interpretation where all provisions are read as a whole with each provision sustaining the other.

54. The Court of Appeal in **Attorney General vs. Law Society of Kenya & 4 others [2019] eKLR** held that:

"The starting point, as always, is Article 259 on the construction of the Constitution which directs that it shall be interpreted 'in a manner that: (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance'. Those values must permeate the process of constitutional interpretation. Many local and international decisions were cited before us to illustrate other governing principles of interpretation but we shall not belabour them as they are largely common ground. For emphasis, however, we reiterate what this Court stated in the case of <u>Njoya & 6 Others vs. Attorney General & another</u> [2004] eKLR thus:

"Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the constitution, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document."

We also emphasize the principle of holistic interpretation where the Constitution, which has different Chapters and Articles is read as one document, not disjointed sections; where each provision is read as supporting the other and not destroying the other; where the provisions are all ultimately in harmonious symphony. In the case of <u>Tinyefuze vs. Attorney General of Uganda</u> Constitutional Petition No. 1 of 1997 [1997] 3 UGCC the Uganda Constitutional Court put it thus:

"The entire Constitution has to be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness."

Our own Supreme Court <u>In the Matter of Kenya National Commission on Human Rights</u> [2014] eKLR explained what a holistic interpretation entails when one counsel before it persisted on asking the Court to find that Article 163(6) of the Constitution does not mean what it says, through "a holistic interpretation". The Court stated:

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

55. The Supreme Court in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No. 26 of 2014 [2014] eKLR**, opined that a purposive interpretation should be given to statutes so as to reveal the intention of the statute. The court observed as follows:

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

"The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

56. While analyzing how to determine the intention of an enactment, the Court of Appeal in **County Government of Nyeri & Anor. vs. Cecilia Wangechi Ndungu [2015] eKLR** held that:

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

57. Mativo, J, citing several authorities, in Stephen Wachira Karani & another vs. Attorney General & 4 others [2017] eKLR clearly elaborated the guiding principles of constitutional interpretation as follows:

> ***"26. The purposive approach (sometimes referred to as purposivism, or purposive construction, or purposive interpretation, or the modern principle in construction) is an approach to statutory and constitutional interpretation under which common law courts interpret an enactment (a statute, part of a statute, or a clause of a constitution) within the context of the law's purpose.***
>
> ***…***
>
> ***28. The leading case in which purposivism was definitively accepted by the House of Lords was Pepper vs Hart. The case established the principle that when primary legislation is ambiguous and certain criteria are satisfied, courts may refer to statements made in the House of Commons or the House of Lords in an attempt to interpret the meaning of the legislation. Before the ruling, such an action would have been seen as a breach of parliamentary privilege. The House of Lords held that courts could now take a purposive approach to interpreting legislation when the traditional methods of statutory construction are in doubt or result in an absurdity."***

58. Justice Mativo identified the principles a court should consider in both statutory and constitutional interpretation as follows:

> ***"45. It is equally important that the court should also as far as possible, avoid any decision or interpretation of the Constitution, which would bring about the result of rendering the Constitution unworkable in practice or create a situation that will go against other provisions of the Constitution governing the subject in issue. In this case, it is important to bear in mind the goal and objects of the drafters of the Constitution. What was the mischief the drafters intended to cure…***
>
> ***46. There are important principles which apply to the construction of statues such as (a) presumption against "absurdity" – meaning that a court should avoid a construction that produces an absurd result; (b) the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces "unworkable or impracticable" result; (c) 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 (d) the presumption against artificial result – meaning that a court should find against a construction that produces "artificial" result and, lastly, (e) 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.""***

59. The Petitioners have invited us to adopt a restrictive interpretation stating that the plain text of **Article 165(4)** of the Constitution speaks for itself. However, we acknowledge that different principles of interpretation apply to different circumstances. In interpreting the Constitution and Statutes, the court should not be put in a straitjacket; the Court should not be shackled to adopt a strict constructionist view of interpretation which requires it to adopt the literal meaning of the language as held in the **Pepper case** *(supra)*. Some or all of these principles overlap and may apply to different issues in a particular case. Each case may be considered on its own merits. This is particularly true when interpreting the Constitution whereby **Article 259** comes into play.

60. Having set out the principles of constitutional interpretation, we will now proceed to address the first issue on whether the objection by the Petitioners in Petition No. E291/2020 meets the threshold of a proper Preliminary Objection.

a. Whether the objection by the Petitioners in Petition No. in E291/2020 meets the threshold of a proper preliminary objection;

61. Counsels for the Petitioners in Petition No. E302/2020, Thirdway Alliance Kenya and the 3rd Petitioner in Petition No. E337/2020 National Gender and Equality Commission, respectively, urged that the Preliminary Objection falls below the threshold of a preliminary objection as set out in **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696** as it fails to highlight the points of law for determination by this court and ought to be dismissed.

62. The circumstances in which a preliminary objection should be raised were discussed in **Oraro vs. Mbaja [2005] KLR 141** where it was held:

> ***"A preliminary objection consists of a point of law which has been pleaded or which arises from clear implication out of pleadings, and which if argued as preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***

63. The Preliminary Objection before us challenges the constitutionality and legality of the act of the Deputy Chief Justice assigning judges

under **Article 165(4)** and by extension therefore, the competence of the bench so empanelled to hear and determine the consolidated petitions. It is our finding that this is a clear point of law which was properly taken as a preliminary objection.

b. Whether the Deputy Chief Justice can exercise the powers of assigning of Judges under Article 165(4) of the Constitution

64. The constitutional provisions on empanelling benches of uneven number of judges under **Article 165 (3) & (4)** are as follows:

> ***"(3) Subject to clause (5), the High Court shall have—***
>
> > ***(a) unlimited original jurisdiction in criminal and civil matters;***
> >
> > ***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***
> >
> > ***(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;***
> >
> > ***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—***
> >
> > > ***(i) the question whether any law is inconsistent with or in contravention of this Constitution;***
> > >
> > > ***(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;***
> > >
> > > ***(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and***
> > >
> > > ***(iv) a question relating to conflict of laws under Article 191; and***
> >
> > ***(e) any other jurisdiction, original or appellate, conferred on it by legislation.***
>
> ***(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice."***

65. The court in **Kenya Medical Research Institute vs. Attorney General & 3 others [2014] eKLR**, described the role of the Chief Justice under **Article 165(4)** as constitutional as opposed to a merely administrative function. The import of a constitutional mandate in our view is to ring fence that mandate from frivolous and unwarranted interference and intermeddling hence the special procedures provided for before such a mandate can be changed. It is also our view that a constitutional mandate of the Chief Justice can be judicial, administrative or political, and the current Constitution does indeed state that the Chief Justice is the Head of the Judiciary which embodies all these functions.

66. Coming to the provisions of **Article 165(4)**, the function allocated to the Chief Justice is that of assigning Judges. The starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question, that is, its proper and most known signification. If there is more than one ordinary meaning, the most common and ordinary is preferred. This interpretation is an application of the plain meaning rule of construction and only applies where the word or enactment under inquiry is either grammatically capable of one meaning only, or where an informed interpretation of that word or enactment raises no doubt as to what grammatical meaning was intended by the legislature. As put in **Halsbury's Laws of England Volume 44 (1)** at paragraph 1487;

> *"If there is nothing to modify, alter or qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning."*

67. The ordinary and plain meaning of "assign" is to allocate a job or duty. The **Oxford Learner's Dictionary** defines assign as to 'give someone something they can use or some work or responsibility'. It is clear that the context in which the function of assigning Judges is given to the Chief Justice in **Article 165(4)**, is to facilitate the hearing of matters that raise a substantial question of law by the High Court. In our view, the Chief Justice in doing so exercises an administrative function. The reason why we say so, is because in exercising that mandate the Chief Justice is not addressing his judicial mind to the decision of whether or not to empanel the bench, but rather is implementing the decision already made by the High Court certifying that the matter discloses a substantial question of law.

68. In **Oraro vs. Speaker of the National Assembly and 11 others [2005] 2 KLR 538** this mandate was elucidated as follows:

> ***"While the Chief Justice in his administrative functions and duties may empanel benches of more than one judge to hear certain cases e.g constitutional cases which may require such empanelment and while he can direct at which station a judge will be based from time to time his roles stop there and he cannot direct any judge of the High Court or Court of Appeal as to how to decide cases being heard by the said judge or in respect of any other matters where the judge is carrying out his judicial functions."***

69. The **Black's Law Dictionary, 9th Edition** at page 28 defines 'administrative act' as 'an act made in management capacity; esp., an act

made outside the actor's usual field (as when a judge supervises court personnel).' **'**Judicial power' is defined at page 924 as *'the authority vested in courts and judges to hear and decide cases and make binding judgments on them; the power to construe and apply the law when controversies arise over what has been done or not done under it'.*

70. In **Hayo vs. Attorney General & 2 others [1992] eKLR** page 200 in which the decision in **Royal Aquarium and Summer and Winter Garden Socy vs. Parkinson 1892 1QB 431** was cited with approval, the term judicial was defined as follows:

> *"**The word 'Judicial' has two meanings. It may refer to discharge of duties exercisable by a judge or justices in court or administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind that is a mind to determine what is fair and just in respect of matters under consideration. Justices for instance act judicially when administering the law in court, and they also act judicially when determining their private rules what is right and fair in some administrative matter before them."***

71. It is thus evident that the constitutional mandate exercised by the Chief Justice under **Article 165(4)** is an administrative function. Our next consideration therefore, is whether the function of the Chief Justice under **Article 165(4)** can be performed by the Deputy Chief Justice.

72. The Constitution and the Judicial Service Act provide that the Deputy Chief Justice deputises the Chief Justice. **Article 161(2)(a)** and **(b)** creates the office of the Chief Justice and Deputy Chief Justice. It provides that:

"There is established the office of—

> ***(a) Chief Justice, who shall be the Head of the Judiciary;***
>
> ***(b) Deputy Chief Justice, who shall be the Deputy Head of the Judiciary;"***

Article 163(1) of the Constitution provides that:

> ***"There is established the Supreme Court, which shall consists of—***
>
> ***(a) the Chief Justice, who shall be the president of the court;***
>
> ***(b) the Deputy Chief Justice, who shall—***
>
> > ***(i) deputise for the Chief Justice; and***
> >
> > ***(ii) be the vice-president of the court; and***
>
> ***(c) five other judges."***

73. Section 5 of the Judicial Service Act provides as follows:

> ***"PART II – ADMINISTRATION OF THE JUDICIARY***

5. Functions of the Chief Justice and the Deputy Chief Justice

> ***(1) The Chief Justice shall be the head of the Judiciary and the President of the Supreme Court and shall be the link between the Judiciary and the other arms of Government.***
>
> ***(2) Despite the generality of subsection (1), the Chief Justice shall—***
>
> > ***(a) assign duties to the Deputy Chief Justice, the President of the Court of Appeal, the Principal Judge of the High Court and the Chief Registrar of the Judiciary;***
> >
> > ***(b) …..***
> >
> > ***(c) exercise general direction and control over the Judiciary.***
>
> ***(3) As the Deputy Head of the Judiciary and the Vice-President of the Supreme Court, the Deputy Chief Justice shall be responsible to the Chief Justice in the exercise of the functions and duties of the office.***
>
> ***(4) In the event of the removal, resignation or death of the Chief Justice, the Deputy Chief Justice shall act as the Chief Justice for a period not exceeding six months pending the appointment of a new Chief Justice in accordance with the Constitution."***

74. Who then is a deputy? The **Black's Law Dictionary** at page 547 defines a "deputy" as '*a person appointed or delegated to act as a substitute for another especially for an official*'. Further, a "general deputy" is defined as '*a deputy appointed to act in another officer's*

place and execute all ordinary functions of the office' while a "special deputy" is defined as '*a deputy specially appointed to serve a particular purpose such as keeping the peace during a rally*'.

75. The provisions in the Constitution and the Judicial Service Act as regards the functions of the Deputy Chief Justice are in the nature of a general deputy, as the holder can undertake any of the functions of the Chief Justice. Neither the Constitution nor the Judicial Service Act places any limitations on the functions that the Deputy Chief Justice can deputise.

76. In **Ellison vs. Stevenson, 22 Ky. 271, 6 T.B. Mon. 271 (1827)** the court defined the role of a deputy clerk and stated;

> ***"…The clerk has by law, a power to make a deputy; he has so made his deputy; and the deputy was regularly admitted and sworn according to law. It cannot be maintained as a legal principle, that the deputy, lawfully constituted as such, has less power than the principal. This point came before the court, and was decided by all the judges of King's bench, in the case of Parker vs. Kett, (1 Lord Ray. 658; Salk. 95; 12 Mod. 466.) …For where an officer has power to make a deputy, such deputy, when he is created such, may do any act that his principal might do; less powers he cannot have.***
>
> ***...The rule as laid down by the court, that a deputy, when he is created such; may do any act which his principal might do; that a restriction of the power of the deputy is void as contrary to the nature of the deputation, has strong foundation in public utility; for otherwise, the people might be greatly deceived and imposed upon, by confiding in one who was ostensibly a public officer, when in fact, by the terms of the contract between the principal and the deputy, the latter would be converted into a private agent. A distinction between the powers of a public officer, and those of his constituted deputy, would be so highly inconvenient in practice, that it ought not to be drawn unless the statute imperiously commanded."***

77. It has been canvassed before us that where the Constitution intends the Deputy Chief Justice to act on behalf of the Chief Justice, it has expressly stated so. Specific examples cited were **Articles 141(1)**, **144(4)** and **148(4)**. These provisions fall under **Chapter 9** of the Constitution that deals with the Executive. This chapter does not have a general provision as regards the deputisation of the Chief Justice by the Deputy Chief Justice, as is provided for in **Article 161(2)(b)** in **Chapter 10** of the Constitution on the Judiciary. Hence the provision for the deputisation of the Chief Justice in **Chapter 9**. A holistic and purposeful interpretation of **Article 161(2)(b) of** the Constitution and section 5 of the Judicial Service Act leads us to the conclusion that the Deputy Chief Justice substitutes the Chief Justice when necessary.

78. It therefore our finding that the constitutional function of the Chief Justice to assign benches under **Article 165(4)** being an administrative function, can be performed by the Deputy Chief Justice when the Chief Justice is for good reason, unable to perform. As to whether they were properly performed in the circumstances of this case is the subject of the next issue.

> ***c. Whether in the circumstances of the consolidated petitions herein, the assigning of judges by the Deputy Chief Justice was proper and lawful;***

79. The Petitioners argued that the Deputy Chief Justice cannot in law or fact purport to *suo moto* exercise the power and authority under **Article 165(4)**. Further that **Article 165(4)** does not allow for the delegation by the Chief Justice of the assignment of the bench required therein, and such delegation must be explicitly provided for in the Constitution.

80. On the other hand, the Respondents argued that the Chief Justice is the substantive Respondent in this matter, and could not be seen to be fair to the Petitioners by constituting the bench personally given that fairness and impartiality are inalienable constitutional imperatives. According to them, the constitution of benches contemplated under **Article 165(4)** is an administrative duty of the Chief Justice which may be delegated or exercised by the Deputy Chief Justice. It was urged that the assignment of that bench by the Deputy Chief Justice is justified pursuant to **Articles 10, 25, 50, 163(1)(b), 165(4), 259(a) & (b)** of the Constitution as read together with **section 5** of the Judicial Service Act.

81. Under **Article 10** of the Constitution, in applying and interpreting the Constitution, we are bound by the national values and principles of governance, which include the rule of law, human rights, integrity, transparency and accountability. Moreover, **Article 50** of the Constitution guarantees the right of every person to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body. In addition, **Article 25(c)** provides that the right to a fair trial shall not be limited. In our view, adherence to these values and principles encompasses the principles of natural justice and fair administrative action.

82. The clearest expression of natural justice is found in the case of **Gas & Fuel Corporation of Victoria vs. Wood Hall Ltd & Leonard Pipeline Contractors Ltd [1978] VR 385** at page 396 where Marks, J held that;

> ***"There are two rules or principles of natural justice... The first is that an adjudicator must be disinterested and unbiased. This is expressed in the Latin-maxim nemo judex in causa sua. The second principle is that the parties must be given adequate notice and opportunity to be heard. This in turn is expressed in the familiar Latin maxim audi alteram partem. In considering the evidence in this case, it is important to bear in mind that each of the two principles maybe said to have sub-branches or amplifications. One amplification of the first rule is that justice must not only be done but appear to be done; ...Sub-branches of the second principle are that each party must be given*** **a** ***fair hearing and*** **a** ***fair opportunity to present its case. Transcending both principles are the notions of fairness and judgment only after*** **a** ***full and fair hearing given to all parties."***

83. This is also restated in **Article 47(1)** of the Constitution and amplified by **section 4(1)** of the Fair Administrative Action Act which provides that every person has the right to administrative action which is expeditious, efficient, reasonable and procedurally fair.

84. That the right to fair administrative action is a reflection of, *inter alia*, the rule of law was appreciated by Githinji, JA in **Judicial Service Commission vs. Mbalu Mutava [2015] eKLR at para 23** where he held that:

> ***"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability."***

85. To be procedurally fair, the rules of natural justice which are a component of the rule of law and which frown upon bias, must be adhered to. As held in **Reg vs. Secretary of State for the Home Department ex-parte Doody [1994] 1 AC 531** *"The rule of law in its wider sense has procedural and substantive effect ...",*

86. Specifically, on the requirement of impartiality on the part of an adjudicator, the Court in the case of **Nathan Obwana v Robert Bisakaya Wanyera & 2 others [2013] eKLR,** citing with approval the case of **R vs. Bowstreet Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (NO.2) (1999) 1 All ER 577** at page 586 noted as follows:

> ***"The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behavior may give rise to a suspicion that he is not impartial because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not be normally himself benefiting, but providing a benefit for another by failing to be impartial."***

87. The first type of case identified in the said quotation results in actual bias, while the second type of case results in apparent bias. The test for disqualification differs between the two types of bias. In the case of actual bias, disqualification is automatic, without there being any "question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case" as stated by Lord Goff in the English case of **R. v. Gough (1993) 2 All E.R. 724**. In the case of apparent bias, the perception of impartiality is measured by the standard of a reasonable observer, and the English House of Lords in **Magill v. Porter (2002) 2 AC 357,** stated that the test for disqualification is whether "a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased".

88. Likewise, the Queen's Bench in Canada in **Allen v. Judicial Council of Manitoba, 1990 CanLII 7952 (MB QB)**, cited with approval the case of ***Brosseau v. Alberta Securities Commission (1989), 1989 CanLII 121 (SCC), 57 D.L.R. (4th) 458, [1989] 1 S.C.R. 301, [1989] 3 W.W.R. 456*** where it was held at pages 463-4 that:

> ***"The maxim nemo judex in causa sua debet esse underlies the doctrine of "reasonable apprehension of bias". It translates into the principle that no one ought to be a judge* in *his own cause.* In *this case, it is contended that the chairman,* in *acting as both investigator and adjudicator* in *the same case, created a reasonable apprehension of bias. As a general principle, this is not permitted* in *law because the taint of bias would destroy the integrity of proceedings conducted* in *such a manner."***

89. The same position has been adopted in our jurisdiction. The Supreme Court of Kenya restated the law on recusal of a judge on the ground of bias in **Robert Tom Martins Kibisu vs Republic (2018) e KLR**, as follows:

> ***"[59] We agree that bias is prima facie a factor that may lead to a judge recusing himself from a matter. Such an action is meant to safeguard the sanctity of the judicial process in tandem with the principle of natural justice that no man should be a judge in his own case and that one should be tried and/or have his dispute determined by an impartial tribunal. This is what is provided for in Article 50(1) of the Constitution thus:***
>
> > ***"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body".***
>
> ***[60] What is bias? The Oxford English Dictionary defines bias thus: "as an inclination or prejudice for or against one thing or person". The Blacks' Law Dictionary 9th edition defines the word bias as "Inclination; prejudice; predilection". Hence, as one of the fundamental tenets of the Rule of Law is impartiality of the judiciary, in circumstances where bias is alleged and proved, then the pragmatic practice is that the particular judge or magistrate will as a matter of course recuse/remove himself from the hearing and determination of the matter.***
>
> ***[61] From the onset, it is worth noting that when interrogating a case of bias, the test is that of a reasonable person and not the mindset of the judge. That is why in Tumaini v. Republic [1972] EA LR 441 Mwakasendo J held that "in considering the possibility of bias, it is not the mind of the Judge which is considered but the impression given to reasonable people…"***

90. In the case of **Republic vs. Cabinet Secretary, Ministry of Trade & Industry & 6 others Ex-parte Josphat Kimani Gacugu & 4 others [2020] eKLR,** the High Court held:

> ***"41. A likelihood or apprehension of bias arises where a decision maker acts in such a way that would lead a fair-minded and informed observer to conclude that there was a real possibility that he or she will be biased. The test to be applied in determining whether there is a likelihood of bias was stated in Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge, [1995-1998] 1 EA 134 by Lakha, JA as follows: -***

"In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part he should not sit…There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; "The judge was biased."

91. The rationale of the rule against bias was explained in detail by the Human Rights Tribunal of Ontario in **Jogendra vs. Human Rights Tribunal of Ontario, 2011 HRTO 322 (CanLII)**, where it was held that:

"[71] In order to frame a discussion of the allegation of bias in the present case, it is necessary to set out some of the key principles established by the case law. First, there is a strong presumption of judicial impartiality and integrity, and this has been extended to administrative tribunals and adjudicators: R. v. Brown, 2003 CanLII 52142 (ON C.A.), (2003), 64 O.R. (3d) 161 (C.A.) at paras. 37-39; Chainauskas Estate v. Reed, 2009 ONCA 572 (CanLII), (2009), 251 O.A.C. 209 (C.A.) at para. 12.

[72] Numerous decisions have noted that the rule against bias is intended to uphold public confidence in the fairness of administrative agencies and their decision-making procedures, and thus requires both independence and impartiality. Both requirements relate to the Latin maxim nemo debet esse judex in propia sua causa – no one should be a judge in their own cause."

92. Where a Judge is a party to a case in which the Judge's act or decision is being impugned, as the Chief Justice is in the instant consolidated petitions, both actual and an apprehension of bias would arise, as the Judge would be sitting in his own cause. The Chief Justice's empanelment of a bench under **Article 165(4)** in those circumstances would, even though he is not determining the matter, give rise to a likelihood or reasonable apprehension of bias. A right minded person seized of the circumstances of these petitions will go away thinking that it is more likely than not that the Chief Justice would not decide fairly and would be biased in his selection of the bench. This is because the rule against bias must be considered within the particular context of the decision making process which is being challenged.

93. This is our understanding of the content of the letter dated 16th October, 2020 by the advocate for the Petitioner in Petition No. E300/2020 addressed to the Chief Justice and annexed to the Supporting Affidavit of Hon. Kenneth Lusaka. The letter at paragraphs 5 and 6 stated:

"We are of the strong view that your decision to assign the Deputy Chief Justice the duty to empanel the bench, the constitutional provision notwithstanding, is a deliberate and calculated attempt on your part to rig the bench and appoint judges you think will have a favourable predisposition to the decision which you have made which is the subject matter of this reference.

In light of the above, we put both you and the Honourable Deputy Chief Justice of (sic) our client's strong disapproval of the manner you have gone about this matter and will challenge the empanelled bench. ***A more fair and transparent system must be devised in light of your obvious interests in the matter."*** *(Emphasis ours)*

94. In the letter cited hereinabove, the Petitioners readily acknowledge that *"the Chief Justice has an obvious interest in the matter."* This acknowledgment demonstrates and buttresses the foregoing principles on the need for impartiality in decision making. It is also evident that, the tone and implication by the Petitioners in the said letter, is that the empanelment of the bench by the Deputy Chief Justice was at the behest of the Chief Justice. According to the Petitioners, a more fair and transparent system must be devised. Having submitted that it is only the Chief Justice who can assign the judges, it is contradictory and a reprobation on the part of the Petitioners, and defeats reason, to propose that the Chief Justice should have devised another system.

95. One of the principles of constitutional interpretation is that the courts should avoid a construction that produces an absurd result. To adopt the submissions by the Petitioners would, in our view, produce an irrational, illogical and unworkable or impracticable result.

96. In the circumstances of the instant petitions, it is evident that the Chief Justice could not, in the interest of justice, rule of law, good governance, integrity, transparency and accountability assign judges to hear and determine the cases challenging The Advice he had personally given to the President. To avoid any perception of bias, it was prudent that another person performs that function. Our finding is that under the Constitution, the Deputy Chief Justice is the person who has authority to undertake the functions of the Chief Justice in his absence, or when necessary, or when for good reason the Chief Justice is unable to act. Therefore, the action of the Deputy Chief Justice in assigning the present bench was proper, legal and constitutional.

Summary of Findings

97. Having considered the issues raised in the Notice of Motion application and the Preliminary Objection by the Petitioners and responses thereto, we find as follows:

a) That the objection by the Petitioners in Petition No. E291 of 2020 is properly raised as a preliminary point of law.

b) The exercise of the powers under **Article 165(4)** of the Constitution, though constitutionally underpinned, is administrative in nature.

c) Being administrative in nature, the said mandate can be exercised by the Deputy Chief Justice when the Chief Justice is absent, when necessary, or if for good reason the Chief Justice is unable to exercise the mandate.

d) In the present circumstances, the rule against bias and the rule that no person shall be a judge in their own cause dictates that the Chief Justice being the main respondent in the instant petitions could not assign judges to hear the said Petitions.

e) It was therefore proper, legal and constitutional for the Deputy Chief Justice to have exercised the powers under **Article 165(4)** of the Constitution.

f) In the premise, this bench is properly assigned.

98. Before we conclude this ruling, we note that there is no procedure prescribed for assignment of Judges under **Article 165(4)** of the Constitution, or any other law. It is our view that it would be prudent for avoidance of further ambiguity that specific rules and/or guidelines be put in place in that regard by the Chief Justice.

Disposition

99. Having arrived at the foregoing findings, we come to the inevitable conclusion that the Notice of Motion by the Petitioners in Petition No. E300/2020 dated 16th October, 2020, and the Preliminary Objection by the Petitioners in Petition No. E291/2020 dated 19th October, 2020, are without merit. We proceed to dismiss both the Notice of Motion and the Preliminary Objection with no order as to costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF FEBRUARY, 2021.

…….……………….. **……………………**

HON. L. A. ACHODE **HON. P. NYAMWEYA**

JUDGE **JUDGE**

…………………..

HON. G. V. ODUNGA

JUDGE

………………….. **……………………**

HON. J. A. MAKAU **HON. A. K. NDUNG'U**

JUDGE **JUDGE**