



**Okoti v Attorney General & 5 others (Constitutional Petition E364 of 2020)  
[2021] KEHC 439 (KLR) (Constitutional and Human Rights) (29 November 2021) (Judgment)**

*Okiya Omtatah Okoti v Attorney General, National Assembly Senate, Parliamentary Service Commission, Law Society of Kenya & Inter-Religious Council of Kenya*

Neutral citation: [2021] KEHC 439 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E364 OF 2020**

**AC MRIMA, J**

**NOVEMBER 29, 2021**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**SENATE ..... 3<sup>RD</sup> RESPONDENT**

**PARLIAMENTARY SERVICE COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**LAW SOCIETY OF KENYA ..... 5<sup>TH</sup> RESPONDENT**

**INTER-RELIGIOUS COUNCIL OF KENYA ..... 6<sup>TH</sup> RESPONDENT**

**Section 2(2)(a) of the Independent Electoral and Boundaries Commission Amendment Act, on the nomination by the Parliamentary Service Commission of 4 out of 7 members of the selection panel for the appointment of the Independent Electoral and Boundaries Commission, is unconstitutional. The petitioner impugned sections 2(2)(a) and 3 of the Independent Electoral and Boundaries Commissions Amendment Act No. 18 of 2020 (IEBC Amendment Act) on grounds that it unconstitutionally assigned four out of the seven slots in the selection panel for the selection of the nominees for the appointment of members of the IEBC (the selection panel) to the Parliamentary Service Commission (PSC). The petitioner contended that that section 3 of the IEBC Amendment Act unconstitutionally assigned the PSC with administrative responsibilities of co-ordinating the IEBC Commissioners' recruitment process and at the same time, the same body, was vested with the duty of appointing four members of the selection panel. The Supreme Court held that to the extent that section 2(2)(a) of the Independent Elections and Boundaries Commission (Amendment) Act No. 18 of 2020 provided**



that the Parliamentary Service Commission was to nominate 4 out of 7 members of the selection panel for the nominees for the appointment of members of the IEBC, then the said provision variously infringed article 10 of the Constitution and was unconstitutional.

Reported by Ribia John

**Statutes** – interpretation of statutes – principles that guided the court in interpretation of statutes - what principles did the court consider in interpreting the Constitution; interpreting statutory provisions; and, interpreting statutory provision vis-à-vis constitutional provisions – what principles were applicable in construction of statutes.

**Constitutional Law** – Legislature – independent commissions – Parliamentary Service Commission – powers of Parliament vis-à-vis the Parliamentary Service Commission - whether Parliament and the Parliamentary Service Commission were the same entity - whether the Parliamentary Service Commission’s role of providing services and facilities to ensure the efficient and effective functioning of Parliament inter alia made it a subordinate of Parliament - what was the role of the Parliamentary Service Commission – Constitution of Kenya, 2010, article 253; Independent Electoral and Boundaries Commissions Amendment Act No. 18 of 2020 sections 2(2)(a) and 3.

**Constitutional Law** – separation of powers – independence of constitutional commissions – where Parliament passed a law granting the Parliamentary Service Commission the power to appoint 4 out of 7 members in the selection panel in charge of nominating candidates for appointment as commissioners of constitutional commissions - whether Parliament in enacting the IEBC Amendment Act violated the principle of separation of powers - whether Parliament erred in legislating for one organ to occupy 4 out of 7 slots in the selection panel to nominate persons to be appointed as commissioners of independent commissions - whether a selection panel which had majority of its members nominated by one entity could pass the threshold of being portrayed as independent and fair - whether, with an election 5 months away, the court could order that the selection panel that appointed commissioners of the Independent Electoral and Boundaries Commission was illegally constituted and order for the re-composition of the selection panel and the nullification of the appointment of the commissioners - Constitution of Kenya, 2010, articles 10, 38, 127(6), 250 and 253; Independent Electoral and Boundaries Commissions Amendment Act, No. 18 of 2020, sections 2(2)(a) and 3.

**Constitutional Law** – constitutional timelines – timelines on the general elections - power of the court to vary constitutional timelines – where the High Court was expected to nullify the appointment of commissioners of the Independent Electoral and Boundaries Commission months before a general election – where such a measure would have the effect of altering the constitutional timelines to host a general election - whether constitutional timelines could be varied - whether the High Court could stop or vary a timeline set out in the Constitution - whether, with an election 5 months away, the High Court could order that the selection panel that appointed commissioners of the Independent Electoral and Boundaries Commission was illegally constituted and order for the re-composition of the selection panel and the nullification of the appointment of the commissioners – Constitution of Kenya, 2010, articles 10, 38, 127(6) and 250.

**Constitutional Law** – fundamental rights and freedoms – right to equality – freedom from discrimination - national values and principles - rule of law – where a law was being challenged for not following the rule of law - section 2(2)(a) and 3 of the IEBC Amendment Act that provided for a selection panel to nominate candidates for appointment as commissioners would have 4 of its 7 panelists appointed by the Parliamentary Service Commission – whether such provisions was unconstitutional to the extent that it violated the rights to equity, equality, non-discrimination and fairness and violated political rights of Kenyans – whether such provision was unconstitutional to the extent that it infringed the rule of law, was an abuse of power, violated the independence of constitutional commissions – Constitution of Kenya, 2010, article 10, 27 and 253; Independent Electoral and Boundaries Commissions Amendment Act, No. 18 of 2020, sections 2(2)(a) and 3.

### **Brief facts**

The petitioner impugned sections 2(2)(a) and 3 of the Independent Electoral and Boundaries Commissions Amendment Act No. 18 of 2020 (IEBC Amendment Act) on grounds that it unconstitutionally assigned four



out of the seven slots in the selection panel for the selection of the nominees for the appointment of members of the IEBC (the selection panel) to the Parliamentary Service Commission (PSC). The petitioner contended that that section 3 of the IEBC Amendment Act unconstitutionally assigned the PSC with administrative responsibilities of co-ordinating the IEBC Commissioners' recruitment process and at the same time, the same body, was vested with the duty of appointing four members of the selection panel.

The petitioner contended that the impugned provisions violated the rule of law, the principles of separation of powers and further contended that Parliament in enacting the IEBC Amendment Act abused its power and failed to adhere to the principle of good governance.

### Issues

- i. What principles did the court consider in:
  1. Interpreting the Constitution?
  2. Interpreting statutory provisions?
  3. Interpreting statutory provisions vis-à-vis constitutional provisions?
- ii. What principles were applicable in the construction of statutes?
- iii. Whether Parliament and the Parliamentary Service Commission were the same entity.
- iv. Whether the Parliamentary Service Commission's role of providing services and facilities to ensure the efficient and effective functioning of Parliament *inter alia* made it a subordinate of Parliament.
- v. What was the role of the Parliamentary Service Commission?
- vi. Whether Parliament in enacting the IEBC Amendment Act violated the principle of separation of powers:
- vii. Whether sections 2(2)(a) and 3 of the IEBC Amendment Act that provided for a selection panel to nominate candidates for appointment as commissioners would have 4 of its 7 panelists appointed by the Parliamentary Service Commission were unconstitutional to the extent that it infringed the rule of law, was an abuse of power, violated the independence of constitutional commissions.
- viii. Whether sections 2(2)(a) and 3 of the IEBC Amendment Act that provided for a selection panel to nominate candidates for appointment as commissioners would have 4 of its 7 panelists appointed by the Parliamentary Service Commission was unconstitutional to the extent that it violated equity, equality, non-discrimination and fairness and violated political rights of Kenyans.
- ix. Whether Parliament erred in legislating one organ to occupy 4 out of 7 slots in the selection panel to nominate persons to be appointed as commissioners of an independent commission.
- x. Whether the High Court could stop or vary a timeline set out in the Constitution.
- xi. Whether a selection panel which had majority of its members nominated by one entity could pass the threshold of being portrayed as independent and fair.
- xii. Whether a court could grant a specific relief when the relief had not been pleaded.
- xiii. Whether, with an election 5 months away, the court could order that the selection panel that appointed commissioners of the Independent Electoral and Boundaries Commission was illegally constituted and order for the re-composition of the selection panel and the nullification of the appointment of the commissioners.
- xiv. Whether a court could issue orders against third parties not included as parties to the suit.

### Held

1. The Constitution was a document *sui generis*. It was the ultimate source of law in the land. It commanded superiority and dominance in every aspect and its interpretation as of necessity had to be in a manner that all other laws bowed to. The Constitution was to be interpreted in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights, permitted the development of the law and contributed to good governance. The Constitution was to be interpreted in a holistic manner, within its context, and in its spirit. Holistic interpretation meant interpreting the Constitution in context.



2. The contextual analysis of a constitutional provision meant reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution had to be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation did not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.
3. The principles of interpretation also applied to the construction of statutes. There were other important principles which applied to the construction of statutes as well as to the construction of a constitution such as:
  1. presumption against absurdity – a court was to avoid a construction that produced an absurd result;
  2. the presumption against unworkable or impracticable result - a court was to find against a construction which produced unworkable or impracticable result;
  3. presumption against anomalous or illogical result - a court was to find against a construction that created an anomaly or otherwise produced an irrational or illogical result;
  4. the presumption against artificial result – a court was to find against a construction that produced artificial result and,
  5. the principle that the law should serve public interest – the court was to strive to avoid adopting a construction which was in any way adverse to public interest, economic, social and political or otherwise.
4. The Constitution had to be read as an integrated whole with no one particular provision destroying the other so as to effectuate the harmonization principle. In determining whether a statute was constitutional, the court had to determine the object and purpose of the impugned statute for it was important to discern the intention expressed in the Act itself. In examining whether a particular statutory provision was unconstitutional, the court had to have regard not only to its purpose but also its effect.
5. Both purpose and effect were relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect could invalidate legislation. All legislation was animated by an object the legislature intended to achieve. That object was realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, were clearly linked, if not indivisible. Intended and achieved effects had been looked to for guidance in assessing the legislation’s object and the validity.
6. The Constitution was to be given a purposive, liberal interpretation that promoted the rule of law and had jurisprudential value that had to take into account the spirit of the Constitution.
7. In ascertaining the manner in which a limitation to a right or fundamental freedom may be justified, courts were to consider a three-pronged criteria;
  1. the objective which the limitation was designed to serve;
  2. the means chosen to attain the objective must be reasonable and demonstrably justified, the proportionality test; and,
  3. the effect of the limitation.
8. To establish that a limit was reasonable and demonstrably justified in a free and democratic society, the objective, which the measures responsible for a limit on a right or freedom were designed to serve, had to be of sufficient importance to warrant overriding a constitutionally protected right or freedom. The standard had to be high in order to ensure that objectives which were trivial or discordant with the principles integral to a free and democratic society were not upheld. It was necessary, at a minimum, that an objective related to concerns which were pressing and substantial in a free and democratic society before it could be characterized as sufficiently important.
9. On the proportionality test, one had to show that the means chosen were reasonable and demonstrably justified. That involved a form of proportionality test: although the nature of the proportionality test



would vary depending on the circumstances, in each case courts would be required to balance the interests of society with those of individuals and groups. There were three important components of a proportionality test: -

1. The measures adopted had to be carefully designed to achieve the objective in question. They were not to be arbitrary, unfair or based on irrational considerations. They had to be rationally connected to the objective.
  2. The means, even if rationally connected to the objective in the first sense, should impair as little as possible the right or freedom in question.
  3. There had to be a proportionality between the effects of the measures which were responsible for limiting the charter right or freedom, and the objective which had been identified as of sufficient importance.
10. On the third test, the effect of the limitation, the general effect of any measure impugned would be the infringement of a right or freedom.
  11. Even if an objective was of sufficient importance, and the first two elements of the proportionality test were satisfied, it was possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure would not be justified by the purposes it was intended to serve. The more severe the deleterious effects of a measure, the more important the objective had to be if the measure was to be reasonable and demonstrably justified in a free and democratic society.
  12. Chapter 15 of the Constitution was on commissions and independent offices. The Parliamentary Service Commission (PSC) was among the commissions. Under article 253 of the Constitution, each commission was a body corporate with perpetual succession and a seal. It was capable of suing and being sued in its corporate name. In discharging their mandates, commissions and independent offices were independent and not subject to direction or control by any person or authority but were only subject to the Constitution and the law.
  13. There was a deliberate pattern of design adopted in the Constitution relating to the arms of government and the commissions associated with the mandates of aiding such arms of government to properly operate. Such commissions were usually provided for under the same chapter as the arm of government. For instance, the Judicial Service Commission was closely associated with the Judiciary as the arm of government. That commission was provided for under chapter 10 of the Constitution which dealt with the Judiciary. Likewise, the PSC was provided for under chapter 8 on the Legislature. Another example was the Office of the Attorney General and that of the Director of Public Prosecutions which were provided for under chapter 9 of the Constitution which was on the Executive.
  14. Resulting from such a constitutional formatting, it appeared as though such commissions and organs were subordinate to the respective arms of government. That was not the position. Each of the commissions, independent offices or state organs were independent and only subject to the Constitution and the law.
  15. Whereas the PSC's main role was to provide services and facilities to ensure the efficient and effective functioning of Parliament, that did not make it subordinate to Parliament. PSC remained independent and was only subject to the Constitution and the law. Whereas PSC and Parliament were interdependent, they were distinct constitutional entities.
  16. The court would be reluctant to question parliamentary procedures, as long as they did not breach the Constitution. Parliament was guided by both the Constitution and the Standing Orders in its legislative process. The functions of Parliament and the PSC were different. There was nowhere any of their powers overlapped.
  17. To adopt an interpretation that PSC was a subordinate of Parliament would be to adopt a formalistic or positivistic approach. Courts while interpreting the Constitution, were to favour a purposive approach as opposed to formalism.



18. The unique circumstances of the instant case did not support the contention that Parliament in enacting the IEBC Amendment Act violated the principle of separation of powers. Parliament discharged its constitutional duty in enacting the IEBC Amendment Act.
19. A petitioner ought to demonstrate with some degree of precision the right it alleged had been violated, the manner it had been violated, and the relief it sought for that violation. A party invoking article 22(1) of the Constitution had to show the rights said to be infringed, as well as the basis of his or her grievance. The petitioner had failed in proving that the IEBC Amendment Act infringed the rule of law.
20. Under the impugned IEBC Amendment Act, PSC nominated four out of the seven nominees for appointment into the Selection Panel for the selection of the nominees for the appointment of members of the Independent Electoral and Boundaries Commission (IEBC). The composition of the selection panel was provided for in the first schedule to the Act. The Selection Panel comprised of 7 members. None of them was nominated by the PSC. The IEBC Act was later amended by the enactment of Election Laws (Amendment) Act, No. 36 of 2016. Then, the Independent Electoral and Boundaries Commission (Amendment) (No. 3) Bill, 2019 proposed some other amendments to the selection panel. The Bill was dealt with by both Houses of Parliament. It then resulted into the enactment of the IEBC Amendment Act.
21. Unlike in the Election Laws (Amendment) Act, No. 36 of 2016 where 4 out of 9 of the members were nominated by PSC and in the Independent Electoral and Boundaries Commission (Amendment) (No. 3) Bill, 2019 where 4 out of the 11 members were to be nominated by PSC, the IEBC Amendment Act provided that out of the 7 members, 4 of them were to be nominated by PSC.
22. One of the reasons why previously the number of nominees by PSC into the selection panel was not more than one half of the nominees was that the perception of independence of the selection panel. A selection panel which had majority of its members nominated by one entity could not pass the threshold of being portrayed as *inter alia* independent and fair. The dominance of the members appointed by one entity into the selection panel definitely raised legal eyebrows.
23. On the objective test, it was necessary, at a minimum, that an objective related to concerns which were pressing and substantial in a free and democratic society before it could be characterized as sufficiently important.
24. From the history of constitution making in Kenya and the quest for free and fair elections, the objective of the IEBC Amendment Act ought to further the realization of the goal that IEBC would eventually conduct fair, free and credible elections and referenda. The IEBC Amendment Act ran counter that objective. The IEBC Amendment Act instead created a scenario of suspicion not only on the commissioners to be appointed, but also the eventual independence of the IEBC. The selection panel was dominated by the nominee selected by PSC. That dominance ran contrary to good governance, transparency, integrity, social justice, equity, inclusiveness, equality, patriotism, national unity among like principles.
25. It was not far-fetched to imagine the likelihood of the majority of the members of the selection panel nominated by PSC to favour some candidates during the nomination process. Such preferred candidates could eventually become commissioners of IEBC and their independence would be put to question.
26. The Constitution gave Parliament powers to allocate any other functions to PSC through legislation. The IEBC Amendment Act did not infringe the principle of rule of law.
27. The objective of the impugned composition of the membership of the IEBC Amendment Act was not to address the concerns which were pressing and substantial in a free and democratic society. Instead, the membership of 4 out of 7 members nominated by PSC favoured a process which did not fully uphold the Constitution. The membership of the IEBC Amendment Act failed the objective test. The proportionality and the effect of the statutory provision could not be subject of further discussion once



- the statute or the provision failed to pass the objective muster. Section 2(2)(a) of the IEBC Amendment Act variously offended the principles of good governance, transparency, integrity, social justice, equity, inclusiveness, equality, patriotism, national unity.
28. There was need for a legislation that would take such principles into account without losing sight of the fact that Kenyans were looking upon Parliament to pass legislations which would foster free, fair and credible elections and referenda. To the extent that section 2(2)(a) of the IEBC Amendment Act provided for the nomination of 4 out of 7 members of the selection panel, then the impugned section 2(2)(a) of the IEBC Amendment Act was unconstitutional.
  29. Even in instances where a party failed to ask for a specific relief, a court, depending on the nature of the matter ought to craft an appropriate relief. Even in instances where there were express provisions on specific reliefs a court was not precluded from making any other orders under its inherent jurisdiction for the ends of justice to be met. Article 23 of the Constitution did not expressly bar the court from granting conservatory orders where a challenge was taken on the constitutionality of legislation.
  30. While protecting fundamental rights, the court had power to fashion new remedies as there was no limitation on what the court could do. Any limitation of its powers could only derive from the Constitution itself. Not only could the court enlarge old remedies, but it could also invent new ones as well if that was what it took or was necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal. The court was always faced with variety of facts and circumstances and to place it into a strait jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects were to be a blot on independence and many faceted jurisdiction and discretionary powers of the High Court.
  31. The selection panel completed its mandate and recommended persons who were eventually appointed as commissioners of IEBC. The said persons were in office. One of the reliefs expected in the instant matter in view of the declaration of unconstitutionality of section 2(2)(a) of the IEBC Amendment Act had to do with the aftermath of what the selection panel yielded. The court declined to nullify the nomination process and to nullify the appointment of the commissioners on grounds that they were deemed as fruits of a poisoned tree. The court declined to order Parliament to come up with a new law and to order that the nomination process be undertaken again for reasons related to non-joinder and on the effect of such orders to the country.
  32. On non-joinder, the petition was filed when the IEBC Amendment Act had been passed into law, but the selection panel was yet to be appointed. Later, the selection panel was put in place. On learning of that development, the petitioner filed the notice of motion dated April 27, 2021. There was no attempt to amend the petition. The petitioner was using the application to expand the petition without properly amending it. The status of the members of the selection panel sought to be served through the Hon. Attorney General was not clear.
  33. The correct procedure to have been adopted by the petitioner was to apply to court to amend the petition and introduce the new cause of action which was the appointment of the selection panel. The petitioner would then have indicated how the members of the selection panel would participate in the matter and the amended petition would have had concise prayers for the new cause of action. The petitioner would have taken the game to a level playing field. As the petitioner failed to do so, the court did not find any justification to deal with that application first or to issue any interim conservatory orders. The court directed that the application be heard together with the petition.
  34. Given that the members of the selection panel were not enjoined as parties in the instant matter, the court could not, at the tail-end of the proceedings, issue any orders to the detriment of any of them. If the court did so then it would infringe on the members' right to a fair trial which was guaranteed



- under article 50(1) of the Constitution. The right to a fair trial was one of the rights which could not be limited in any manner whatsoever as provided for under article 25 of the Constitution.
35. IEBC was at the heart of preparing for the next general elections. The elections were expected to be conducted in the next 8 months. If the court made an order that the four new commissioners vacate office, IEBC would lack quorum to conduct its affairs. The effect of such an order would mean that Parliament would have to come up with another piece of legislation and the process of selecting the four commissioners would begin afresh. If the court allowed that to happen, then the chances that IEBC would not be able to prepare and conduct the next general elections would be high.
  36. The general elections were constitutionally-provided and no court could tamper with constitutional timelines. If the court put IEBC in a situation where it could not prepare and conduct the next general elections, then it would be creating a constitutional crisis. A court of law had to uphold the Constitution. A court was not to create a constitutional crisis. It remained the cardinal duty of a court to foresee such a crisis and take steps to avoid it.
  37. The fact that four commissioners of IEBC resigned and their positions remained vacant for a while, was due to the fact that there was no law in place on how other commissioners were to be appointed. The scenario resulted from the amendments which were made through section 6 of the Election Laws (Amendment) Act, No. 36 of 2016, which stated that the selection panel shall stand dissolved upon the requisite appointments being made under paragraph 4. The selection panel was wound up when the seven commissioners (which included the chairperson) were appointed on January 17, 2017. The next law on the appointments was the IEBC Amendment Act which came into effect on November 13, 2020. Interestingly, the Selection Panel provided for in the IEBC Amendment Act also stood dissolved on the appointment of the four commissioners.
  38. There was no standing selection panel for nominees for appointment as IEBC Commissioners. Whenever a vacancy in the IEBC Commissioners arose, Parliament would first have to come up with the law on the next selection panel. There was need for Parliament to relook at the law on the selection panel. Even though the selection panel did not necessarily have to be a standing committee, the law could provide for the manner in which the next selection panel could be constituted without the need to first enact a new law to that end.
  39. In order to aid IEBC to operate without any legal hitches on its quorum, there was need for Parliament to consider the period within which any vacancies which may arise in IEBC Commissioners had to be filled.

*Petition partly allowed.*

#### **Orders**

- i. *The notice of motion filed on April 27, 2021 was dismissed.*
- ii. *A declaration issued that to the extent that section 2(2)(a) of the Independent Elections and Boundaries Commission (Amendment) Act No. 18 of 2020 provided that the Parliamentary Service Commission was to nominate 4 out of 7 members of the selection panel for the nominees for the appointment of members of the IEBC, then the said provision variously infringed article 10 of the Constitution and was unconstitutional.*
- iii. *An order was issued quashing section 2(2)(a) of the Independent Elections and Boundaries Commission (Amendment) Act No. 18 of 2020.*
- iv. *The Hon. Deputy Registrar of the court was to transmit certified copies of the judgment to both speakers of Parliament.*
- v. *No orders as to costs.*

#### **Citations**

##### **Cases**

##### **Kenya**



1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) - (Applied)
2. *Center for Rights Education and Awareness & another v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 101 (KLR) - (Explained)
3. *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* Petitions 628, 630 of 2014 & 12 of 2015 (Consolidated); [2015] eKLR - (Explained)
4. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petitions 14, 14 A, 14 B & 14 C of 2014; [2014] KESC 53 (KLR) - (Explained)
5. *Council of County Governors v Inspector General of National Police Service, Director of Public Prosecutions, National Assembly & Attorney General* Petition 298 of 2014; [2015] KEHC 7650 (KLR) - (Mentioned)
6. *Council of Governors & 3 others v Senate & 53 others* Petition 381 & 430 of 2014 (Consolidated); [2015] eKLR - (Mentioned)
7. *In the Matter of Kenya National Commission on Human Rights* Reference 1 of 2012, [2014] eKLR - (Followed)
8. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR) - (Explained)
9. *In the Matter of the National Land Commission* Advisory Opinion Reference 2 of 2014; [2015] eKLR - (Explained)
10. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR) - (Explained)
11. *Institute of Social Accountability (TISA) & another v National Assembly & 4 others* Civil Appeal 92 & 97 of 2015 (Consolidated); [2015] eKLR - (Mentioned)
12. *Institute of Social Accountability & another v National Assembly & 4 others* Petition 71 of 2013; [2015] eKLR - (Mentioned)
13. *Judicial Service Commission v Speaker of the National Assembly & 4 others; Commission on Administrative Justice (Amicus Curiae); Law Society of Kenya (Interested Party)* (Petition 518 of 2013) [2014] KEHC 7493 (KLR) - (Applied)
14. *Kariuki, James Gacheru & 19 others v County Government Of Mombasa & 56 others* Petition 56 of 2016; [2019] KEHC 7298 (KLR) - (Mentioned)
15. *Kenya Human Rights Commission v Attorney General & another* Constitutional Petition 87 of 2017; [2018] eKLR - (Mentioned)
16. *Kitbeka, Simeon Kioko & 18 others v County Government of Machakos & 2 others* Petition 9 of 2018; [2018] eKLR - (Explained)
17. *Law Society of Kenya v Anne Kananu Mwenda & others* Petition E019, E005, E009, E011, E012, E13, E015 & E021 of 2021 & E433 of 2020 (Consolidated); [2021] eKLR - (Explained)
18. *Law Society of Kenya v Attorney General & another* Constitutional Petition E327 of 2020; [2021] eKLR - (Explained)
19. *Law Society of Kenya v Attorney General & another* Petition 4 of 2019; [2021] eKLR - (Mentioned)
20. *Mate & another v Wambora & another* Petition 32 of 2014; [2017] KESC 1 (KLR) - (Mentioned)
21. *Momanyi, Samuel G v Attorney General & another* Petition No 341 of 2011; [2011] eKLR - (Mentioned)
22. *Mugambi Imanyara & another v Attorney General & 5 others* Election Petition 5 of 2017; [2017] eKLR - (Mentioned)
23. *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Applied)
24. *Murang'a Bar Operators & another v Minister of State for Provincial Administration and Internal Security and others* Petition No 3 of 2011; [2011] eKLR - (Mentioned)
25. *Mwau, John Harun v Andrew Mulei & others* Civil Appeal No 175 of 2009 - (Applied)



26. *Mwau, John Harun v Independent Electoral and Boundaries Commission & another* Civil Appeal 112 of 2014; [2019] KECA 86 (KLR) - (Mentioned)
27. *National Assembly of Kenya & another v Institute for Social Accountability & 8 others* Civil Appeal 92 & 97 of 2015 (Consolidated); [2017] KECA 170 (KLR) - (Explained)
28. *Okeyo, Erick v County Government of Kisumu & 2 others* Petition No 1 'A' of 2014; [2014] eKLR - (Mentioned)
29. *Okoiti, Okiya Omtatah v Public Service Commission & 73 others* Constitutional Petitions No 33 and 42 of 2018 (Consolidated); [2021] eKLR - (Mentioned)
30. *Pharmacy and Poisons Board v George Wang'anga & 6 others* Civil Appeal 79 of 2018; [2020] KECA 775 (KLR) - (Mentioned)
31. *Republic ex parte Chudasama v Chief Magistrate's Court, Nairobi & another* Civil Case No 473 of 2006; [2008] 2 EA 311 - (Explained)
32. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR) - (Explained)
33. *Total Kenya Limited v Kenya Revenue Authority* Civil Appeal 148 of 2013; [2013] eKLR - (Mentioned)
34. *Trusted Society for Human Rights Alliance v Attorney General & 2 others* Petition 229 of 2012; [2012] eKLR - (Mentioned)
35. *Wanjohi v Kariuki & 2 others* Civil Application 6 of 2014; [2014] KESC 24 (KLR) - (Mentioned)

#### **Tanzania**

*Ndyanabo v Attorney General* [2001] EA 495 - (Explained)

#### **Uganda**

*Tinyefuza v Attorney General* [1997] UGCC 3 (25 April 1997) - (Explained)

#### **South Africa**

1. *Economic Freedom Fighters v Speaker of the National Assembly and Others; and Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 - (Explained)
2. *Fose v Minister of Safety & Security* [1977] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 - (Explained)
3. *Minister of Health & others v Treatment Action Campaign & others* (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) - (Explained)
4. *National Coalition for Gay and Lesbian Equality and Others vs Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) - (Followed)
5. *S v Zuma* (CCT5/94) [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568; [1996] 2 CHRLD 244 - (Applied)

#### **United Kingdom**

1. *Blackburn v Attorney General* [1971] 1 WLR 1037 - (Mentioned)
2. *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC) - (Explained)

#### **United States**

*United States v Butler* 297 US 1 (1936) - (Applied)

#### **Canada**

*R v Big Drug Mart Ltd* [1985] 1 SCR 295 - (Explained)

#### **Statutes**

##### **Kenya**

1. Constitution of Kenya articles 1(1); 2(4); 10; 20(4); 38; 73; 81; 88(5); 92; 94(4)(5); 95(4)(b)(c); 96; 97(1)(a)(b); 98(a); 101(4); 109; 127(6)(e)(ii); 165(3)(d)(i)(ii); 248(2)(d); 249(2)(b); 250(1)(2)(a); 252(1); 259(1); Chapter 10, 15- (Interpreted)



2. Election Laws (Amendment) Act, 2016 (Act No 36 of 2016) section 38- (Interpreted)
3. Evidence Act (cap 80) sections 107(1)(2); 109- (Interpreted)
4. Independent Electoral and Boundaries Commission Act (cap 7C) sections 1(6); 2(2)(a); 3 - (Interpreted)
5. Independent Electoral Boundaries Commission (Amendment) Act, 2020 (Act No 18 of 2020) section 2(2)(a) - (Interpreted)
6. Law Society of Kenya Act (cap 18) section 4- (Interpreted)

#### **Advocates**

*Mr Kuria Thande*, Instructed by the Attorney General for the 1st respondent

*Mr Mwendwa* for the 2nd respondent

*Miss Thanji* for the 3rd respondent

*Mr. Wambulwa* for the 4th respondent

*Mr Osiemo* for the 5th respondent

## **JUDGMENT**

### **Introduction**

1. In Kenya, elections and referenda are conducted by the Independent Electoral and Boundaries Commission (hereinafter referred to as “the Commission” or “IEBC”).
2. In discharging its mandate, the Commission is governed by the Constitution and various legislations. One of such legislations is the *Independent Electoral and Boundaries Commission Act*, No 9 of 2011 (hereinafter referred to as “the IEBC Act”).
3. The Petition subject of this judgment seeks to challenge some amendments made to the IEBC Act on grounds of unconstitutionality. The changes were introduced to the IEBC Act vide the Independent Electoral and Boundaries Commission (Amendment) Act, No 18 of 2020 (hereinafter referred to as “the IEBC Amendment Act”).

### **The Parties:**

4. The petitioner, Okiya Okioti Omtatah, describes himself as a law-abiding citizen of Kenya, a public spirited individual, and a human rights defender. He is the Executive Director of Kenyans for Justice and Development Trust, a legal trust, incorporated in Kenya with the purpose of promoting democratic governance, economic development and prosperity.
5. The 1<sup>st</sup> respondent, The Attorney General, is the principal legal adviser of the Government of Kenya. It is enjoined in this suit on the basis of article 156 of the *Constitution*.
6. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are the two Houses of Parliament, the National Assembly and the Senate respectively. They are sued for violating the Constitution by enacting the impugned IEBC Amendment Act.
7. The 4<sup>th</sup> respondent, Parliamentary Service Commission (hereinafter referred to as “the PSC”) is one of the independent commissions in Kenya. It is established under article 127 of the *Constitution of Kenya* to ensure smooth functioning of the Houses of Parliament. It is sued for its role under the impugned IEBC Amendment Act.



8. The 5<sup>th</sup> respondent is the Law Society of Kenya (hereinafter referred to as “the LSK”) and the 6<sup>th</sup> respondent is the Inter-Religious Council of Kenya (hereinafter referred to as the “IRCK”). Both are likewise sued for their respective roles under the impugned IEBC Amendment Act.

**The Petition:**

9. The petition is dated November 3, 2020. It is supported by the affidavit of the petitioner sworn on even date. Together with the filing of the petition was a notice of motion also evenly dated . It sought conservatory orders to restrain the IEBC Amendment Act from coming into force.
10. The application was heard *inter-partes* and disallowed vide a ruling rendered on November 16, 2020.
11. Later, the petitioner filed another application by way of notice of motion again seeking conservatory orders against the implementation of Kenya Gazette No 4004 of April 26, 2021 where the President appointed seven members of the Selection Panel for the selection of the nominees for the appointment of members of the IEBC. The application was dated April 27, 2021.
12. On directions of this court, the application dated April 27, 2021 was subsumed into the main petition and both were heard together.
13. The petitioner impugned the *IEBC Amendment Act* on several grounds. First, it was contended that section 2(2)(a) thereof unconstitutionally assigned four out of the seven slots in the Selection Panel for the selection of the nominees for the appointment of members of the IEBC (hereinafter referred to as ‘the Selection Panel’) to the PSC.
14. Second, that section 3 of the *IEBC Amendment Act* unconstitutionally assigns the PSC with administrative responsibilities of co-ordinating the IEBC Commissioners’ recruitment process and at the same time, the same body, is vested with the duty of appointing four members of the Selection Panel. Further, PSC receives names from other agencies nominating their members to the Selection Panel and transmits them to the President for appointment.
15. The third ground is that the IEBC Amendment Act infringed the principle of separation of powers. The petitioner posited that despite the constitutional mandate to Parliament to legislate under article 88(5) of the *Constitution*, to oversight vetting and approval of nominees under article 250(2)(a) of the *Constitution*, allocating funds to the Commission under article 95(4)(b) & (c) of the *Constitution* and to initiate the removal process of the IEBC Commissioners, Parliament violated the constitutional edict on separation of powers by passing legislation that allowed Parliament to have effective control over the selection process of the Commissioners of the Commission.
16. Fourth, the petitioner averred that the *IEBC Amendment Act* violated the principle of rule of law. He pleaded that other than hiring parliamentary staff, neither does the Constitution nor the Parliamentary Service Commission Act allocate the PSC the power to select or control the selection of members of constitutional commissions and independent commissions including the IEBC. As such, parliament violated the rule of law by developing legislation whose purpose or effect is to provide Parliament and Parliamentary Service Commission with the control on selection of IEBC Commissioners.
17. On a fifth ground, the petitioner averred that Parliament in enacting the IEBC Amendment Act abused its power and failed to adhere to the principle of good governance in contravention of articles 94(4) and 73 of the Constitution that required it to protect the Constitution and promote democratic governance and the exercise of authority in a manner that brings honour to the nation and dignity to the office.



18. While stressing the fifth ground, the petitioner posited that the IEBC Amendment Act brought about a selection process that was heavily controlled by Parliament and PSC which in effect compromised the independence of or perception of independence of IEBC in violation of articles 81, 88 and 249 of the Constitution that peremptorily required IEBC to be independent.
19. The petitioner vehemently claimed that the IEBC Amendment Act unfairly and unconstitutionally elevated the status of Parliament by creating the impression that IEBC primarily exists to service it, demeaning many other state and public organs that depend on IEBC to conduct or oversee their elections, including the County Governments.
20. It was the petitioner's further case as ground six that Parliament created an unconstitutional situation of inequality and discrimination in violation of article 10 of the Constitution by legislating that one organ occupies four out of seven slots in the IEBC Commissioners' Selection Panel.
21. On infringement of article 38 of the Constitution as the seventh ground, the petitioner averred that the failure to constitute an independent electoral and management body had direct effect of enjoyment of political rights as constitutionally guaranteed.
22. The petitioner expounded the foregoing seven grounds in the Petition.
23. He averred that the IEBC Amendment Act is unconstitutional as it concentrated power in a small clique of individuals who have more in common with each other (that is the four people all nominated by the PSC) than the other three members of the selection panel, one nominated by the Law Society of Kenya and two by the Inter-Religious Council of Kenya.
24. The petitioner further posited that the IEBC Amendment Act was actuated by mischief intended to undermine the independence of IEBC despite the fact that under the 2010 constitutional dispensation, it was not open for Parliament to grant the PSC any functions whose purpose and or effect was outside the constitutional dictates.
25. The petitioner further pleaded that the role of PSC under section 1(6) of the first schedule of the *IEBC Act* is to provide secretariat services and as such, nominating members into the selection panel cannot be part of providing secretariat services.
26. He deponed that to both nominate members of the selection panel and at the same time provide the secretariat services and facilities required by the selection panel amounts to gross conflict of interest and breach of the Constitution.
27. The petitioner also hinted on the delay by the President to announce vacancies in the IEBC after the resignation of some Commissioners and to set in motion recruitment process. He pleaded that such amounted to abuse of power and dereliction of the constitutional duty. He further stated that the abuse was aided and abetted by Parliament which failed in its constitutional duty to hold the Executive to account for these vacancies on behalf of the People of Kenya.
28. As a result of the foregoing, the Petitioner averred that having sat on their hands for years and refused to declare the four vacancies in the IEBC or be held accountable, the President and Parliament mischievously sought to unconstitutionally influence the outcome of the selection process for the Commissioners of IEBC, to suit their own political interests.
29. The Petitioner further stated that it is the duty of this court to ensure that the public is left in no doubt that the Commissioners of IEBC are appointed into office in accordance with the Constitution as opposed to extraneous considerations, including political patronage. He claimed that the PSC ought not to be used to undermine the independence of IEBC, a creature of the Constitution.



30. The petitioner posited that there was no reason why the vacancies in the Commission could not have been filled using the selection procedure in section 38 of the First Schedule of the *Election Laws (Amendment) Act, 2016*. It was his case that the IEBC Amendment Act did not comply with the Constitution and were enacted for extraneous considerations.
31. On the foregoing, the petitioner invited the court to determine the question whether, sections 2(2)(a) and 3 of the IEBC Amendment Act are unconstitutional; whether the PSC is conflicted and it should not participate in any way in the appointment of the IEBC Chair and Commissioners and whether the IEBC Amendment Act is unconstitutional and, therefore, invalid, null and void.
32. In the main, the petitioner prayed for the following reliefs: -
- a. A declaration be and is hereby issued that section 2(2)(a) and section 3 of the Independent Electoral Boundaries Commission (Amendment) Act No 18 of 2020 are unconstitutional.
  - b. A declaration be and is hereby issued that the Independent Electoral and Boundaries Commission (Amendment) Act No 18 of 2020 is unconstitutional.
  - c. A declaration be and is hereby issued that the respondents should be condemned to pay the costs of this motion.
  - d. An Order be and is hereby issued that section 2(2)(a) and section 3 of the Independent Electoral Boundaries Commission (Amendment) Act No 18 of 2020 are unconstitutional.
  - e. An Order be and is hereby issued that the Independent Electoral Boundaries Commission (Amendment) Act No 18 of 2020 is unconstitutional.
  - f. An order be and is hereby issued compelling the respondents to bear the costs of this Petition.
  - g. Consequent to the grant of the prayers above the honourable court be pleased to issue any other or further remedy (directions and orders) that the honourable court shall deem necessary to give effect to the foregoing orders, and/or favour the cause of justice.
33. The petitioner also filed written submissions in further support to the petition. The submissions were dated November 24, 2020.
34. In his submissions, the petitioner mainly reiterated the averments of the Petition.
35. In urging this court to allow the petition, the petitioner submitted that both article 2(4) and 165(3) (d)(i) & (ii) of the *Constitution* gives this court the power to invalidate any law, act or omission that is inconsistent with the Constitution. Reliance was placed on the decision in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR where several provisions of the Security Laws (Miscellaneous Amendment) Act 2015, an omnibus bill providing for amendments to various security and related laws were struck down for violating the Bill of Rights.
36. Reference was also made to the decision in the *Institute of Social Accountability (TISA) & another v National Assembly & 4 others* [2015] eKLR and *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR where the County Development Act, No 30 of 2013 and County Governments (Amendment) Act 2014 were voided for breaching fundamental principles of the Constitution.
37. On the basis of the foregoing, the petitioner submitted that Parliament in enacting sections 2(2)(a) and 3 of the IEBC Amendment Act violated article 10 of the *Constitution* on separation of powers; checks and balances; rule of law; good governance; equity and equality, inclusiveness and non-discrimination.



38. In describing how separation of powers was violated, the Petitioner stated that the Commission is an independent commission ought to be an independent institution. He argued that since PSC is an organ of the Legislature under chapter 8 of the Constitution and selects four out of the seven members of the Selection Panel, it would have an overbearing control and effect of those recommended for nomination to be Commissioners of the IEBC.
39. To buttress the principle of separation of powers, reliance was placed on Supreme Court in *In the Matter of the Interim Independent Electoral Commission* Constitutional Application No 2 of 2011 where it was held that: -
- .... Separation of powers is an integral principle in Kenya's Constitution: for instance, chapter 8 is devoted to the legislature; chapter 9 to the executive; and chapter 10, on the Judiciary . . .
- the essence of separation of powers, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several governmental organs functions in splendid isolation.
40. Reference was also made to the decision in *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others* [2018] eKLR. where it was observed thus: -
- ... When the legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, there is no liberty if the power of judging is not separated from the legislative and Executive, there would be an end to everything, if the same man or the same body were to exercise those three powers.
41. To further demonstrate that Parliament had control in the process towards the selection of the IEBC Commissioners, it was submitted that under article 250(1) of the *Constitution* it was still the Parliament (in this case the National Assembly) which vets and approves the persons nominated to be IEBC Commissioners.
42. In closing, the petitioner stated that a law that directly or indirectly vested Parliament with a substantially dominant role in the selection of the IEBC Commissioners not only undermined the principle of separation of powers but blurs the constitutional requirement of checks and balances.
43. On the limb of equity, equality and inclusiveness, the Petitioner submitted that since the IEBC is also responsible for the elections of Governors and County Assemblies, equity, equality and inclusiveness demanded that some of the slots assigned to PSC to appoint members of the Selection Panel be nominated by organs of County Governments, such as the Service Boards of County Assemblies and the Council of Governors.
44. On the requirement that the law should yield good governance, the rule of law and accountability, the petitioner submitted that in enacting the impugned legislation, Parliament failed to uphold article 10 of the Constitution and the findings in *Economic Freedom Fighters v Speaker of the National Assembly & others; and Democratic Alliance v Speaker of the National Assembly & others* [2016] ZACC 11, where it was observed that the foregoing principles and values strengthen and sustain constitutional democracy.
45. The petitioner also submitted that the IEBC Amendment Act ran counter the provisions of articles 15 and 17 of the African Charter on Democracy Elections and Governance which required State parties to establish public institutions that promote and support democracy and ensure that the independence or autonomy of the said institutions are guaranteed by a defined constitutional order.



46. It was also submitted that the IEBC Amendment Act threatened article 38 of the Constitution on political rights.

47. The petitioner urged the court to look at the purpose and effect of the IEBC Amendment Act and declare it unconstitutional. To buttress the point, reference was made The Institute of Social Accountability & another v National Assembly & 4 others case (*supra*) where the court observed as follows: -

[58] ...Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 enunciated this principle as follows:

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.

48. In submitting on the need to preserve operational independence of Commissions and Independent offices, the petitioner made reference to Advisory Opinion Reference No 2 of 2014 - In the Matter of the National Land Commission[2015] eKLR where it was stated that: -

Operational independence: this includes functional independence, and is a safeguard or shield for independence, manifested through the procedure of the appointments of commissioners; composition of the commission; and procedures of the commission.

49. Further reliance was placed on In the Matter of the Interim Independent Electoral Commission Sup Ct Application No 2 of 2011; [2011] eKLR where the Supreme Court observed that: -

..... [T]he real purpose of the „independence clause?, with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of Government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of Government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as ‘people’s watchdogs’ and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the „independence clause?.

50. It was the petitioner’s further submission that to the extent that the IEBC Amendment Act vested power in Parliament to determine who becomes the IEBC Chair and member, it violated the general public’s legitimate expectation in the rule of law and constitutionalism. The Supreme Court decision



in *Communication Commission of Kenya v Royal Media Services & 5 others*, Supreme Court of Kenya, Pet 14A, 14B & 14C of 2014 [2014] eKLR was referred to where the test for legitimate expectation was set out as follows: -

[269] The emerging principles may be succinctly set out as follows: (a) There must be an express, clear and unambiguous promise given by a public authority; (b) The expectation itself must be reasonable; (c) The representation must be one which it was competent and lawful for the decision-maker to make; and (d) There cannot be a legitimate expectation against clear provisions of the law or the Constitution.

51. On costs, the petitioner made two submissions. The first one was that he be awarded costs of the petition. On this point, he submitted that since the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were sued in their capacities as public institutions established under the Constitution for enacting an unconstitutional legislation, then they should pay costs. Support was found in *Erick Okeyo v County Government of Kisumu & 2 others* [2014] eKLR.

52. The second submission on costs was that in the event the Petition was disallowed, the Petitioner ought not to be condemned to costs.

53. In the end, the petitioner urged the court to grant additional appropriate reliefs further to the ones prayed for in the petition. Support was found in the South African Constitutional Court in *Minister of Health & others v Treatment Action Campaign & others* (2002) 5 LRC 216 where it was as held that: -

...appropriate relief will in essence be a relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal.

54. The 5<sup>th</sup> respondent herein, the LSK, supported the petition. As such, I will deal with its case before venturing into the parties who opposed the Petition.

#### **The 5<sup>th</sup> Respondent's Case:**

55. The LSK supported the petition through its written submissions dated December 14, 2020.

56. LSK posited that pursuant to section 4 of the Law Society of Kenya Act, No 21 of 2014, it had the obligation to assist the Government and courts in matters relating to legislation, the administration of justice, upholding the Constitution and advancing the rule of law.

57. Given its objects, LSK submitted that it supported the Petition on the basis that its participation in the recruitment of the IEBC Commissioners was of paramount national importance and that it had a duty to ensure that the Selection Panel was a true reflection of the spirit of the Constitution. However, it flouted that petitioner in suing it as a respondent instead of an Interested Party.

58. On the constitutionality of the IEBC Amendment Act, LSK submitted that Parliament violated the principles of the Constitution in amending the IEBC Act.

59. It was its case that the IEBC Amendment Act failed the principle of separation of powers since Parliament exercised both the selection and oversight authority over IEBC contrary to article 249(2)



(b) of the Constitution that require members of Commissions and holders of independent offices not to be subject to direction or control of any person or authority. LSK buttressed the argument in relying in Judicial Service Commission v speaker of Parliament & 8 others.

60. The 5<sup>th</sup> respondent further submitted that the IEBC Amendment Act violated article 10 of the Constitution. To that end, it referred to The Interim Independent Electoral Commission Constitutional Application No 2 of 2011 and the Canadian Supreme Court in R v Big M Drug Mart Ltd, 1985 1 SCR 295 where it was the court's finding that implementation of an impugned legislative would bring an unconstitutional effect by giving the executive arm a discretion that was not intended by the Constitution.
61. In sum, the 5<sup>th</sup> respondent pitched that section 2(2) and (3) of IEBC Amendment Act were enacted in flagrant violation of the Constitution and as such the entire IEBC Amendment Act ought to be struck down.
62. Having dealt with the parties supporting the Petition, I will now deal with those who opposed the Petition.

### **The 1<sup>st</sup> Respondent's Case:**

63. The honourable Attorney General opposed to the petition through written submissions dated May 5, 2021.
64. The 1<sup>st</sup> respondent asserted that there is no prayer sought in the main challenging constitutionality of the Gazette Notice appointing the members of the Selection Panel. It went ahead to identify the issues for determination as whether the participation of the Parliamentary Service Commission in the selection panel of the IEBC Commissioners is unconstitutional and Whether sections 2(2) and 3 of the amendments to the IEBC Act meet the constitutional muster.
65. As to whether the participation of the PSC in the selection panel of the IEBC Commissioners was unconstitutional, the 1<sup>st</sup> respondent submitted that the petitioner erroneously infuses two distinct constitutional institutions; Parliament and the PSC into one institution in order to convince the Court that Parliament deliberately made legislation for the ulterior purpose of controlling the selection exercise of the IEBC Commissioners and eventually the entire IEBC.
66. It was the 1<sup>st</sup> respondent's case that the PSC and the Parliament are two distinct institutions. It stated that Parliament is established under article 94 of the Constitution and comprise of the National Assembly and the Senate under articles 95 and 96 of the Constitution respectively whereas the PSC is one of the Independent Commissions established under chapter 15 of the Constitution and at article 248(2) d.
67. The 1<sup>st</sup> respondent further shed light on the differences in the PSC and the Parliament in that the duty of the commissions and independent offices, unlike the legislative role of Parliament, is to protect the sovereignty of the people, ensure that all State organs adhere to and observe the democratic values and principles, promote constitutionality and that Commissions, and the holders of independent offices, are subject only to the Constitution and the law, and are independent, and not subject to the direction or control by any person or authority.
68. The 1<sup>st</sup> respondent referred to the scholarly works of Professor PLO Lumumba and Professor Francheschi in The Constitution of Kenya, an Introductory Commentary, 2014, at page 19, where it was observed that the newly-formed commissions and independent offices carry out functions which were previously performed by the traditional arms of Government; and hence the framers of the



Constitution must have deliberately intended that certain Government functions be separated from the familiar arms of Government, in order to promote transparency, fairness and objectivity.

69. In light of the foregoing, the 1<sup>st</sup> respondent submitted that the functions of the PSC according to article 127(6) of the Constitution do not permit the PSC to participate in the nomination process of IEBC Commissioners and cannot be conflicted in nominating members to the Selection Panel.
70. The 1<sup>st</sup> respondent maintained that the allocation of 4 slots to the PSC in the Selection Panel by sections 2(2) and 3 of the IEBC Amendment Act is constitutional when looked in the lenses of article 127(6) (e) of the *Constitution*.
71. The 1<sup>st</sup> respondent further stated that the amendments meet the constitutional muster and do not in any manner limit the rights enshrined under article 38 of the *Constitution*. It claimed that it does not restrict the right to form, join or participate in the activities of an association.
72. The petitioner was faulted for not demonstrating any shortcomings of the composition of the Selection Panel. In urging the court to interrogate the objects and purpose of the IEBC Amendment Act the court's attention was drawn to the decision in *Murang'a Bar Operators & another v Minister of State for Provincial Administration and Internal Security and Others* Nairobi Petition No 3 of 2011 [2011] eKLR and also in *Samuel G Momanyi v Attorney General and another* High Court Petition No 341 of 2011.
73. The 1<sup>st</sup> respondent further stated that legislation is a constitutional function of parliament and as such court should be hesitant to declare such statutes or amendments to statute unconstitutional without interrogating the mischief that the legislature wanted to cure. Court was invited to find persuasion in the US Supreme Court in *US vs Butler*, 297 US 1 [1936] and the Supreme Court in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others* [2015] eKLR where in the latter it was observed thus: -

.... This judgment has raised important questions regarding the role of this court in determining issues relating to the legislative process and we have determined that whereas under article 165(3) (d) of the *Constitution* as read with articles 22(1) and 23(1), the High Court has wide interpretative powers donated by the Constitution, it must be hesitant to interfere with the legislative process except in the clearest of cases. The words of Nzamba Kitonga, SC must therefore ring in the ears of all; that the High Court should not be turned into an alternative forum where losers in Parliamentary debates rush to assert revenge on their adversaries. It would render parliamentary business impossible if the deliberate disruption of legislative proceedings by a member or members unhappy with decisions of the speaker was to lead to invalidation of legislation by the courts. In saying so, we maintain that the doors of the courts shall remain open and deserving litigants will always obtain relief from the fountain of justice....

74. In rebutting the claim that the IEBC Amendment Act had limited political rights under article 38 of the *Constitution*, the 1<sup>st</sup> respondent submitted that there was no demonstration of how the amendments affected the petitioner's right to make political choices including the right to form political parties, participate in formation and activities of political parties, recruit members campaign for a political party.
75. In the end, the 1<sup>st</sup> respondent submitted that the Petition was speculative since the role of the Selection Panel is to recruit, shortlist and interview Kenyans who wish to apply for membership of IEBC. It was stated that the IEBC Amendment Act do not stipulate that the said nominees must come from the membership of the PSC itself.



76. The 1<sup>st</sup> respondent submitted that the petition was premised on misapprehension of the law and had failed to demonstrate unconstitutionality of the IEBC Amendment Act. It prayed that the Petition be dismissed with costs.

**The 2<sup>nd</sup> Respondent's Case:**

77. The National Assembly opposed the petitioner through the replying affidavit of Michael Sialai, the Clerk of National Assembly.

78. He deponed that the National Assembly's mandate to enact, amend and repeal laws is derived from the Constitution and as such the petitioners' claims seek to threaten and restrict the legislative role of Parliament under articles 1(1), 94, 95 and 109 of the Constitution.

79. He further deponed that the IEBC Amendment Bill was subjected to regular parliamentary process. He pointed out that on May 8, 2019 the Bill was published, it was read for the first time on May 9, 2019 and thereafter committed to Departmental Committee on Justice and Legal Affairs pursuant to Standing Order 127 and article 118 of the Constitution.

80. It was also deponed that the Bill was then advertised in local daily newspapers of May 29, 2019 and invited members of public to make presentations on it in compliance with article 118 of the Constitution.

81. It was his disposition that the Justice and Legal Affairs Committee received submissions and memoranda from the IEBC and having taken into account concerns of different stakeholders, it compiled its report on the consideration of the impugned Bill and thereafter went into the second reading.

82. The Clerk deponed that the Bill was then subjected to the third reading and passed on September 24, 2019. The Bill was then referred to the Senate for consideration and was accordingly subjected to the rigours of due process.

83. It was posited that the Senate made several proposals including the reduction of the Commissioners, removed some clauses and qualification of the members of the Selection Panel, among others.

84. It was further posited that on September 15, 2020 the National Assembly considered and approved the Senate's proposals and then forwarded the Bill for the Presidential assent in accordance to article 115 of the Constitution. The Bill was assented into law on November 13, 2020.

85. On the foregoing recount of events, the 2<sup>nd</sup> respondent deponed that the IEBC Amendment Bill was subjected to requisite legislative procedure under the Constitution and courts have no mandate to nullify a constitutionally valid statute. He stated that the petition contravenes the presumption of constitutionality of legislation enacted by Parliament and the onus was on the petitioner to prove to court the manner in which the Constitution had been violated as required in the case of Anarita Karimi Njeru v Republic and Court of Appeal decision in Mumo Matemu & another v Trusted Society of Human Rights.

86. In reference to the Court of Appeal decision in Civil Appeal No 175 of 2009; John Harun Mwau v Dr Andrew Mulei & others, Mr Sialai deponed that courts ought not to interfere with operations of other arms of Government. It was his case that the petition was an affront to the doctrine of separation of powers and an encroachment to the legislative mandate.



87. Mr Sialai also deponed that courts should not question each and every procedural infraction that may occur in either House of Parliament. He relied of the Supreme Court in the *Speaker of Senate & another v Attorney General & 4 others*.
88. It was also deposed that the IEBC Amendment Bill was made as a result of the lacuna in the First Schedule of the IEBC Act which only applied to the recruitment of the current Commissioners and as such there was need to enact legislation for subsequent appointments.
89. In urging the court to dismiss the petition, Mr Sialai deponed that the Petitioner had not adduced any cogent evidence to demonstrate that his rights had been infringed upon.
90. In its written submissions dated December 10, 2020, the 2<sup>nd</sup> respondent largely reiterated the contents of the replying affidavit of Mr Sialai.
91. It was submitted that under articles 94 and 109 of the *Constitution*, the 2<sup>nd</sup> respondent exercised its constitutional mandate and that there were no procedural gaps in the enactment of the impugned IEBC Amendment Act.
92. As regards the contention that the IEBC Amendment Act threatened Political Rights under article 38, it was submitted that the effect and purpose of the amendment could not be faulted. To that end, reliance was placed on the Canadian Supreme Court decision in *R v Big Drug Mart Ltd*. Reference was also made to the decision in *Mugambi Imanyara & another v Attorney General & 5 others* [2017] eKLR where it was held that courts must examine the direct and inevitable effect of law and the legislative history of the statute.
93. It was reiterated in the submissions that the IEBC Amendment Act was constitutional and the burden was on the party challenging it to prove violation of Constitution. Reliance was placed on the decision of the Court of Appeal of Tanzania in *Ndyanabo v Attorney General* [2001] EA 495 where it was observed: -
- Until the contrary is proved, a legislation is presumed to be constitutional. It is sound legal principle of constitutional construction that, if possible, a legislation should receive such a construction that will make it operative and not inoperative.
94. To further buttress the foregoing, the 2<sup>nd</sup> respondent relied on *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR, *The Council of Governors v Inspector General of Police & 3 others* [2015] eKLR.
95. It was submitted that the petitioner had not discharged his burden for the granting of the declaration of invalidity of the impugned IEBC Amendment Act.
96. In submitting that allowing the petition would amount to violation of the principle of separation of powers, reference was made to *James Gacheru Kariuki & 10 others v County Government of Mombasa & 56 others* [2019] eKLR and *Trusted Society for Human Rights Alliance v Attorney General & 2 others* [2012] eKLR where in the latter, the court observed as follows: -
- .... Among other pragmatic manifestations of the doctrine, it means that when a matter is textually committed to one of the coordinate arms of government, the courts must defer to the decisions made by those coordinate branches of government.....
97. In the end the 2<sup>nd</sup> respondent submitted that the prayers in the Petition were tantamount to asking the court to amend or repeal legislation. It stated that such invitation should be exercised with restraint as



was observed by the Court of Appeal in *Pharmacy and Poisons Board v George Wang'anga & 5 others* [2020] eKLR.

### **The 3<sup>rd</sup> respondent's case:**

98. The 3<sup>rd</sup> respondent, The Senate, opposed the petition through the affidavit of Jeremiah Nyegenye, the Clerk to the Senate, deponed to on December 16, 2020.
99. He deponed that Parliament has power to make laws under article 94(5) of the *Constitution* which are subsequently presumed constitutional and the burden of demonstrating unconstitutionality is on the person contesting.
100. In reference to article 250 of the *Constitution* that requires composition of Commissions and Independent offices to be identified and recommended for appointment in a manner prescribed by national legislation, the 3<sup>rd</sup> respondent deposed that the IEBC Amendment Act was constitutional.
101. He deposed that under article 127(6)(e)(ii) of the *Constitution*, the PSC could perform any roles assigned to it by national legislation.
102. He opposed the petitioner's claim of conflict of interest and stated that the PSC's role in appointing the Selection Panel and providing secretariat services have been in existence even in legislation; the Elections (Amendment) Act 2016.
103. In its written submissions dated January 11, 2021 the 3<sup>rd</sup> respondent stated that every legislation is presumed to be constitutional and to justify its nullification, there must be a clear and unequivocal breach of the Constitution. Reference was made to *Commission for Implementation of the Constitution v Parliament of Kenya and another* High Court No 454 of 2012 where it was stated: -

I adopt the words of court in *v Varty* [1972] 1 WLR 534, as cited in *Application by Bahadur* [1986] LRC 545 (Const), where it was stated, "I would only emphasise that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown..." In the same vein I will reiterate that this court will start from the presumption that a statute as enacted by Parliament is constitutional, is fair unless the contrary is proven.
104. It was stated that under article 250 of the Constitution, national legislation provides for composition, appointment and terms of office of Constitutional Commissions and Independent Offices.
105. In the end, it was submitted that the petitioner had not demonstrated unconstitutionality of the IEBC Amendment Act. It urged the court to dismiss the petition.

### **The 4<sup>th</sup> Respondent's case:**

106. The 4<sup>th</sup> respondent opposed the petition through grounds of opposition dated November 11, 2020 and the replying affidavit of Jeremiah Nyegenye deposed to on December 14, 2020.
107. In the grounds of opposition, it was its case that the petition was an affront to the legislative role of parliament under article 1(1), 92, 94, 95 and 96 of the Constitution.
108. It claimed that under article 127 of the Constitution, the PSC has the mandate to provide services and facilities to ensure efficient and effective functioning of Parliament and performing other functions as prescribed by legislation.



109. The 4<sup>th</sup> respondent stated that if the petition were allowed, there will be no procedure for the appointment of IEBC Commissioners or filling of vacancies that may arise contrary to article 250(2) of the Constitution.
110. It urged that the petition lacked merit, was argumentative and an outright abuse of court process.
111. In the replying affidavit, the dispositions of Mr Nyegenye were a replica of his deposition on behalf of the 3<sup>rd</sup> respondent.
112. The 4<sup>th</sup> respondent filed written submissions dated December 14, 2020. It restated and emphasized the averments in the replying affidavit of Jeremiah Nyegenye.
113. It added that the petitioner had not demonstrated as per the principles established in *Anarita Karimi* case how the IEBC Amendment Act had violated the Constitution.
114. In respect of the claim on separation of powers, it was submitted that PSC is an independent constitutional commission under article 127 of the Constitution contrary to the allegations by the petitioner that the PSC is an appendage of Parliament.
115. It further stated that the impugned the IEBC Amendment Act had introduced parameters for appointment of the members of the Selection Panel that was not there before and made the requirement that members appointed to the Selection Panel to take and subscribe to the oath of office before assuming office. As such, it submitted that the members of the Selection Panel will discharge their mandate independently regardless of the appointing authority.
116. The 4<sup>th</sup> respondent further submitted that the court had the obligation to consider historical developments, purpose and interest that led to the enactment of the IEBC. To that end, reference was made to the *Matter of the National Land Commission Advisory Opinion No 2 of 2014 [2015] eKLR* where the Supreme Court stated that: -
- The Constitution is to be interpreted in a holistic manner that entails reading alongside other provisions and considering the historical perspective purpose and interest of the provisions in question.
117. While referring to the decision of Salmon LJ in *Blackburn v Attorney General* (1971) 1 WLR 1037 it was submitted that the Petition is a textbook example of litigation aimed at influencing the outcome of political decisions.
118. It was also argued that the process of appointing the Selection Panel to recommend persons for appointment as Commissioners of the IEBC is a political process that was arrived at after political compromises between various players in the political and electoral sector in the country. Support was found in *National Assembly of Kenya & another v Institute of Social Accountability & 6 others* [2017] eKLR where the Court of Appeal stated that: -
- Furthermore, questions such as division of functions, divisions of revenue, legislative process and budget process are essentially political questions which fall within political question doctrine and which the Constitution has assigned to other political institutions for resolution and created institutions and mechanisms for such resolutions.
119. The 4<sup>th</sup> respondent contended that if the petition is allowed, there would be no procedure for the appointment of IEBC Commissioners or filling of nay vacancy that may arise contrary to article 250(2) of the Constitution which is against public interest in view of the fast-approaching elections.



120. In response to the contention that there was violation of separation of powers, the 4<sup>th</sup> respondent stated that pure separation of power does not exist. He stated that there always are incidences of overlap.
121. In the end, it submitted that the petitioner had not demonstrated how the role of PSC in appointing its members to the Selection Panel and to provide secretarial services offended the principle of separation of powers. It urged the court to dismiss the Petition for lack of merit.

### **Issues for Determination**

122. From my reading of the court documents filed and consideration of the submissions of the parties, I have identified the following issues for discussion: -
- i. Principles of constitutional and statutory interpretation.
  - ii. Whether Parliament and Parliamentary Service Commission are distinct constitutional entities.
  - iii. Whether Parliament in enacting the IEBC Amendment Act violated the principle of separation of powers.
  - iv. Whether the IEBC Amendment Act or section 2(2)(a) and 3 of the IEBC Amendment Act are unconstitutional to the extent that they infringe article 10 of the Constitution in being counter the rule of law, are an abuse of power and good governance, violates the independence of IEBC, violates equity, equality, non-discrimination and fairness and also violates article 38 of the Constitution.

### **Analysis and Determination:**

123. I will deal with the issues sequentially.

#### **i. Principles of constitutional and statutory interpretation:**

124. The Petition herein raises various constitutional issues. The issues border on the manner in which the Constitution and the law ought to be interpreted.
125. In such instance, a look at the settled principles in constitutional and statutory interpretation becomes imperative. That, needless to say, shall lay a firm basis for consideration of the rest of the issues with ease.
126. The Constitution is a document *sui generis*. It is the ultimate source of law in the land. It commands superiority and dominance in every aspect and its interpretation as of necessity must be in a manner that all other laws bow to.
127. In Nairobi High Court Constitutional Petitions No 33 and 42 of 2018 (Consolidated) [Okiya Omtatah Okoiti v Public Service Commission & 73 others](#) [2021] eKLR , this court discussed the principles of constitutional interpretation at length. It observed as follows: -
54. As regards the interpretation of the Constitution, suffice to say that the Constitution itself gives guidelines on how it ought to be interpreted. That is in articles 20(4) and 259(1).
  55. Article 20(4) requires courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) command Courts to interpret the Constitution in a manner that promotes its purposes, values and principles,



advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.

56. Courts have also rendered how the Constitution ought to be interpreted. The Supreme Court in a ruling rendered on 21<sup>st</sup> December, 2011 in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR discussed the need for courts, while interpreting the Constitution, to favour a purposive approach as opposed to formalism. The court stated as under: -

[86] .... The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20 (4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.

[87] In article 259(1) the Constitution lays down the rule of interpretation as follows: “This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.” Article 20 requires the courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.

[88] ..... Article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

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

57. On the principle of holistic interpretation of the Constitution, the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2015] eKLR affirmed the holistic interpretation principle by stating that:

This court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.



58. The meaning of holistic interpretation of the Constitution was addressed by the Supreme Court in *In the Matter of the Kenya National Human Rights Commission*, Sup Ct Advisory Opinion Reference No 1 of 2012; [2014] eKLR. The court at paragraph 26 stated as follows: -

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

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

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

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

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

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



of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.

63. In Advisory Opinion Application No 2 of 2012, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, the Supreme Court spoke to purposive interpretation of the Constitution. It had the following to say: -

...The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution.

64. The court went ahead and gave further meaning of the term purposive by making reference to the decision in the Supreme Court of Canada in *R v Drug Mart* (1985) when it made the following remarks: -

The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.

65. The Supreme Court, while referring to the South African Constitutional decision in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC), went further and stated that a purposive approach is 'a generous interpretation... suitable to give individuals the full measure of the fundamental rights and freedoms referred to.'

66. The learned judges of the Supreme Court further agreed with the South African Constitutional Court in *S v Zuma* (CCT5/94) 1995 when it stated that in taking a purposive approach in interpretation, regard must be paid to the legal history, traditions and usages of the country concerned.

67. The Supreme Court embellished the need to pay attention to legal history while interpreting not only the Constitution but also statutes. It observed as follows: -

8.11 This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting the Constitution, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself.

68. The Court of Appeal while dealing with holistic interpretation of the Constitution in Civil Appeal 74 & 82 of 2012, *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR stated that the entire Constitution must be read as an integrated whole and no one particular provision destroying the other so as to effectuate harmonization principle.



128. In discussing how constitutionality of impugned Acts of Parliament ought to be interpreted against the constitutional muster, the High Court in Petition No 71 of 2014, *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR remarked as follows: -

[I]n determining whether a statute is constitutional, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see *Murang'a Bar Operators and another v Minister of State for Provincial Administration and Internal Security & others* Nairobi Petition No 3 of 2011 [2011]eKLR, *Samuel G Momanyi v Attorney General and Another (supra)*). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 enunciated this principle as follows: -

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.

[59.] Fourth, the Constitution should be given a purposive, liberal interpretation. The Supreme Court In *Re The Matter of the Interim Independent Electoral Commission Constitutional Application (supra)* at para 51 adopted the words of Mohamed A J in the Namibian case of *State v Acheson* 1991(20 SA 805, 813) where he stated that;

The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and..... aspirations 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 process of judicial interpretation and judicial discretion.

Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see *Tinyefuza v Attorney General of Uganda* Constitutional Petition No 1 of 1997 (1997 UGCC 3)).

We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution. "As this is a matter that concerns devolution, we recall what the Supreme Court stated in *The Speaker of the Senate & another v Attorney-General & another & 3 others* - Advisory Reference No 2 of 2013 [2013] eKLR.

129. Recently, in Nairobi High Court Constitutional Petition No E327 of 2020 *Law Society of Kenya v The Attorney General and another* [2021] eKLR this court in furthering the discussion on the constitutionality of a statute expressed itself as follows: -



110. I will also look at the decision in *R v Oakes*. The brief facts are that the respondent, David Edwin Oakes, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s 4(2) of the Narcotic Control Act, but was convicted only of unlawful possession. After the trial judge made a finding that it was beyond a reasonable doubt that the Respondent was in possession of a narcotic, the respondent brought a motion challenging the constitutional validity of s 8 of the Narcotic Control Act. That section provides that if the court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he or she must be convicted of trafficking. The Ontario Court of Appeal, on an appeal brought by the Crown, found that this provision constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence now entrenched in s 11(d) of the Canadian Charter of Rights and Freedoms. The Crown appealed and a constitutional question was stated as to whether s 8 of the Narcotic Control Act violated s 11(d) of the Charter and was therefore of no force and effect. Inherent in this question, given a finding that s 11(d) of the Charter had been violated, was the issue of whether or not s 8 of the Narcotic Control Act was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of s 1 of the Charter.
111. The appeal was dismissed and the constitutional question answered in the affirmative. In so holding, the Supreme Court of Canada, then presided by the Chief Justice in a Seven-Judge bench discussed the criteria in ascertaining the manner in which a limitation to a right or fundamental freedom may be justified. The court came up with a three-pronged criteria. First, the objective which the limitation is designed to serve. Second, the means chosen to attain the objective must be reasonable and demonstrably justified. This is the proportionality test. Third, the effect of the limitation.
112. On the objective test, the Supreme Court stated as follows: -
67. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, ..... the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R v Big M Drug Mart Ltd, supra*, at p 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
113. On the proportionality test, the Supreme Court stated that: -
70. Second, once a sufficiently significant objective is recognized, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R v Big M Drug Mart Ltd, supra*, at p 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first



sense, should impair "as little as possible" the right or freedom in question: *R v Big M Drug Mart Ltd, supra*, at p 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

114. On the third test, that is the effect of the limitation, the Supreme Court stated that: -
71. With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.
130. Lastly, the Court of Appeal in *John Harun Mwau v Independent Electoral & Boundaries Commission & Attorney General* [2019] eKLR had the following to say on the constitutionality of statutes: -
27. Here the question we have to answer is whether the learned judge erred by not declaring section 10 of the Political Parties Act unconstitutional? The cardinal rule in interpretation of statute is to check whether it complies with the constitutional mandate. This is a rule that has gained traction in several jurisdictions as stated in the case of, *US v Butler, (supra)* which was relied on by the appellant. It was held that a duty of a court in determining the constitutionality of a provision of a statute should take the following as a guidance: -

When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

Also in *The Queen v Big M Drug Mart Ltd*, 1986 LRC (Const) 332, the Supreme Court of Canada stated that;

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the



legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity.

28. Bearing in mind the above principles we are of the view that although the Constitution does not make any provisions for political mergers or coalitions, Parliament is mandated under article 92 to make Legislation to provide inter alia for the regulation of political parties, the roles and functions of political parties and other matters necessary for their management thereto. We are cognisant of the fact that enactment of legislation involves a lengthy process that involves people's representative as well as public participation. A party seeking to strike a provision of a statute must demonstrate how the particular enactment is unfair, irrational and patently against the values or the spirit of the Constitution.....
131. Having had a detailed discussion in the manner in which courts ought to deal with the interpretation of the Constitution and the constitutionality of statutes, and as said, that discourse now lays a basis for the consideration of the rest of the issues. I will now consider the other issues.

**ii. Whether Parliament and Parliamentary Service Commission are distinct constitutional entities:**

132. The Parliament and the PSC are both provided for in the Constitution. I will, therefore, look at what the Constitution says on each of them.
133. I will begin with the Parliament. Chapter 8 of the Constitution establishes the Legislature. Part 1 is on the establishment and role of Parliament. It provides as follows: -

Chapter Eight – The Legislature

PART 1 – Establishment and the Role of Parliament

93. Establishment of Parliament

- (1) There is established a Parliament of Kenya, which shall consist of the National Assembly and the Senate.
- (2) The National Assembly and the Senate shall perform their respective functions in accordance with this Constitution.

94. Role of Parliament

- (1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.
- (2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.
- (3) Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.
- (4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.



- (5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.
- (6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.

95 Role of the National Assembly

- (1) The National Assembly represents the people of the constituencies and special interests in the National Assembly.
- (2) The National Assembly deliberates on and resolves issues of concern to the people.
- (3) The National Assembly enacts legislation in accordance with Part 4 of this Chapter.
- (4) The National Assembly—
  - (a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve;
  - (b) appropriates funds for expenditure by the national government and other national State organs; and
  - (c) exercises oversight over national revenue and its expenditure.
- (5) The National Assembly—
  - (a) reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office; and
  - (b) exercises oversight of State organs.
- (6) The National Assembly approves declarations of war and extensions of states of emergency.

96. Role of the Senate

- (1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.
- (2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in articles 109 to 113.



- (3) The Senate determines the allocation of national revenue among counties, as provided in article 217, and exercises oversight over national revenue allocated to the county governments.
  - (4) The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with article 145.
134. Part 2 deals with composition and membership of Parliament. Part 3 is on Offices of Parliament. Part 4 provides for the Procedures for enacting legislation while Part 5 deals with Parliament's General Procedures and Rules whereas Part 6 is on Miscellaneous matters which includes the establishment of the PSC.
135. The PSC is established under article 127 of the Constitution. Sub-articles 1, 2 and 3 thereof provides as follows: -
127. Parliamentary Service Commission
- (1) There is established the Parliamentary Service Commission.
  - (2) The Commission consists of—
    - (a) the Speaker of the National Assembly, as chairperson;
    - (b) a vice-chairperson elected by the Commission from the members appointed under paragraph (c);
    - (c) seven members appointed by Parliament from among its members of whom—
      - (i) four shall be nominated equally from both Houses by the party or coalition of parties forming the national government, of whom at least two shall be women; and
      - (ii) three shall be nominated by the parties not forming the national government, at least one of whom shall be nominated from each House and at least one of whom shall be a woman; and
    - (d) one man and one woman appointed by Parliament from among persons who are experienced in public affairs, but are not members of Parliament.
  - (3) The Clerk of the Senate shall be the Secretary to the Commission.
136. Sub-article 4 is on the vacation of office of a member of the PSC. Sub-article 5 is on the term of office of a member of PSC who is a Member of Parliament.
137. Article 127(6) of the [Constitution](#) is on the functions of PSC. It states as under: -
- 127(6) The Commission is responsible for—
- (a) providing services and facilities to ensure the efficient and effective functioning of Parliament;
  - (b) constituting offices in the parliamentary service, and appointing and supervising office holders;



- (c) preparing annual estimates of expenditure of the parliamentary service and submitting them to the National Assembly for approval, and exercising budgetary control over the service;
  - (d) undertaking, singly or jointly with other relevant organisations, programmes to promote the ideals of parliamentary democracy; and
  - (e) performing other functions—
    - (i) necessary for the well-being of the members and staff of Parliament; or
    - (ii) prescribed by national legislation.
138. Having set out the establishment and mandates of the Parliament and the PSC, I will, further, look at the PSC as a constitutional Commission.
139. Chapter 15 of the [Constitution](#) is on Commissions and Independent offices. PSC is among the commissions.
140. Under article 253 of the [Constitution](#), each commission is a body corporate with perpetual succession and a seal. It is capable of suing and being sued in its corporate name.
141. The objects of the commissions and independent offices are provided for under article 249 of the [Constitution](#) as to protect the sovereignty of the people; to secure the observance by all State organs of democratic values and principles and to promote constitutionalism.
142. In article 252(1) of the [Constitution](#), the following further functions and powers of the commissions and independent offices are provided: -
- (a) may conduct investigations on its own initiative or on a complaint made by a member of the public;
  - (b) has the powers necessary for conciliation, mediation and negotiation;
  - (c) shall recruit its own staff; and
  - (d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.
143. In discharging their mandates, commissions and independent offices are independent and not subject to direction or control by any person or authority, but are only subject to the Constitution and the law.
144. There is a deliberate pattern of design adopted in the Constitution relating to the arms of Government and the commissions associated with the mandates of aiding such arms of Government to properly operate. The design is that such commissions are usually provided for under the same chapter as the arm of Government. For instance, the Judicial Service Commission is closely associated with the Judiciary as the arm of Government. That commission is provided for under Chapter 10 of the [Constitution](#) which deals with the Judiciary. Likewise, the PSC is provided for under Chapter 8 on the Legislature. Another example is the Office of the Attorney General and that of the Director of Public Prosecutions which are provided for under Chapter 9 which is on the Executive.
145. Resulting from such a constitutional formatting, it may appear as though such commissions and organs are subordinated to the respective arms of Government. However, that is not the position. The



prevailing and constitutionally-anchored position is that each of the commissions, independent offices or state organs are independent and only subject to the Constitution and the law.

146. Deriving from the foregoing, whereas the PSC's main role is to provide services and facilities to ensure the efficient and effective functioning of Parliament, that does not make it subordinated to Parliament. PSC always remains independent and is only subject to the Constitution and the law.
147. Having said so, the issue under consideration can be firmly settled in the affirmative. In other words, whereas PSC and Parliament are inter-dependent, they remain distinct constitutional entities.

**iii. Whether Parliament in enacting the IEBC Amendment Act violated the principle of separation of powers:**

148. In the preceding issue, I have established that Parliament and PSC are distinct institutions. However, the petitioner contended that given the relationship between the Parliament and PSC then Parliament ought not to have included any nominee of PSC as part of the Selection Panel.
149. According to the petitioner, the inclusion of the nominees from PSC in the Selection Panel compromises the independence of the Selection Panel or it creates a reasonable perception of compromise. As a result, the petitioner argued that the eventual Commissioners who will be appointed courtesy of that process will owe allegiance to PSC and Parliament and, hence, that will compromise the independence of or perception of independence of the IEBC.
150. The petitioner, therefore, posited that that PSC is conflicted and it should not nominate its members to be part of the Selection Panel otherwise the veil of separation of powers is ruptured.
151. The respondent sars of the contrary position.
152. The legislative process of Parliament and the concept of separation of powers were discussed by the Supreme Court in Petition 32 of 2014, *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR. The decision in Reference No 2 of 2013 *Speaker of the Senate & another v Attorney General & 4 others*, was referred where the Learned Judges observed as follows: -

[59] Also quite relevant is this court's decision in *Speaker of the Senate & another v Attorney General & 4 others*, Reference No 2 of 2013; [2013] eKLR. The court, in that case, signalled that it would be reluctant to question parliamentary procedures, as long as they did not breach the Constitution. In reference to article 109 of the Constitution, which recognizes that Parliament is guided by both the Constitution and the Standing Orders in its legislative process, the court thus held [paragraphs 49 and 55]:

Upon considering certain discrepancies in the cases cited, as regards the respective claims to legitimacy by the judicial power and the legislative policy – each of these claims harping on the separation-of-powers concept – we came to the conclusion that it is a debate with no answer; and this court in addressing actual disputes of urgency, must begin from the terms and intent of the Constitution. Our perception of the separation-of-powers concept must take into account the context, design and purpose of the Constitution; the values and principles enshrined in the Constitution; the vision and ideals reflected in the Constitution...



153. The apex court made further reference to its earlier decision in *In Re the Matter of the Interim Independent Electoral Commission* [2011] eKLR, where the rule of law was discussed to be intricately intertwined with the principle of separation of powers in the following way: -

The effect of the Constitution's detailed provision for the rule of law in the processes of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the Executive branch.

The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several governmental organs functions in splendid isolation.

154. I have already enumerated the functions of Parliament and PSC. The functions are clearly different. There is nowhere any of such powers overlap.
155. Article 88(5) of the Constitution mandates Parliament to provide for national legislation to aid IEBC discharge its mandate. The provision states as follows: -

The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation.

156. To, therefore, adopt an interpretation that favours the Petitioner's view in the circumstances of this case will be to adopt a formalistic or positivistic approach. *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, the Supreme Court emphasized the need for courts, while interpreting the Constitution, to favour a purposive approach as opposed to formalism.
157. The unique circumstances of this case do not, hence, support the contention that Parliament in enacting the IEBC Amendment Act violated the principle of separation of powers. In fact, Parliament discharged its constitutional duty in enacting the IEBC Amendment Act.
158. The issue is answered in the negative.

**iv. Whether the IEBC Amendment Act or section 2(2)(a) and 3 of the IEBC Amendment Act are unconstitutional to the extent that they infringe article 10 of the Constitution in being counter the rule of law, are an abuse of power and good governance, violates the independence of IEBC, violates equity, equality, non-discrimination and fairness and also violates article 38 of the Constitution:**

159. The petitioner's and respondents' arguments on this issue have already been comprehensively captured in this judgment.
160. It is now a well settled principle that a petitioner ought to demonstrate with some degree of precision the right it alleges has been violated, the manner it has been violated, and the relief it seeks for that violation.
161. The burden of proof on a petitioner in a constitutional Petition was addressed by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR as follows: -

Although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be



infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

162. The conduct of constitutional petitions is also guided by various laws. For instance, the Evidence Act applies to matters generally relating to evidence. The Evidence Act is clear on its application to constitutional petitions and affidavits in section 2 thereof. The provision provides as follows: -

- (1) This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's Court, but not to proceedings before an arbitrator.
- (2) Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.

163. Sections 107(1), (2) and 109 of the [Evidence Act](#) are on the burden of proof. They state as follows:

107(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.

and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

164. Turning back to this matter and on whether the IEBC Amendment Act infringes the rule of law, suffice to say that the petitioner based the contention on the understanding that PSC was an organ of the Legislature. (See paragraph 106 of the petition).

165. This court has, however, demonstrated the otherwise position.

166. The petitioner has, hence, failed in proving that the IEBC Amendment Act infringes the rule of law.

167. There is also the argument that Parliament erred in legislating one organ to occupy 4 out of 7 slots in the Selection Panel. To that end, it was argued that the principles of equity, equality, non-discrimination and fairness were violated.

168. It is a fact that in the impugned IEBC Amendment Act, PSC nominates four out of the seven nominees for appointment into the Selection Panel. Perhaps it is important to reproduce the IEBC Amendment Act in whole and as under: -

The Independent Electoral and Boundaries Commission (Amendment) Act, 2020

No 18 of 2020

Date of Assent: October 28, 2020



Date of Commencement: November 13, 2020

AN ACT of Parliament to amend the Independent Electoral and Boundaries Commission Act, 2011 and for connected purposes.

ENACTED by the Parliament of Kenya, as follows —

1. This Act may be cited as the Independent Electoral and Boundaries Commission (Amendment) Act, 2020.
2. The First Schedule to the Independent Electoral and Boundaries Commission Act, 2011 is amended —
  - (a) in paragraph 1(1) by deleting the words "such persons as Parliament shall determine" appearing immediately after the words "consisting of and substituting therefor the words "seven persons;
  - (b) by deleting paragraph 1(2) and substituting therefor the following new subparagraph —
    - (2) The selection panel shall consist of —
      - (a) two men and two women nominated by the Parliamentary Service Commission;
      - (b) one person nominated by the Law Society of Kenya; and
      - (c) two persons nominated by the Inter-religious Council of Kenya.
      - (d) by inserting the following new paragraph immediately after paragraph 1 (2)—
    - (2A) A person is qualified for appointment as a member of the selection panel if such person —
      - (a) is a citizen of Kenya;
      - (b) meets the requirements of leadership and integrity set out in Chapter Six of the Constitution; and
      - (c) holds a degree from a university recognized in Kenya.
      - (d) by deleting paragraph 1(3) and substituting therefor the following new subparagraph—
- (3) The respective nominating bodies under subparagraph (2)(b) and (c) shall, within seven days of the declaration of a vacancy in the office of the chairperson or member of the Commission, submit the names of their nominees to



the Parliamentary Service Commission for transmission to the President for appointment.

169. To be able to address this sub-issue comprehensively, I will take a tour of the composition of the Selection Panels since 2011. The first Selection Panel was pursuant to section 5(2) of the *IEBC Act*, No 9 of 2011.
170. The said provision established the composition of the Selection Panel in the First Schedule. Section 1 of the First Schedule provided as follows: -

**Selection Panel.**

1. Within fourteen days of the commencement of this Act, the President shall, in  
(1) consultation with the Prime Minister and with the approval of the National Assembly, appoint a Selection Panel comprising –
    - (a) two persons, being one man and one woman, nominated by the President;
    - (b) two persons, being one man and one woman, nominated by the Prime Minister;
    - (c) one person nominated by the Judicial Service Commission;
    - (d) one person nominated by the Kenya Anti-Corruption Advisory Board; and
    - (e) one person nominated by the Association of Professional Societies of East Africa.
171. The Selection Panel comprised of 7 members. None of them was nominated by the PSC.
172. The IEBC Act, No 9 of 2011 was later amended by the enactment of Election Laws (Amendment) Act, No 36 of 2016. The amendment was assented on September 13, 2016 and became operational on October 4, 2016.
173. The *Election Laws (Amendment) Act*, No 36 of 2016 amended the First Schedule on the procedure for appointment of Chairperson and members of the IEBC. The amendment provided the following 9 members: -
  - (a) Four persons, being two men and two women, nominated by the Parliamentary Service Commission;
  - (b) One person nominated by the Kenya Conference of Catholic Bishops;
  - (c) One person nominated by the National Council of Churches of Kenya;
  - (d) One person nominated by the Supreme Council of Kenya Muslims, the National Muslim Leaders Forum and the Council of Imams and Preachers of Kenya;
  - (e) One person nominated by the Evangelical Alliance of Kenya; and
  - (f) One person nominated by the Kenya Conference of Catholic Bishops;
174. In this scenario, out of the 9 members of the Selection Panel, 4 of them were nominated by PSC.



175. There was then a Bill by the National Assembly which proposed some other amendments to the Selection Panel. It was the Independent Electoral and Boundaries Commission (Amendment) (No 3) Bill, 2019. In that Bill, the composition of the 11 - member Selection Panel was proposed as follows: -
- (a) Four persons, being two men and two women, nominated by the Parliamentary Service Commission;
  - (b) One person nominated by the Public Service Commission;
  - (c) One person nominated by the Ethics and Anti-Corruption Commission;
  - (d) One person nominated by the Law Society of Kenya;
  - (e) One person nominated by the National Gender and Equality Commission;
  - (f) One person nominated by the Attorney General;
  - (g) One person nominated by the Kenya National Commission on Human Rights; and
  - (h) One person nominated by the Inter-Religious Council of Kenya.
176. Only 4 out of the 11 members were to be nominated by PSC.
177. The Bill was dealt with by both Houses of Parliament. It then resulted into the IEBC Amendment Act.
178. Unlike in the [Election Laws \(Amendment\) Act](#), No 36 of 2016 where 4 out of 9 of the members were nominated by PSC and in the Independent Electoral and Boundaries Commission (Amendment) (No 3) Bill, 2019 where 4 out of the 11 members were to be nominated by PSC, the IEBC Amendment Act provided that out of the 7 members 4 of them were to be nominated by PSC.
179. There must have been good reasons why previously the number of nominees by PSC into the Selection Panel was not more than one half of the nominees. Indeed, the reasons are many. One of them is the perception of independence of the Selection Panel. A Selection Panel which has majority of its members nominated by one entity cannot pass the threshold of being portrayed as inter alia independent and fair. The dominance of the members appointed by one entity into the Selection Panel definitely raises legal eye brows.
180. Having said so, I will, nevertheless, apply the three tests of the objective, proportionality and the effect of a statutory provision as developed by the Supreme Court of Canada in *R v Oakes* case (*supra*) to the impugned IEBC Amendment Act.
181. On the objective test, the Supreme Court held that ‘... it is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
182. From the history of Constitution-making in Kenya and the quest for free and fair elections, the objective of the IEBC Amendment Act ought to further the realization of the goal that IEBC will eventually conduct fair, free and credible elections and referenda.
183. In this case, the IEBC Amendment Act runs counter that objective. The IEBC Amendment Act instead creates a scenario of suspicion not only on the Commissioners to be appointed, but also the eventual independence of the IEBC. It is clear beyond any peradventure that the Selection Panel was dominated by the nominees by PSC. That dominance runs contrary to good governance, transparency, integrity, social justice, equity, inclusiveness, equality, patriotism, national unity among like principles.



184. It is not far-fetched to imagine the likelihood of the majority of the members of the Selection Panel nominated by PSC to favour some candidates during the nomination process. Such preferred candidates may eventually become Commissioners of IEBC and their impendence would naturally be put to question.
185. The respondents did not give any reasons for the impugned membership of the Selection Panel in the IEBC Amendment Act. In other words, no justification was tendered against the serious contention raised. The much the respondents did was to hold that the Constitution gave Parliament powers to allocate any other functions to PSC through legislation. That is true and it is the reason why this court has already found that the IEBC Amendment Act did not infringe the principle of rule of law.
186. The unresolved contention is, however, that the membership of the Selection Panel infringes *inter alia* various constitutional principles in article 10 of the Constitution.
187. Going by the guidance in *R v Oakes* case (*supra*), this Court finds that the objective of the impugned composition of the membership of the IEBC Amendment Act was not to address the concerns which are pressing and substantial in a free and democratic society. Instead, the membership of 4 out of 7 members nominated by PSC favoured a process which did not fully uphold the Constitution. The membership of the IEBC Amendment Act, hence, fail the objective test.
188. From the discussion in *R v Oakes* case (*supra*), the rest of the tests, that is the proportionality and the effect of the statutory provision, cannot be subject of further discussion once the statute or the provision fails to pass the objective muster.
189. In this case, therefore, it is the finding of the court that section 2(2)(a) of the IEBC Amendment Act variously offends the principles of good governance, transparency, integrity, social justice, equity, inclusiveness, equality, patriotism, national unity.
190. There is now the need for a legislation that will take such principles into account without losing sight of the fact that Kenyans are looking upon Parliament to pass legislations which will foster free, fair and credible elections and referenda.
191. In sum, this court finds and holds that to the extent that section 2(2)(a) of the IEBC Amendment Act provides for the nomination of 4 out of 7 members of the Selection Panel, then the said section 2(2)(a) of the IEBC Amendment Act is unconstitutional.

#### **Remedies:**

192. The foregoing discussion has resulted to the success and failure of the petition dated November 3, 2020 in equal measure. Whereas the petitioner failed to prove that Parliament and Parliamentary Service Commission are not distinct constitutional entities and that the IEBC Amendment Act violated the principles of separation of powers and the rule of law, he has, on the other side succeeded to prove that section 2(2)(a) of the [IEBC Amendment Act](#) is unconstitutional.
193. Since the petition is partly successful, this court is duty-bound to grant the most appropriate reliefs in the circumstances of this case. Even in instances where a party fails to ask for a specific relief, a court, depending on the nature of the matter ought to craft an appropriate relief.
194. Courts have severally rendered on reliefs. The Court of Appeal in [Total Kenya Limited v Kenya Revenue Authority](#) [2013] eKLR held that even in instances where there are express provisions on specific reliefs a court is not precluded from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties. The High Court in [Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others](#) [2018] eKLR held that article 23 of the Constitution



does not expressly bar the court from granting conservatory orders where a challenge is taken on the constitutionality of legislation.

195. In *Republic ex parte Chudasama v The Chief Magistrate's Court, Nairobi and another* Nairobi HCCC No 473 of 2006, [2008] 2 EA 311, Rawal, J (as she then was) stated that:

While protecting fundamental rights, the court has power to fashion new remedies as there is no limitation on what the court can do. Any limitation of its powers can only derive from the Constitution itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the Court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal. See *Gaily v Attorney-General* [2001] 2 RC 671; *Ramanoop v Attorney General* [2004] Law Reports of Commonwealth (From High Court of Trinidad and Tobago); *Wanjuguna v Republic* [2004] KLR 520...The court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many faceted jurisdiction and discretionary powers of the High Court. See *The Judicial Review Handbook* (3<sup>rd</sup> Edn) by Michael Fordham at 361.

196. The Constitutional Court of South Africa in *Fose v Minister of Safety & Security* [1977] ZACC 6 emphasized the foregoing as follows: -

Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.

197. There is no doubt that the Selection Panel completed its mandate and recommended persons who were eventually appointed as Commissioners of IEBC. The said persons are now in office.
198. One of the reliefs expected in this matter in view of the declaration of unconstitutionality of section 2(2)(a) of the *IEBC Amendment Act* has to do with the aftermath of what the Selection Panel yielded. It is expected that a further declaration will issue nullifying the nomination process and orders will then follow nullifying the appointment of the Commissioners who are deemed as fruits of a poisoned tree. The court is then expected to order Parliament to come up with a new law and that the nomination process be once again undertaken.
199. This court agrees to that general expectation. However, in the unique circumstances of this case, the court will decline the invitation for two reasons. The first reason is on non-joinder and the second one is on the effect of such orders to the country.
200. On the issue of non-joinder, the petition was filed when the IEBC Amendment Act had been passed into law, but the Selection Panel was yet to be appointed. Later, the Selection Panel was put in place. On learning of that development, the petitioner filed the notice of motion dated April 27, 2021. The application sought to stay or suspend the appointment of the Selection Panel which had been constituted vide Kenya Gazette Notice No 4004 of April 26, 2021. The application also sought for service of the application upon the members of the Selection Panel through the Hon Attorney General.



201. This court heard counsel on the best way forward in respect to the application. The court then directed that the application be heard together with the petition which had by then been fixed for hearing.
202. One of the reasons why this court made that direction on the application was that the application did not in any way seek to enjoin the members of the Selection Panel as parties to the petition. Likewise, there was no attempt to amend the petition. The result was that the petitioner was using the application to expand the petition without properly amending it. Further, the status of the members of the Selection Panel sought to be served through the Hon Attorney General was not clear. Were they coming on board as respondents or interested parties or otherwise?
203. The correct procedure to have been adopted by the petitioner was to apply to court to amend the Petition and introduce the new cause of action which was the appointment of the Selection Panel. The petitioner would then have clearly indicated how the members of the Selection Panel would participate in the matter and the amended petition would have had concise prayers of the new cause of action. By doing so, the petitioner would have taken the game to a level playing field.
204. As the petitioner failed to do so, this court did not find any justification to deal with that application first or to issue any interim conservatory orders. The court directed that the application be heard together with the Petition.
205. Given that the members of the Selection Panel constituted vide Kenya Gazette Notice No 4004 of April 26, 2021 were not enjoined as parties in this matter, this Court cannot, at the tail-end of the proceedings, issue any orders to the detriment of any of them. If the court does so then it will infringe on the said members' right to a fair trial which is guaranteed under article 50(1) of the Constitution. Suffice to say, the right to a fair trial is one of the rights which cannot be limited in any manner whatsoever as provided for under article 25 of the Constitution.
206. The second reason why the expected orders cannot issue is on the effect of such orders to the country. At the moment, the IEBC is at the heart of preparing for the next general elections. The elections are expected to be conducted in the next 8 months.
207. If this court makes an order that the four new Commissioners do vacate office, then going by binding precedents IEBC will lack quorum to conduct its affairs. The effect of such an order will mean that Parliament will have to come up with another legislation and the process of selecting the four Commissioners to begin afresh. If this court allows such to happen, then high are the chances that IEBC will not be able to prepare and conduct the next general elections.
208. This court ought to be cautiously reminded that the general elections are constitutionally-provided and no court can temper with constitutional timelines. The position was affirmed by the Supreme Court in Civil Application No 6 of 2014 *George Mike Wanjohi v Steven Kariuki & 2 others* [2014] eKLR. In the case, the court was confronted with the question as to whether it could stop the constitutionally triggered timeline under article 101(4) of the *Constitution* which made it a requirement that a by-election shall be held within 90 days of the occurrence of a vacancy in the office of a member of National Assembly elected under article 97(1)(a) or (b) or of the Senate elected under article 98(a) of the *Constitution*.
209. In making the finding that constitutional timelines must be kept sacred, the learned judges made the following finding: -
- [45] Consequently, any statutory process or act done ultra vires the provisions of the Constitution, this court will not hesitate to declare them void. Hence, a stay order will not be tantamount to stopping a constitutional process. We hasten to add that what the Court cannot do is to



extend the 90 days' period within which the election should be held. That period is sacred as it is provided for in the Constitution and even this court, a creature of the Constitution, cannot extend it.

210. In essence, if this court puts IEBC in a situation where it cannot prepare and conduct the next general elections, then it will be creating a constitutional crisis. As I stated in Petition No E019 of 2021 *Law Society of Kenya v Anne Kananu Mwenda & others* [2021] eKLR: -

41. A court of law must, as a primary duty and in public interest, uphold the Constitution. A court must not in any manner whatsoever create a constitutional crisis. It remains the cardinal duty of a court to foresee such a crisis and take steps to avoid it.

211. Before I end this discourse, I wish to point out that despite the fact that four Commissioners of IEBC resigned, the positions remained vacant for such a while. The reason was that there was no law in place on how other Commissioners were to be appointed. The scenario resulted from the amendments which were made through section 6 of the *Election Laws (Amendment) Act*, No 36 of 2016 which stated that: -

6. The selection panel shall stand dissolved upon the requisite appointments being made under paragraph 4.

212. The above selection panel was wound up when the seven Commissioners (which included the Chairperson) were appointed on January 17, 2017. The next law on the appointments was the IEBC Amendment Act which came into effect on November 13, 2020. Interestingly, the Selection Panel provided for in the IEBC Amendment Act also stood dissolved on the appointment of the four Commissioners.

213. As at now, there is no standing Selection Panel for nominees for appointment as IEBC Commissioners. It, therefore, means that whenever a vacancy in the IEBC Commissioners arises, Parliament will first have to come up with the law on the next Selection Panel.

214. There is, hence, the need for Parliament to relook at the law on the Selection Panel. Even though the Selection Panel may not necessarily have to be a Standing committee, the law may provide for the manner in which the next Selection Panel may be constituted without the need to first enact a new law to that end.

215. Further, in order to aid IEBC to operate without any legal hitches on its quorum, there is need for Parliament to consider the period within which any vacancies which may arise in IEBC Commissioners must be filled.

216. In the end, in the course of the tour of navigating the issue of the appropriate reliefs, this court will bear the foregoing in mind.

### **Disposition:**

217. As I come to the end of this judgment, this court wishes to apologize to the parties for the late delivery of this decision. The delay was mainly occasioned by the pressure of work within the Constitutional and Human Rights Division of the High Court.

218. The court, thereby, wishes to thank the parties and their counsel in the patience they extended to the court and their courteous participation in this matter.

219. In the end, the petition partly succeeds and the following final orders hereby issue: -

(a) The notice of motion dated April 27, 2021 be and is hereby dismissed.



- (b) A declaration hereby issues that to the extent that section 2(2)(a) of the *Independent Elections and Boundaries Commission (Amendment) Act* No 18 of 2020 provides that the Parliamentary Service Commission shall nominate 4 out of 7 members of the Selection Panel for the nominees for the appointment of members of the IEBC, then the said provision variously infringes article 10 of the *Constitution* and is, therefore, unconstitutional.
- (c) An order hereby issues quashing section 2(2)(a) of the *Independent Elections and Boundaries Commission (Amendment) Act* No 18 of 2020.
- (d) The Hon Deputy Registrar of this court shall transmit certified copies of this judgment to both Speakers of Parliament.
- (e) There shall be no orders as to costs as the matter is a public interest litigation.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2021**

**A. C. MRIMA**

**JUDGE**

**JUDGMENT VIRTUALLY DELIVERED IN THE PRESENCE OF:**

**OKIYA OMTATAH OKOITI, THE PETITIONER IN PERSON.**

**MR. KURIA THANDE, LEARNED STATE COUNSEL INSTRUCTED BY THE HONOURABLE ATTORNEY GENERAL FOR THE 1ST RESPONDENT.**

**MR. MWENDWA, LEARNED COUNSEL FOR THE 2ND RESPONDENT.**

**MISS. THANJI, LEARNED COUNSEL FOR THE 3RD RESPONDENT.**

**MR. WAMBULWA, LEARNED COUNSELS FOR THE 4TH RESPONDENT.**

**MR. OSIEMO, LEARNED COUNSEL FOR THE 5TH RESPONDENT.**

**ELIZABETH WANJOHI – COURT ASSISTANT**

