REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. E040 OF 2021

BENARD AMBASA..... PETITIONER

-VERSUS-

1. INSTITUTE OF HUMAN RESOURCE MANAGEMENT

2. TRUNEX LIMITED

3. CABINET SECTRETARY PUBLIC SERVICE & GENDER

4. THE HON. ATTORNEY GENERAL.....RESPONDENTS

-AND-

LILIAN NGALA ANYANGO..... INTERESTED PARTY

JUDGMENT

Introduction:

1. The Petitioner herein, *Benard Ambasa*, is a member of the Institute of Human Resource Management (hereinafter referred to as '***the Institute***' or '***the 1st Respondent***'). He was one of the candidates in the elections of a member of the 1st Respondent's Council for Nairobi, Central and North Eastern Region. The elections were held between 16th November, 2020 and 18th November, 2020.

2. The Institute appointed the 2nd Respondent as the Returning Officer in the election. The interested party was declared the winner of the election. She was thereafter gazetted by the 3rd Respondent as the duly elected the member of the Council of the Institute.

3. Aggrieved by the outcome of the election, the Petitioner instituted the proceedings subject of this judgment.

The Petition:

4. The Petition is dated 2nd February, 2021. Contemporaneously with the filing of the Petition, the Petitioner filed an evenly dated Notice of Motion under certificate of urgency seeking some conservatory orders. The application is supported by an affidavit sworn by the Petitioner on even date. The Petitioner further filed a Verifying Affidavit sworn on 2nd February, 2021 and a supplementary affidavit which he swore on 15th March, 2021 respectively.

5. In further support to the Petition, the Petitioner filed written submissions and a List of Authorities both dated 15th March, 2021.

6. In the main, the Petitioner prays for the following orders: -

> *1. A declaration by this honorable court that the 1st Respondent's council held between 16th November 2020 to 18th November 2020 by the 1st and 2nd Respondents were not free and fair within the meaning of Article 81 of the Constitution of Kenya.*

2. An order of Certiorari to bring into this court and quash gazette notice No 530 dated 19th January 2020 issued by the 3rd Respondent appointing the interested party to the 1st Respondent's board.

3. An order directing the 1st Respondent to conduct fresh elections officiated by a freshly procured and credible election body.

4. Costs and interest.

The Responses:

7. The Petition was opposed by all the Respondents. The Interested Party did not take part in these proceedings.

8. The 1st Respondent filed a Replying Affidavit sworn by one *Irene Kimacia*, the 1st Respondent's Acting Executive Director. The 2nd Respondent filed a Replying Affidavit sworn by one *Kevin Manganga*, an employee of the 2nd Respondent. The 1st and 2nd Respondents filed joint written submissions dated 26th March, 2021.

9. The 3rd and 4th Respondents filed a joint Replying Affidavit sworn by one *Mrs. Mary Kimonye*, the 3rd Respondent's Principal Secretary in charge of the State Department for Public Service and Gender. The affidavit was sworn on 9th April, 2021. The Respondents also filed joint submissions dated 28th June, 2021.

10. The 1st and 2nd Respondents rooted for the position that the election was credible and was conducted within the law. The 3rd and 4th Respondents posited that the 3rd Respondent gazetted the winner of the election after it considered the Petitioner's objection and was satisfied that the election was held in accordance with the law.

11. The Respondents prayed that the Petition be dismissed with costs.

Issues for Determination:

12. I have carefully considered the Petition, the responses thereto, the parties' submissions and the decisions referred to. I find that the following three main issues arise for determination: -

(a) Preliminary issues;

(b) Whether the election was conducted within the law;

(c) Whether the 3rd Respondent rightly considered the Petitioner's objection.

13. I will deal with the issues in seriatim.

Analysis and Determination:

(i) Preliminary issues:

14. There are three sub-issues raised under this limb. They are: -

· *Whether the Petition is defective for want of a supporting affidavit;*

· *Whether the Petition raises any constitutional questions; and,*

· *Whether the Petition is barred by the doctrine of exhaustion.*

15. A consideration of the above sub-issues follows.

Whether the Petition is defective for want of a supporting affidavit:

16. The 1st and 2nd Respondents contend that the Petition is fatally defective as it is not supported by an affidavit. Instead, the Petition is supported by a verifying affidavit which does not contain any evidence.

17. It is submitted that the supporting affidavit on record is the one which supported the Notice of Motion which application was abandoned for the main Petition.

18. Referring to *Dimension Outdoor Limited v. County Government of Isiolo (2017) eKLR*, the 1st and 2nd Respondents urges this Court to follow suit in striking out the Petition.

19. The Petitioner holds the contrary position. He relies on *Rule 11* of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereinafter referred to as '***the Mutunga Rules'***) in submitting that there is on record a supporting affidavit which contains the evidence which affidavit was filed together with the Petition and the application.

20. This issue relates to the form of a Petition. It is on a procedural prerequisite. *Article 159(2)(d)* of the Constitution call upon Courts and Tribunals to administer justice without undue regard to procedural technicalities.

21. The Supreme Court while addressing itself to the said provision in ***Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others,*** Petition No. 14 of 2013 held that: -

> ***[46]*** *In arriving at this conclusion, by no means do we underestimate the importance of Rule 33(1) of the Supreme Court Rules, which stipulates that an appeal is complete when it has the full package– a notice, a petition and a record. We agree with counsel for the other respondents, through learned counsel Messrs. Khaminwa, Ojiambo and Mwenesi, that the applicable rules must be complied with by those who seek justice from the Courts. Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do, is to be guided by the principle that "justice shall be administered* ***without undue regard to technicalities."*** *It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis (****Raila Odinga and 5 Others v. IEBC and 3 Others;*** *Petition No. 5 of 2013, [2013] e KLR).*
>
> ***[47] We believe that the application before us is one such case, where the provisions of Article 159(2) (d) of the Constitution are applicable to save an appeal from waste occasioned by failure to observe one limb of a procedural rule***.

22. In ***Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 Others [2015] eKLR*** the Supreme Court held that Article 159(2)(d) of the Constitution cannot be relied upon to bypass a jurisdictional prerequisite.

23. Rule 10(1) and (2) of the Mutunga Rules provides seven key contents of a Petition. They are as follows: -

> *Form of petition.*
>
> *10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.*
>
> *(2) The petition shall disclose the following—*
>
> *(a) the petitioner's name and address;*
>
> *(b) the facts relied upon;*
>
> *(c) the constitutional provision violated;*
>
> *(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;*
>
> *(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;*
>
> *(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and*
>
> *(g) the relief sought by the petitioner.*

24. Sub-rules (3) and (4) further provide as follows:

> *(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.*
>
> *(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.*

25. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.

26. Rule 11 of the Mutunga Rules state as follows: -

> *(1) The Petition filed under these rules may be supported by an affidavit.*
>
> *(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.*

27. From the foregoing, it comes out that a Court ought not to place a lot of premium on procedural requirements except in instances where such requirements goes to the jurisdiction of the Court or where they are likely to highly prejudice the other parties. As stated in ***Law Society***

of Kenya v. The Centre for Human Rights & Democracy & 12 Others *case (supra) such matters are to be dealt with on a case by case basis.*

28. In this case, it is readily admitted that the Petition is not accompanied with a supporting affidavit. The Petitioner, however, takes refuge in the supporting affidavit that accompanied the Notice of Motion. The supporting affidavit was sworn by the Petitioner on the 2nd February, 2021 as well as the Verifying affidavit. The Petition is also evenly dated.

29. All the Respondents filed respective Replying Affidavits. A perusal of the said affidavits reveal that they responded to the issues raised in the Petition and the supporting affidavit. Further, the Notice of Motion application in this matter was not struck out, but it was abandoned in favour of an expedited hearing of the main Petition. As such, the Notice of Motion remain part of the record only that it was not prosecuted.

30. Further, the Respondents have not demonstrated the prejudice they stand to suffer in the absence of the affidavit specifically stated to be in support of the Petition. A look at the Petition, the Replying Affidavits and the submissions supports the position that the issues in this matter are crystal clear such that had the affidavit in support of the Petition been filed, the same would have contained similar contents as the affidavit in support of the application.

31. This Court is, hence, persuaded that, in the unique circumstances of this matter, the affidavit in support of the application can be safely deemed to be in support of the Petition as well. In so finding, I note that the Respondents have not submitted that the absence of the affidavit specifically in support of the Petition goes to the jurisdiction of the Court. I further note that Rules 10 and 11 of the Mutunga Rules do not state that for a Petition to be competent it must be supported by an affidavit. In fact, Rule 11 of the Mutunga Rules, provides a scenario where an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom may be deemed as a competent Petition.

32. This Court, therefore, does not find favour in the Respondents' position. Instead, this Court finds that the totality of the Petition, the verifying affidavit, the notice of motion and the affidavit in support thereof, brings forth the Petitioner's allegations on violation and infringement of rights and fundamental freedoms. The Petition is, hence, not defective in form for want of a supporting affidavit.

Whether the Petition raises any constitutional questions

33. The 1st and 2nd Respondents contend that the Petition as filed does not raise any constitutional issues. Instead, the Petition is based on the Petitioner's failure to win the election as a Council member. Relying on *Jennifer Shamalla v. Law Society of Kenya & 15 Others (2017) eKLR* and *Godfrey Paul Okutoyi & Others v. Habil Olaka & Another (2018) eKLR* the Respondents submit that the Petition does not raise any issue whose resolution requires the interpretation of the Constitution and that the issues raised can be determined by way of the ordinary civil suits.

34. The Petitioner did not respond to the 1st and 2nd Respondents' contention. That notwithstanding, I will deal with it.

35. This Court dealt with the same issue in ***Nairobi Petition No. E406 of 2020 Renita Choda -versus- Kirit Kapur Rajput*** *(unreported)***.** This is what I stated: -

> *38. Both parties are in agreement with what a constitutional issue is. They both referred to* ***Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others*** *case (supra) where the Court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court as follows: -*
>
> *The Constitution provides no definition of 'constitutional matter'. What is a constitutional matter must be gleaned from a reading of the Constitution itself: if regard is had to the provisions of… Constitution,* ***constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State…. the interpretation, application and upholding of the Constitution are also constitutional issues. So too …. is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights.*** *If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction…*
>
> *39. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.*
>
> *40. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or the Constitution itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement. In the words of* ***Langa, J*** *in* ***Minister of Safety & Security vs. Luiters, (2007) 28 ILJ 133 (CC)****: -*
>
> ***…*** *When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values…*
>
> *41. Whereas it is largely agreed that the Constitution of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as* ***Lenaola, J*** *(as he then was) firmly stated in* ***Rapinder Kaur Atal vs. Manjit Singh Amrit case*** *(supra) '… Courts must interpret it with all liberation they can marshal…'*

42. Resulting from the above discussion and the definition of a constitutional issue, this Court is in agreement with the position in ***Turkana County Government & 20 Others vs. Attorney General & Others*** *case (supra) where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.*

36. In this case, the Petitioner alleges that his rights under Articles 35(1)(b), 38(2) and 47 of the Constitution were variously infringed by the Respondents. The rights complained of are among those in the Bill of Rights. The Petitioner has also averred and deponed how the rights are allegedly contravened by the Respondents. By way of pleading, the Petitioner has attempted to establish a link between himself, as the aggrieved party, the provisions of the Constitution alleged to have been contravened and the manifestation of contravention or infringement.

37. The manner in which the Petition is drafted fully complies with Rule 10(1) and (2) of the Mutunga Rules as well as the requirements set out by the Supreme Court in ***Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR.***

38. In other words, the Petitioner seeks the intervention of this Court on the basis that the Respondents have infringed upon his rights and fundamental freedoms guaranteed under the Bill of Rights. In such a scenario, the issues transcend the borders of ordinary issues into the realm of and crystallize into constitutional issues.

39. The Petition, therefore, raises pure and serious constitutional issues for consideration by this Court. This Court is duty bound under Article 165(3) of the Constitution to determine any question as to whether a right or fundamental freedom in a Bill of Rights has been infringed, denied, violated or threatened.

40. I, hence, find that the contention that the Petition is devoid of raising any constitutional issues cannot be maintained. The same is for rejection.

Whether the Petition is barred by the doctrine of <u>exhaustion:</u>

41. The 1st and 2nd Respondents posit that the Petitioner did not exhaust the mechanism provided for under Rule 13(2) of the *Human Resource Management Professionals (Elections to the Council) Regulations, 2015* (hereinafter referred to as ***'the Regulations'***).

42. It is further posited that the Petitioner was to lodge an appeal to the Cabinet Secretary within 7 days of his objection being dismissed by the 2nd Respondent. That was to be on or before 25th December, 2020. However, the Petitioner ignored the said provisions and instead lodged an objection to the Cabinet Secretary on 29th December, 2020 out of time and as such the Cabinet Secretary had no obligation to consider the appeal. The decision in *Bernard Murage v. Fine Serve Africa Ltd & Others (2-15) eKLR* was referred to in support of the submission.

43. The Petitioner did not deal with the above issue either. Nevertheless, this Court is duty bound to consider the Respondents submissions.

44. In ***Nairobi Petition No. E406 of 2020 Renita Choda -versus- Kirit Kapur Rajput*** *(unreported)*, this Court also dealt with the doctrine of exhaustion and its exceptions. This is what I stated: -

64. The doctrine of exhaustion was recently dealt with in detail by a 5-Judge Bench in ***Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR.*** *The Court stated as follows: -*

52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in ***R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR,*** *where the Court opined thus:*

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in ***Speaker of National Assembly v Karume [1992] KLR 21*** *in the following oft-repeated words:*

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

This is ***Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR,*** *where the Court of Appeal stated that:*

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to

ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

65. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. ***Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.***

45. The 1st and 2nd Respondents' contention is based on the provisions of Rule 13(2) of the Regulations. Rule 13 is on the validity of elections. The provision states as follows: -

(1) Any candidate unsuccessful at the poll may either personally or by his agent appointed in writing, notify the returning officer within fourteen days after the declaration of the result of the elections that he contests the validity of that part of the election in respect of which he was unsuccessful on the ground of non-compliance with the provisions of these Regulations, or of misdescription or miscount, or of the non-delivery or loss of any document.

(2) If after consideration of the contention disclosed in the notice, the returning officer is satisfied in respect of that part that the election was conducted substantially in accordance with the provisions of these Regulations and that any non-compliance, misdescription, miscount, non-delivery or loss, did not affect the result of that part of the election, it may, within fourteen days of receiving the notice, so certify and in that event it shall forward a copy of its certificate to the unsuccessful candidate, who may, within seven days of receiving that copy, appeal to the Cabinet Secretary.

(3) Where the returning officer does not so certify, it shall, not later than the fifteenth day after receiving the notice forward a copy thereof to the Cabinet Secretary together with such comments as it thinks fit.

(4) The Cabinet Secretary shall consider any appeal made under paragraph (2) or any notice received under paragraph (3) and his decision as to whether the result of the relevant part of the election was so affected shall be, final.

46. There is no doubt that the elections were conducted between 16th November, 2020 and 18th November, 2020. The result of the election was made on the 19th November, 2020. According to Rule 13 of the Regulations, any unsuccessful candidate or the agent may challenge the result of that election. I find that provision problematic. *First*, it is restricted to only the candidates and their agents. What if a voter is aggrieved in the manner in which an election was conducted? What if a voter has evidence and is willing to demonstrate that the election was not conducted in accordance with the law and the Regulations? *Second*, the challenge to the election is limited to the Regulations. The regulations do not take into account instances where the elections may be in contravention of the Constitution or the law. As rightly pointed out by the 1st and 2nd Respondents in paragraph 24 of their submissions, *'… some of the issues raised by the Petitioner … are not specifically provided for under the Rules governing the elections ….'*

47. The case at hand reveals an attempt to contest, in a broader perspective, the election on the basis that *inter alia* some fundamental rights and freedoms are infringed. It is not demonstrated that the claimed constitutional violations are mere "bootstraps" or the Petition is merely framed in Bill of Rights language as a pretext to gain entry to the Court. Where a question on the enforcement of fundamental rights or freedoms arises, that question can only be determined by the High Court under Article 165(3) of the Constitution.

48. Having said so, it is imperative to also consider the argument by the 1st and 2nd Respondents that the election was only confined to the Regulations and that the provisions of the Constitution and any other statutes do not apply.

49. The 1st and 2nd Respondents contend that the Institute is a professional statutory body and that its elections were not based on universal suffrage, but to only the registered members of the Institute. It is also contended that the Institute is not a public body as contemplated under Article 38(2)(a) of the Constitution and that the elections contemplated under Articles 38 and 81 of the Constitution relates to political rights in respect to the affairs of political parties or political causes. The decisions in *Association of Retirement Benefits Schemes v. Attorney General & 3 Others (2017) eKLR* and *Morgan & Another* were cited in support of the submissions.

50. The Petitioner responded to the Respondents' submissions on the applicability of the Constitution and the statutes in the election and whether the Institute is a public body at length.

51. The Petitioner argues that the 1st Respondent is established under an Act of Parliament, the *Human Resource Management Professionals Act No. 52 of 2012* (hereinafter referred to as '***the Act'***), whose preamble states that it is '*an Act of Parliament to provide for the establishment of the Institute of Human Resource Management and the Human Resource Management Professionals Board; to provide for the examination, registration and regulation of the standards and practice of human resource management professionals and for connected purposes.'*

52. The Petitioner relied in ***Association of Retirement Benefits Schemes v. Attorney General & 3 others*** *[2017] eKLR* where the High Court was faced with determining whether the Petitioner was a public body. The Court noted that the word '*regulation'* appearing in the short title of Retirement Benefits Authority Act suggested state control and as such Retirement Benefits Authority was a public body. The Court extensively held thus:

> *Secondly, the definition of a public body by* ***Section 3(1)*** *of the Interpretation and General Provisions Act**[42]** points out the public nature of the 1st and 2nd Respondents "Public body" has been defined therein as:*
>
> *any authority, board, commission, committee or other body, whether paid or unpaid, which is invested with or is performing, whether permanently or temporarily, functions of a public nature.*
>
> *To me the words 'other body' or is performing, whether permanently or temporarily, functions of a public nature" ought to be given their natural and literal interpretation, and in my view pension schemes perform duties of public nature. Further, the preamble to the Retirement Benefits Authority Act reads that "An Act of Parliament to establish a Retirement Benefits Authority for the regulation, supervision and promotion of retirement benefits schemes, the development of the retirement benefits sector and for connected purposes. The use of the word regulation suggests state control."*
>
> ***Part IV*** *of the Retirement Benefits Authority Act is entitled "Regulation and Supervision Of Retirement Benefits Schemes." Again this clearly demonstrates an element of both regulation and supervision by the state. Section 32 provides as follows: -*
>
> *32. (1) There shall be, in respect of every scheme other than a scheme funded out of the Consolidated Fund, a scheme fund into which all contributions, investment earnings, income and all other moneys payable under the scheme rules or the provisions of this Act shall be paid.*
>
> *(2) The scheme fund and all moneys therein shall at all times be maintained separately from any other funds under the control of the trustees or the manager thereof.*
>
> *(3) Subject to the provisions of this Act, the Minister may, in consultation with the Authority, make regulations with regard to the funding, vesting, custody, management, application and the transfer of scheme funds and the accounting for such funds.*
>
> *The language in the above provisions is clear. The words regulation and management used in my view are a clear testimony of state control. Applying the cannons of statutory interpretation discussed above, I find that the Retirement Benefits Schemes are public bodies and are controlled by the state as provided by the Retirement Benefits Authority Act. That being the definition accorded to a public body it is obvious that the interested party is such body. A similar finding was arrived at in the case of Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others **[43]***
>
> *I also find myself in agreement with Onguto J in earlier cited case where he stated that the phrase "public entity" under article 227 should include statutory bodies, parastatals, bodies established by statute but managed and maintained privately such as universities and professional societies…and also any private bodies fulfilling key functions under state supervision.*
>
> *(emphasis added).*

53. On the same breadth, the Petitioner submitted that the 1st Respondent is a public body because just like Section 32 of the Retirement Benefits Authority Act, Section 44 of the Act, allows the Cabinet Secretary to make regulations to regulate human resource professionals. Further, the 1st Respondent is established by an Act of Parliament even through it is managed and maintained privately.

54. In an endeavour to posit that public bodies are bound by the Constitution, the Petitioner submitted that Article 38(2) of the Constitution provides for elections to a public body. Further, Articles 2(1) and 20(1) of the Constitution are clear on the sovereignty of the Constitution.

55. The Petitioner further relied in ***Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits***

Scheme & 3 others, where the Learned Judge stated that:

> *55. Looking at the provisions of **Articles 2(1), 19(3)** and **20(1),** I am certain that the Bill of Rights can be enforced as against a private citizen, a public or a government entity such as the 1st and 2nd Respondents. I say so deliberately and with firmness because previous decisions of this Court on the subject have been completely misunderstood and misread by more persons than the misguided journalist masquerading as a scholar of Constitutional interpretation. The Bill of Rights is therefore not necessarily limited to a State Organ as argued by the 1st and 2nd Respondents and in saying so, I am alive to the provisions of Article **2(1)** of the **Constitution** which provides that 'this Constitution is the Supreme Law of the Republic and binds all persons and all state organs at both levels of the Government.'*
>
> ***Article 21(1)** of the **Constitution** also provides that;*
>
> *It is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.*
>
> *56. In this regard, the obligations of the State and its Organs are clear cut it must **"observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights"** The very raison d'etre of the State is the welfare of the people and the protection of the people's rights and it is its obligation, under international and national laws, to ensure that human rights are observed, respected, and fulfilled, not only by itself but also by other actors in the country. For this purpose, it can and should regulate the conduct of non-state actors to ensure that they fulfill their obligations; as is the case herein with the 1st and 2nd Respondents.*
>
> *57. Even if an argument could be sustained that the 1st and 2nd Respondents are not established under the Constitution, as stated elsewhere above, they are established under statute and as I have already found them to be public bodies established to provide services of a public nature, they are bound as much as State Organs are to the same Constitutional obligations. The 1st Respondent which is a fully owned state body, which in turn is subject to the direction of the Minister of Transport, a State Officer, is certainly a Government agency.*
>
> *58. I am also aware that under the provisions of **Article 20(3)** as read with **Article 259** of the **Constitution,** this Court is obligated to develop the law to the extent that it gives effect to a right or fundamental freedom; and it must adopt an interpretation that favours the enforcement of a right or fundamental freedom, in order to promote the spirit and objects of the Bill of Rights. Clearly, to interpret the Constitution in a manner to even suggest that the 1st and 2nd Respondents do not have an obligation to promote and protect the Petitioners' rights and freedoms does not only fly right out of the window, but would also defeat the very essence and spirit of **Article 20(3).** It is thus clear to my mind that it would not have been the intention of the drafters of the Constitution and the Kenyan people who overwhelmingly passed the Constitution that the Bill of Rights would only bind State Organs. A purposive interpretation as can be seen above would imply that the Bill of Rights binds all State Organs and all persons, whether they are public bodies or juristic persons.*
>
> *59. It also seems clear to me therefore that from a wide definition of the term "person" as contained in **Article 260**, the intention of the framers of the Constitution was to have both a vertical and a horizontal application of the Bill of Rights. I therefore find that the Petitioners are entitled to file a claim under **Article 22** before this Court alleging a violation of the Petitioners rights by any of the Respondents, and the Court can properly grant an appropriate relief as envisaged by **Article 23** of the **Constitution.** I hope this settles the issue once and for all in as far as the views of this Court are concerned.*

56. The Petitioner emphasized that the 1st Respondent is a public body and is bound by the Bill of Rights and the principles set out in the Constitution. Further, whereas the 2nd Respondent is a limited liability company, it is also bound by the Constitution by virtue of Articles 2(1) and 20(1) of the Constitution.

56. The subject of the applicability of the Constitution in our society is by now so well settled. Article 2(1) of the Constitution is clear that the '*Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.'* No one is an exception when it comes to the applicability of the Constitution. It is basic that no law can surpass what the Constitution provides. The 1st and 2nd Respondents argument, regardless of whether the Institute is a public body or not, cannot hold. No Court can, in the clear terms of Article 2(1) of the Constitution, entertain an argument limiting the applicability of the Constitution. To me, such a thought, leave alone an argument, ought not to form in one's mind in light of the dictates of the Constitution of Kenya, 2010.

57. This Court can only reiterate the position that Courts have, without number, variously restated the supremacy of the Constitution.

58. On whether the Institute is a public body, the decision in *Association of Retirement Benefits Schemes v. Attorney General & 3 others* case (supra), correctly so, laid down the legal principles in determining whether an entity is a public body.

59. Applying those principles to this case, it is clear that the Institute is a public body. For instance, the functions of the Institute as provided for in Section 6, the inclusion of the the Principal Secretary of the Ministry for the time being responsible for public service or a representative designated in writing by the Principal Secretary as a member of the Council in Section 7, the control of the remuneration of the Council members by the Salaries and Remuneration Commission under Section 12, the inclusion of the Attorney General as a member of the Registration Committee under Section 18, the financial control by the Cabinet Secretary in Section 38, the auditing of the Institute's books of accounts by the Auditor General under Section 39 and the role of the Cabinet Secretary in making regulations under Section 44 of the Act, point to the extent of State regulation of the Institute.

60. To further buttress the position that the Constitution and other laws are applicable to the elections to the Council, Rule 17 of the Regulations is on election offences, Sub-rule 1(a) provides as follows: -

17(1) Any person who –

(a) commits the offence of personation, treating, undue influence or bribery as defined in the Elections Act, 2011 (No. 24 of 2011);

61. Of further importance is **Rule 14** of the Regulations which provides that anyone to be elected as a Chairperson or a member of the Council must satisfy the requirements of Chapter Six of the Constitution.

62. I believe I have said enough on the matter. In sum, it is the finding of this Court that the doctrine of exhaustion is inapplicable in this matter as the Petition raises constitutional questions; that the Constitution and other relevant laws apply to the elections to the Council, that the Institute is a public body and that the Petition is not defective for want of a supporting affidavit.

63. I will now deal with the merits of the Petition.

(ii) Whether the election was conducted within the law:

64. It is the Petitioner's case that the election conducted by the 1st and 2nd Respondents was not free and fair in that it was not transparent and accountable. The Petitioner contends that the election infringed his right to a free and fair elections protected under Article 38(2) of the Constitution. Further, it is contended that the election did not conform to the general principles of an election system laid out at Article 81 of the Constitution. He relied on the definition of the word 'transparent' as made in *James Omingo Magara v Manson Onyongo Nyamweya & 2 others [2010] eKLR.*

65. In demonstrating the foregoing, the Petitioner averred that on 15th November 2020, he and his chief agent wrote to the 2nd Respondent asking to be *given access to the system and database* which the 2nd Respondent would use in the conduct of the elections to enable them satisfy themselves that the system and the process would be verifiable, transparent and credible. The Petitioner further averred that the access into the system would have enabled him to witness the streaming in of votes in real time. In other words, the Petitioner wanted to understand the voting system and be able to see through what was going on in the system during the elections. However, the Petitioner pleads that his request was never granted by the 2nd Respondent thereby the Petitioner and his Chief Agent did not understand the system.

66. The Petitioner further avers that the 2nd Respondent did not brief the candidates on how the system works and that the Petitioner was not informed where the Tallying Centre was until hours to the announcement of the result of the election.

67. The Petitioner also contended **that the 2nd and 3rd Respondents failed to send electronic voting papers within the timelines set by the Regulations.**

68. It is submitted that the requirement for transparent and accountable elections is enshrined in the Constitution and since the Regulations do not provide for transparency of the elections, then the elections cannot stand. As such the elections conducted by the 2nd Respondent was not substantially in accordance with the general principles of an election system set out at Article 81 of the Constitution.

69. On the basis of an English case of ***Morgan & another – vs – Simpson & another [1974] 3 ALL E.R* 722 which was referred to *Hamzah Musuri Kevogo v Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR,* the Petitioner relied on the following excerpt:**

An election court was required to find an election invalid: -

(a) if irregularities in the conduct of elections had been such that it could not be said that the elections had been conducted as to be substantially in accordance with the law as to the election; or

(b) if the irregularities had affected the results.

Accordingly, where breaches of the election rules, though trivial, had affected the results, that, by itself, was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election had been affected.

70. The Petitioner also relied in the famous case of *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR where the Supreme Court partly* **expressed itself as follows: -**

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

71. The Petitioner, therefore, prays that this Court find that the election did not adhere to constitutional principles, the law and the Regulations, hence, cannot be allowed to stand.

72. The 1st and 2nd Respondents vehemently opposed the Petitioner's request. Accordingly, they averred that the election was conducted in strict accordance with the law and the Regulations. They posit that the election was conducted electronically and the tallying was done by the execution of a 'Tally widget' in the presence of the candidates and their agents where the vote counting was done automatically. It was explained that the voting system showed how many people had voted before one voted.

73. The Respondents submitted that the Petitioner failed to confirm how any of the alleged irregularities adversely affected the outcome of the election.

74. It was further submitted that the failure to accord the Petitioner the access he requested and the failure by the Agent to understand the online voting system did not render the election void. The Court was urged to dismiss the contention.

75. Having found that the Constitution applies to any person and entity in Kenya, suffice to say that it also applies to all electoral processes, of course with the necessary modifications. That being the case, I will briefly look at the electoral law in Kenya.

76. Article 1 of the Constitution is on the Sovereignty of the people of Kenya. It is constitutionally provided that the sovereign power, which only belongs to the people of Kenya, can be exercised either directly or through their democratically elected representatives. To immortalize the exercise of such power under the second limb, the Constitution lays down the principles and processes in Articles 38 of the Constitution as well as Articles 81 to 92 inclusive of the Constitution.

77. Article 81 of the Constitution sets out the general principles on which an electoral system must be hinged on. The electoral system, as it were, is a complex hub of institutions, activities and processes all intertwined and working together to achieve the constitutional guarantee under Article 81. Article 88 of the Constitution establishes Independent Electoral and Boundaries Commission (IEBC) as the institution responsible for conducting or supervising referenda and elections. Under Article 89 of the Constitution IEBC is further charged with the responsibility of reviewing the names and boundaries of constituencies as well as the names, number and boundaries of wards periodically. It is still IEBC which must ensure that all those eligible to be registered as voters are so registered and that the candidates cleared for various positions including independent candidates do comply with the Electoral Code of Conduct.

78. In respect to the actual voting, Article 86 of the Constitution requires IEBC to ensure that: -

> *(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;*
>
> *(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;*
>
> *(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and*
>
> *(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.*

79. Summing up the foregoing, the Supreme Court of Kenya in ***Presidential Election Petition No. 1 of 2017 Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR*** expressed itself in paragraph 200 as follows: -

> ***The principles cutting across all these Articles include integrity; transparency; accuracy; accountability; impartiality; simplicity; verifiable; security; and efficiency as well as those of a free and fair election which are by secret ballot, free from violence, intimidation, improper influence or corruption, and the conduct of an election by an independent body in transparent, impartial, neutral, efficient, accurate and accountable manner.***

80. The Court further and upon being guided by the above principles, stated as follows on voiding an election under the Constitution and Section 83 of the Elections Act: -

> ***[211]*** *In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election.* ***In other words, a Petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.***

81. The Court also stated as follows: -

> ***131. …The onus is therefore upon a Petitioner who seeks the annulment of an election 'on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds 'to the satisfaction of the court'. That is fixed at the onset of the trial and unless circumstances change, it remains unchanged ……***

82. It is on that background that the Court in ***Singh vs. Mota Singh & Another (2008) 1 KLR 1*** stated that *an election is a matter of public importance not to be lightly set-aside* and in the case of ***Jeet Mohinder Singh vs. Harminder Singh Jassi, AIR 2000 SC 258*** the Supreme Court of India stated that *'the success of a candidate who has won at an election should not be lightly interfered with…Any person seeking such interference must strictly conform to the requirements of the law….'.*

83. For a Petition challenging an election to succeed, there must be evidence attaining a certain threshold. This Court discussed the issue of

burden and the standard of proof in ***Bungoma High Court Election Petition No. 2 of 2017 Suleiman Kasuti Murunga vs. Independent Electoral and Boundaries Commission & 2 Others (2018) eKLR*** as follows: -

> *21. The issue of the burden and standard of proof in election petitions is by now well settled by the law and binding precedents. That election petitions are not ordinary suits is not in doubt. Election Petitions are special disputes which tend to interrogate whether the electoral system and processes contemplated under **Article 81** of the **Constitution** were adhered to and/or attained in an election. The crux of that interrogation is **Section 83** of the **Act** which provides for instances where an election may be nullified……..*
>
> 22. *That is the rationale why the incidences of proof are to be intently looked at.*
>
> ***(i) <u>The legal burden of proof: -</u>***
>
> 23. *The legal basis for the legal burden of proof is provided in **Section 107** of the **Evidence Act**, **Cap. 80** of the **Laws of Kenya**. The said section states as follows: -*
>
> > *(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist;*
> >
> > *(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*
>
> 24. *The onus is therefore upon a Petitioner who seeks the annulment of an election 'on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds 'to the satisfaction of the court'. That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.…….…' (See paragraph 131 of <u>'the 2017 majority judgment'</u>).*
>
> 25. *That is the legal burden of proof.*
>
> ***(ii) <u>The evidential burden of proof: -</u>***
>
> 26. *The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.*
>
> 27. *The principle of 'evidential burden of proof' is hence anchored on the rebuttable presumption of validity of election results. That, until and unless a Petitioner discharges the evidential burden of proof an election is presumed valid. It is on that background that the Court in **<u>Singh vs. Mota Singh & Another (2008) 1 KLR 1</u>** stated that an election is a matter of public importance not to be lightly set-aside and in the case of **<u>Jeet Mohinder Singh vs. Harminder Singh Jassi, AIR 2000 SC 258</u>** the Supreme Court of India stated that 'the success of a candidate who has won at an election should not be lightly interfered with…Any person seeking such interference must strictly conform to the requirements of the law….'.*
>
> 28. *The Supreme Court in **<u>the 2017 majority judgment</u>** had the following to say on the evidential burden of proof in **paragraphs 132** and **133** thereof as follows: -*
>
> *[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.*
>
> *[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law….*
>
> 29. *It therefore follows that the legal burden of proof is static and rests on the Petitioner throughout the trial. It is only the evidential burden of proof which may shift to the Respondents depending on the nature and effect of evidence adduced by a Petitioner.*
>
> ***(iii) <u>The Standard of Proof: -</u>***
>
> 30. *The **Black's Law Dictionary,** (9th Edition, 2009) at page 1535 defines '**the standard of proof**' as '[t]he degree or level of proof demanded in a specific case in order for a party to succeed.' In many jurisdictions and decisions world over three main categories of the standard of proof emerge being the criminal standard of proof of beyond reasonable doubt; the application of civil case standard of 'balance of probabilities'; and the application of an intermediate standard of proof.*
>
> 31. *My Lordships and Ladyship in **<u>the 2017 majority judgment</u>** in dealing with this subject and after reviewing many decisions*

found and held as follows: -

[152] ***We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt****. Consequently, we dismiss the petitioners' submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.*

[153] We recognize that some have criticized this higher standard of proof as unreasonable, however, as we have stated, electoral disputes are not ordinary civil proceedings hence reference to them as sui generis. It must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not.

84. Deriving from the foregoing constitutional and legal position on electoral disputes, I will now apply the threshold to the Petition at hand.

85. As said, the Regulations partly govern the elections of the Chairperson and members of the Council. Rule 9(1) of the Regulations provide that the elections shall be conducted online. As such, the 1st Respondent appointed the 2nd Respondent as the Returning officer pursuant to Rule 3(1) of the Regulations.

86. Given that the voting was scheduled for a number of days, the counting of the votes was not real time. The online system had a specially-designed vote counting module which was to be activated at the end of the voting process by the execution of the '***Tally widget'***. That was provided for under TOR REF IHRM 01/2019-2020.

87. It is on record by the Respondents that since the vote counting was as well automated, the candidates and their Chief agents were at liberty to attend the counting either at the Tallying Centre or virtually. In this case, there is no contention that the Petitioner virtually attended the vote counting whereas his Chief Agent physically appeared at the Tallying Centre. It is also not disputed that the Petitioner was indeed accorded an opportunity and addressed the participants. This Court is, hence, persuaded that given the nature of the online voting system and the vote counting module in place, the physical attendance of a candidate or the candidate's Chief Agent at the tallying centre was not necessary as long as such a party had access to appear virtually.

88. On the Petitioner's contention that he did not understand how the online system worked and the 2nd Respondent did not schedule a meeting with the candidates, the Respondents are of the position that all clarifications and queries on the system and election process were dealt with online more so given the restrictions on gatherings as a result of the Covid-19 pandemic. The record has various correspondences exchanged between the Petitioner and the 2nd Respondent on various aspects of the election. Infact one of such correspondences, the 2nd Respondent's letter dated 17th November, 2020 specifically responded to why the Petitioner could not have a one-on-one meeting with the 2nd Respondent.

89. In the event the Petitioner was dissatisfied with the 2nd Respondent's response and still did not understand the online system, he was at liberty to seek the intervention of a Court of law including seeking an order to stop the election. Alternatively, just like how the Petitioner handled the issue of request for information in the ***Presidential Election Petition No. 1 of 2017 Raila Amolo Odinga & Another vs. IEBC & 2 Others*** case (supra), the Petitioner herein ought to have sought for such information in these proceedings, including orders for scrutiny of the votes and a demonstration of how the online system works, prior to the full hearing of the Petition. That way, the Petitioner would be in a position to properly demonstrate the allegations in support of his case.

90. The Petitioner did not also avail any other evidence to buttress some of the allegations on irregularities. For instance, there is no eligible member of the 1st Respondent who deponed that he or she did not get the electronic voting papers or could not vote for any reason attributable to the technical nature of the online system. In fact, the only evidence on record in support of the Petitioner's case is solely that of the Petitioner.

91. As said, the Petitioner did not opt to seek remedies on scrutiny in the Petition. The Respondents having countered the allegations, and without more, leaves this Court with a limited purview to interrogate the manner the election was conducted. The upshot is that the alleged irregularities in respect of the online voting system as pleaded were not proved to the required legal threshold. The allegations remain largely unproved. I so find.

(iii) Whether the Respondents rightly considered the <u>Petitioner's objection:</u>

92. It is the Petitioner's standpoint that upon the declaration of the results of the election, he lodged an appeal to the 3rd Respondent but the same was not dealt with or at all.

93. The Petitioner contends that he had a legitimate expectation that his appeal would be dealt with by the 3rd Respondent expeditiously, efficiently, lawfully, reasonable and in a procedurally fair manner. He also expected to be given reasons for whichever decision the 3rd Respondent would arrive at. To the Petitioner's shock and surprise, the 3rd Respondent ignored his appeal and proceeded to gazette the Interested Party as the winner of the election and appointed her to the 1st Respondent's Council.

94. The 1st and 2nd Respondents contend that there was no appeal to the Cabinet Secretary as required under the Regulations. As such, Cabinet Secretary had no legal obligation to deal with the 'objection' which, in any event, was filed out of time.

95. The 3rd Respondent deponed that despite receiving an objection instead of an appeal and indeed out of time, the Cabinet Secretary dealt with the issues raised therein. A request was made to the 1st Respondent to provide information on whether the 2nd Respondent considered

the objection and why the 2nd Respondent was of the view that the result did not affect the result of the election.

96. On receipt of the information from the 1st Respondent, the 3rd Respondent was satisfied with the manner in which the election was conducted and proceeded to gazette the Interested Party accordingly.

97. As the Petitioner's claim hinges on whether Article 47 of the Constitution was adhered to, I will reproduce sub-articles (1), (2) and (3) thereof and as under: -

> *(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
>
> *(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*
>
> *(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—*
>
> > *(a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and*
> >
> > *(b) promote efficient administration*

98. The legislation that was contemplated under Article 47(3) is the Fair Administrative Actions Act. No. 4 of 2015. Section 4 thereof provides that: -

> *(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.*
>
> *(2) Every person has the right to be given written reasons for any administrative action that is taken against him.*
>
> *(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-*
>
> *(a) prior and adequate notice of the nature and reasons for the proposed administrative action;*
>
> > *(b) an opportunity to be heard and to make representations in that regard;*
> >
> > *(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;*
> >
> > *(d) a statement of reasons pursuant to section 6;*
> >
> > *(e) notice of the right to legal representation, where applicable;*
> >
> > *(f) notice of the right to cross-examine or where applicable; or*
> >
> > *(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.*
>
> *(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-*
>
> > *(a) attend proceedings, in person or in the company of an expert of his choice;*
> >
> > *(b) be heard;*
> >
> > *(c) cross-examine persons who give adverse evidence against him; and*
> >
> > *(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.*
>
> *(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.*
>
> *(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.*

99. Section 2 of the Fair Administrative Actions Act defines an '*administrative action'* and an '*administrator*' as follows: -

> '*administrative action' includes -*
>
> > *(i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or*

(ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

'administrator' means 'a person who takes an administrative action or who makes an administrative decision'.

100. In ***Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR*** Court of Appeal addressed itself on Article 47 of the Constitution. The Court 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. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

101. The South African Constitutional Court in ***President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98) 2000 (1) SA 1*** ring-fenced the importance of fair administrative action as a constitutional right. The Court while referring to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution stated as follows: -

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…

102. The right was further discussed in ***Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti [2018] eKLR***. The Court had the following to say:

25. *In John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano*[39] *the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.*

These are: -

a. ***Illegality*** *- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.*

b. ***Fairness -*** *Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.*

c. ***Irrationality and proportionality*** *- The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in* ***Associated Provincial Picture Houses Ltd vs Wednesbury Corporation****: -*

If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...

103. Emerging from the above, there is no doubt that the decision expected from the 3rd Respondent on the appeal was an administrative action. I say so because it affected the legal rights and interests of the Petitioner. As such, the decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

104. There can be no argument that the law accords the Cabinet Secretary the duty to consider the appeal. On procedural fairness, the Cabinet Secretary sought for the requisite information from the other Respondents. On receipt of the information, the Cabinet Secretary was satisfied that the there was nothing that affected the result of the election. In other words, the Cabinet Secretary wholly agreed with the 1st and 2nd Respondent's position.

105. The Cabinet Secretary received the objection (instead of an appeal) towards the end of December, 2020. The request for the information was made in January, 2021. The gazettement of the Interested Party was on the 19th January, 2021.

106. Rule 13(4) of the Regulations does not set the timeline within which the Cabinet Secretary ought to respond to the appeal. Ideally speaking, the Cabinet Secretary was expected to respond to the appeal before making the decision to gazette the Interested Party. However, given the lacuna in the Regulations coupled with the fact that the Cabinet Secretary found favour with the 1st and 2nd Respondents' position,

the response would have not aided the Petitioner in anyway.

107. This Court, therefore, comes to a conclusion that the failure by the Cabinet Secretary to communicate the decision on the appeal to the Petitioner did not in any way affect the result of the election. I also note that the Petitioner did not seek any prayer against the Cabinet Secretary in the Petition.

Disposition:

108. Having considered all the issues raised in the Petition and given the findings and conclusions that none of the alleged irregularities, as well as the objection, affected the result of the election of the Interested Party as a member of the 1st Respondent's Council representing the Nairobi, Central and North Eastern Region, this Court finds that the election did not infringe Articles 35(1), 38(2) or 47(1) of the Constitution as alleged.

109. The Petition is wholly unsuccessful.

110. In the end, the Petition is hereby dismissed with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF JULY, 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Otieno, Counsel for the Petitioner.

Mr. Manyara, Counsel for the 1st and 2nd Respondents.

Mr. Marwa holding brief for **Miss. Robi,** Counsel for the 3rd and 4th Respondents.

Elizabeth Wambui – Court Assistant