



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 129 OF 2017

**IN THE MATTER OF: SECTION 2 (d) & (e), 6 (8A) (1) 2) & (3) OF THE ELECTIONS LAW
(AMENDMENT) ACT NO. 36 OF 2016.**

**IN THE MATTER OF: SECTION 17 (5) (C) (j) AND SECTION 26 OF THE ELECTIONS LAW
(AMENDMENT) ACT NO. 36 OF 2016.**

**IN THE MATTER OF: THE TENDER NO. IEBC/05/2016-2017 FOR THE CONSULTANCY
SERVICES FOR THE AUDIT OF THE VOTER REGISTER.**

**IN THE MATTER OF: THE DECISION BY THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION DATED 02/12/2016 AWARDED A TENDER TO KPMG FOR
THE AUDIT OF THE VOTERS REGISTER**

**IN THE MATTER OF: ARTICLES 10, 38, 81, 86 (4), 88, 249 (1) (b) OF THE CONSTITUTION
OF KENYA, 2010.**

**IN THE MATTER OF: NOTIFICATION OF AWARD OF TENDER NO. IEBC/05/2016-2016
FOR THE PROVISION OF CONSULTANCY SERVICES FOR THE AUDIT OF THE VOTER
REGISTER**

**IN THE MATTER OF: IN THE MATTER OF DECLARATION OF VACANCY OF THE
POSITION OF THE CHAIRPERSON AND SIX MEMBERS OF THE INDEPENDENT
ELECTORAL AND BOUNDARIES COMMISSION VIDE SPECIAL ISSUE OF KENYA
GAZETTE NO. 121 OF 6TH OCTOBER 2016.**

**IN THE MATTER OF: DEGAZETEMENT OF THE CHAIRPERSON AND SIX MEMBERS
OF INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....RESPONDENT

AND

KPMG.....1ST INTERESTED PARTY

COALITION FOR REFORMS & DEMOCRACY

[CORD].....2ND INTERESTED PARTY

JUDGMENT

1. This judgment determines the humble petition of **OKIYA OMTATAH OKOITI** (hereinafter known as the Petitioner), being an adult citizen of the Republic of Kenya, resident of Nairobi County.
2. The Petitioner 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, which is a legal trust, incorporated in Kenya and founded on republican principles and was set up with the purpose of promoting democratic governance, and economic development and prosperity.
3. The Respondent is the **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION** established under Article 88 of the Constitution with the express mandate of conducting and supervising elections and referenda as well as other elections under the Constitution and other laws.
4. **The 1ST Interested Party KPMG** is described as a financial audit tax and advisory services firm.
5. The 2ND Interested Party is The **COALITION FOR REFORMS AND DEMOCRACY [CORD]** a Coalition of political parties comprising the Orange Democratic Movement, the Wiper Democratic Party and the Forum for the Restoration of Democracy- Kenya (FORD – KENYA) registered under the Political Parties Act and each and all the constituent parties are registered under the Political Parties Act.
6. The petitioner as per his amended petition dated 5th April 2017 seeks from this court the following principal reliefs:

*i. **DECLARATION be made that the letter dated 2nd of December, 2016 by the Respondent to the Interested Party notifying the award to the interested party herein, for Tender No. IEBC/05/2016-2017 for the Consultancy Services for Audit of the Voter Register was made in violation of section 6 of the Election Laws (Amendment) Act, No.36 of 2016, ARTICLES 10, 38, 81, 86 (4), 88, 249 (1) (b) OF THE CONSTITUTION OF KENYA and therefore is null and void.***

*ii. **A DECLARATION be made that the purported stakeholders’ meeting convened by the Respondent on Friday 14th October 2016 to discuss the implication of the new election laws and the audit of the voter register did not meet the threshold for consultation and public participation contemplated under Article 10 of the Constitution and section 17(5) of the Election Laws Amendment Act 2016 and is therefore unconstitutional to the extent of irregularity and illegality.***

*iii. **A DECLARATION be made that the decision by the Respondent to undertake an audit of the Register pursuant to section 6 of the Election Laws Amendment Act No. 36 of 2016 in the absence of a properly constituted Respondent Commission is in contravention of Article 10, and 249, and section 35 of the Election Laws Amendment Act No. 36 of 2016 and is therefore illegal, irregular, and unconstitutional.***

*iv. **A DECLARATION be made that the audit contemplated under section 6(3) of the Election Laws Amendment Act No. 36 of 2016 as read together with section 17(5) (c) includes a system audit of Biometric Voter Registration kits, Electronic Voter Identification Devices (EVID), Election Results Transmission System in accordance with section 17(5) (c) of the Election Laws Amendment Act No. 36 of 2016.***

v. **D1. A DECLARATION THAT the contract entered between the Respondent herein the Independent Electoral and Boundaries Commission and the 1st Interested Party KPMG, on the 31st of March, 2017 and made public vide a media release of 4th April, 2017 engaging KPMG to audit the register of voters as required by section 8A of the Election Laws (Amendment) Act, 36, 2016 for the purposes of: (i) Verifying the accuracy of the register; (ii) Recommending mechanism of enhancing the accuracy of the register and; (iii) Updating the register is irregular, illegal and be and is hereby declared null and void ab initio.**

vi. **D2. A DECLARATION THAT verification of biometric data done pursuant section 6A of the Election Laws (Amendment) Act, 36, 2016 carried out on the basis of the contract entered into between the Respondent herein the Independent Electoral and Boundaries Commission and the 1st Interested Party KPMG, on the 31st of March, 2017 and made public vide a media release of 4th April, 2017 engaging KPMG to audit the register of voters as required by section 8A of the Election Laws (Amendment) Act, 36, 2016 is irregular, illegal and be and is hereby declared null and void ab initio.**

vii. **E. AN ORDER OF PERMANENT INJUNCTION be issued restraining the Respondent from issuing any award or entering into any contract with the interested party or any other party pursuant to Tender No. IEBC/ 05/2016-2017 for Consultancy Services for the Audit of the Voter Register except in accordance with the Constitution and all relevant law.**

viii. **F. AN ORDER DIRECTING THE RESPONDENT, within seven (7) days from the Order of the court to convene a National Stakeholders meeting with all relevant agencies, organs of Government and political parties to come up with a proper framework, methodology and terms of reference for an audit of the Voter Register contemplated under section 6 of the Election Laws Amendment Act No. 36 of 2016.**

ix. **G. The costs of this petition be awarded to the petitioner be in the cause.**

7. The petitioner's case as per his humble petition and sworn affidavit in support is that the Respondent herein, the **Independent Electoral and Boundaries Commission** hereinafter called the Commission, by a letter dated 2nd of December, 2016 made a notification of award to **KPMG**, the interested party herein, for Tender No. IEBC/05/2016-2017 for the Consultancy Services for Audit of the Voters Register.

8. It is alleged by the petitioner and the second interested party CORD that the said award was purportedly being made pursuant to provisions of section 6 of the Election Laws (Amendment) Act, No.36 of 2016.

9. That prior to the award, the Respondent published on its website Tender No. IEBC/EO1/05/2016-2017 being request for Expression of Interest for Consultancy Services for the Audit of the Voters Register.

10. That vide a press statement published in the Respondent's Website, the Respondent indicated that it had shortlisted eleven firms for purposes of consideration of the Tender. The firms are:

i. KPMG Kenya

ii. Data Science Limited

iii. Smart Application International Limited

iv. Institute of Education in Democracy

v. ACTS Business Limited

vi. LANTeck Africa Limited

- vii. Campton Limited
- viii. Ernest and Young LLP
- ix. PKF Consulting
- x. Olsen Limited
- xi. Bidvest Paper Plus Proprietary Limited

11. It is further claimed that the Respondent upon evaluation of the aforesaid tenderers considered that six (6) of the eleven (11) firms had met the preliminary requirements and were issued with a request for proposals.

12. That of the six (6) shortlisted firms, the Respondent in its press statement stated the only the following four(4) firms submitted technical and financial proposals.

- i. KPMG Kenya
- ii. ACTS Business Limited
- iii. LANTeck Africa Limited
- iv. Ernest and Young LLP

13. That on Friday 14th October 2016, the Respondent purported to hold a Stakeholders' Meeting ostensibly to discuss ***the implication of the new election laws and the audit of the voter register.***

14. It is alleged by the Petitioner that the Respondent and the 1st Interested Party KPMG entered into a contract on the 31st of March, 2017 which by a media release of 4th April, 2017, the 1st Interested Party KPMG informed the public that the Respondent, which is the Independent Electoral and Boundaries Commission had engaged it[KPMG] to audit the register of voters as required by section 8A of the Election Laws (Amendment) Act, No. 36, 2016 for the purposes of:

- a. Verifying the accuracy of the register;
- b. Recommending mechanism of enhancing the accuracy of the register and;
- c. Updating the register.

15. According to the petitioner, the said stakeholders' meeting did not involve the key decision making organs and/ or offices of political parties and that it is *not the consultation contemplated in Section 17(5) of the Election Laws Amendment Law No. 36 of 2016 which calls for consultation with relevant agencies, institutions and stakeholders, including political parties in making regulations for the implementation of the said section and the Act.*

16. The petitioner averred that Section 6 of the Election Laws Amendment Act, 2016 amending Section 8 of the Election Act, 2011 provides that the Commission may at least six months before a general election, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of—

- (a) verifying the accuracy of the Register;
- (b) recommending mechanisms of enhancing the accuracy of the Register; and
- (c) Updating the register.

17. That under the new Section 8A (3) of the Election Act, 2011, for purposes of the first general election after the commencement of this section, the Commission shall, within thirty days of the commencement of this section, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of—

(a) verifying the accuracy of the Register;

(b) recommending mechanisms of enhancing the accuracy of the Register; and

(c) Updating the register.

18. It was averred by the petitioner that the ultimate objectives of the audit as set out under the new section 8A of the of the Election Act, 2011 is to verify the accuracy of the register and update it, which objective cannot be realized in the absence of an agreed methodology, criteria and or benchmarks for the audit of the register of voters.

19. The petitioner avers that under Section 6(3) of the Election Laws Amendment Act No. 36 of 2016 as read together with section 17(5) (c), a system audit includes audit of Biometric Voter Registration kits, Electronic Voter Identification Devices (EVID), Election Results Transmission System.

20. Further, that in the **Presidential Election Petition No.5 of 2013 (Raila Odinga and 5 others Versus the Independent Electoral and Boundaries Commission)** the Commission presented different versions of the register of voters variant from what was gazetted before the election and that in this abundance of confusion, there is no clarity as to which register is being subjected to the audit.

21. Further, that the history behind the enacted Election Laws (Amendment) Act, 36 reveals that it was a product of a long fought battle and process leading to a negotiated bipartisan legislation. This bipartisan legislation agreed on among other key issue the use of biometrics in voter registration and integrated sharing of data as well as audit of the register by an internationally reputable firm.

22. It is therefore the petitioner's concern that the Respondent has not only acted maliciously and in a suspicious manner to dilute the gains in the Amendment Laws but has also sponsored Court Petitions and recommended rules and regulations to Parliament whose effect would be to undo the entire Election Laws Amendment Act, 2016.

23. In addition, it is claimed that the Respondent has prepared draft regulations for tabling with the National Assembly Justice and Legal Affairs Committee whose effect would be to negate and undo the entire gains of the Election Laws (Amendment) Act No. 36 of 2016, which is further evidence of bad faith.

24. The petitioner alleges and verily believes that the intended audit of the register of voters is clouded with opaqueness, secrecy and lack of accountability since no methodology or criteria for the audit has been disclosed to ensure the objectives set out in law are realized. In addition, it is alleged by the petitioner that the Respondent set out irrelevant specifications during the advertisement of the tender having failed to seek stakeholders' views and that the Commission itself having no previous experience of offering tenders for audit of the Register of Voters and therefore the entire process was tainted with speculation, guesswork and experimentations that offends the objectives of the law set out under section 8A of the Act as amended.

25. In the view of the petitioner, the objective of ascertaining the accuracy of the Register of Voters can only be realized if the biometric data in the register is cross-authenticated with the data from the Registrar of Persons, as well as the Registrar of births and deaths to weed out dead, underage and cases of double registration. However, that in the present scenario, no criteria has been set out by the Commission to ensure the audit firm is availed with the above information and therefore the proposed audit will amount to nothing but an exercise in futility.

26. It is also claimed that the audit firm that was awarded the tender to audit the register has no demonstrable experience of undertaking a similar task in any other jurisdiction in the world and neither have any guarantees be given on its ability and capacity to undertake such an important exercise.

27. Further, it is averred that the elections of 7th August, 2017 largely if not wholly depends on the authenticity of the voter register and the award and process of audit of the register should therefore be done in accordance with both the spirit and letter of the Election Laws (Amendment), Act No. 36 of 2016.

28. The petitioner complains that the Respondent's decision to appoint an audit firm and create a methodology and criteria of voter registration audit without consultation of key players is illegal, irrational and procedurally improper; and that there are anomalies in the voter registration process itself.

29. The petitioner's greatest concern is that the voter register in place as of now has significant and weighty discrepancies. For instance, that on the Tuesday January 2017 a news paper article reporting on the conference attended by the new IEBC team led by the Chairman Wafula Chebukati stated that more than 128,000 people shared identification details in the voters register.

30. Further, it is claimed by the petitioner that in as much as the IEBC Chairman strives to down play the figures by alleging that the duplicated Identity card Numbers are only 0.8 percent of the larger voter population, **the fact is that most affected citizens are from the Applicant's strong hold areas.** As such, that the Commission should stay minded and focused in coming up with a quick solution to ensure all voters whose identity cards are shared with other persons get exclusive rights to the said identities well in advance before the elections.

31. Further to this, it is alleged by the Petitioner that the Identity Numbers of other prominent persons have been tampered with which goes to show that indeed the electoral commission's register has been corrupted. For instance that the Former President Daniel Moi whose ID'S coding is quite unique (0000001) was used to register one Joseph Marrion Nchabani Mwika. Consequentially, Mr. Moi's name does not appear in the BVR register, and that Former President Kibaki's Identity Card Number was also used to register eight different voters.

32. It was further alleged that The Applicants; Coalition for Reforms and Democracy Principals were not exempted either in this massive voter registration anomaly in that on or about 11th January 2017 Mr. Kalonzo Musyoka discovered that he shared an identity card number with one Salome Njoroge, and that a similar incident was experienced by the Coalition President Mr. Raila Odinga on two separate occasions where his ID card was shared with other persons.

33. The petitioner claims that following a press release statement, the IEBC stated that among the 128,000 persons with identity card anomaly on the voter register, the Commission identified 107, 777 records showing that it was the same Identity with different names. That this therefore calls for accountability on the National Registration Bureau to make clarification on the same; and that at the end of clarification of the 128, 000 persons, the IEBC declared that only 50, 174 records of voters were legitimate and as such the rest were fake.

34. In the petitioner's view, the intended audit process of the register of voters is clouded with opaqueness, secrecy and lack of accountability since no methodology or criteria for the audit has been disclosed to ensure the objectives set out in law are realized. And that with these massive anomalies it is quiet convincing that the Respondent's intention is to interfere with the voter register.

35. The petitioner maintains that the electoral process and especially the voter register verification is marred with mysteries that are not friendly to the democratic spirit that the process deserves; that there have been reports of tampering with the BVR kits as well as theft escapades being linked to the referenced BVR kits.

36. Further, the petitioner claims that the Respondent's BVR Kits were in the recent past stolen from Arabia Mandera where the Respondent confirmed that voter transfer forms-33 duly filled and 82 Identity

Cards were swiped, a notebook with 500 names, a printer and one acknowledgement slip was also nabbed. That despite information that on the 12th February 2017 BVR Kits were found to be used for registration of unknown people were nabbed in Eastleigh, the Respondent has moved it alleging that the items did not comprise the BVR Kits.

37. It is therefore the petitioner's view that deliberate and conscious effort has to be made by all the parties concerned in verifying the accuracy of the register, updating it and ensuring that an efficient voter register is put up awaiting the general elections and that this cannot be realized in the absence of an agreed methodology, criteria and or benchmarks for the audit of the register of voters.

38. The petitioner claims that the Independent Electoral and Boundaries Commission should not proceed with the audit of the voters register without consultation and or engagement with the stakeholders including political parties in designing the criteria and or the methodology for the audit as mandated by the law.

39. He alleges that it is a disastrous and severe error for the Respondent Commission to go ahead and hand over the voter registration auditing work to KPMG, which is the 1st Interested Party, a firm that has not satisfactorily proven its capability or qualifications to the said job except by word of mouth as seen in the Respondent's and the 1st Interested Party's Replying Affidavits.

40. In addition, the petitioner claims that despite the Interested Party claiming to have an International Partner, the Respondent as well as the Interested Party have not remotely demonstrated or shown which other International partner they are willing to work with hence, it is clear that the Respondent's decisions are made for an illegal, improper motive and for extraneous reasons.

41. It is further claimed by the petitioner that the Respondent in failing to carry out proper stakeholder's consultation also failed to take into account international best practice including the Nigerian model of audit of the voters register where the Nigerian equivalent of our IEBC in the 1st instance set out to audit the register resulting in 650,000 double registration being detected. That upon carrying out further audit using different methodology and applying different parameters, the second audit yielded 10,000,000 double registrations being detected and permanent chip cards for voter registration and identification issued. That therefore these best practices and model or methodology are issues only a properly constituted Commission could apply its mind to, taking into account stake holder involvement.

42. The petition which was supported by the affidavit sworn by the **petitioner Mr Okiya Omtatah Oloit** and a further affidavit sworn in response to the respondent's and 1st interested party's replying affidavits. The petitioner deposes, reiterating the contents of the petition and further states that the respondent's actions are inconsistent with and or are in contravention of the Constitution in that:

i. The decision of the Respondent is in breach of Article 10 of the Constitution on the national values and principles of governance, and which principles and values bind all persons and state organs and which must be applied in interpreting, enacting or implementing laws or making policy decisions.

ii. The decision of the Respondent is in breach of Article 38 of the Constitution or at least threatens the enjoyment of the rights guaranteed under the said Article namely the rights to- 38(1) (a) form, or participate in forming, a political party; b) to participate in the activities of, or recruit members for a political party c) to campaign for a political party or cause; (38) (2) Every has a right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for;

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member;

(38)(3) every adult citizen has the right, without unreasonable restrictions;

(a) to be registered as a voter;

(b) any office of any political party of which the citizen is a member;

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

43. The petitioner further claimed that the audit of the voters register and its authenticity is very crucial to the enjoyment of the political rights under Article 38 stated above and therefore any decision or exercise that would affect the enjoyment of the stated right must be above board, be inclusive, involving the broadest possible consultation incorporating the key players and stake holders who are the competing political parties.

44. That therefore the decision by the Respondent purporting to consult the amorphous outfit called the Political Parties Liaison Committee is mischievous and intended to circumvent the requirement to form a technical committee to set the parameters and methodology and objectives of what the audit should achieve.

45. According to the petitioner, among other things that required to be agreed on is what constitutes an international firm for purposes of a voter register audit and therefore, the decision of the Respondent is in breach of the its duty under Article 249 of the Constitution on the objects of the Commissions and Independent Commissions Article provides as follows:

249 (1) “The objects of the commissions and the independent Offices:

(a) Protect the sovereignty of the people;

(b) Secure the observance by all state organs of democratic values and principles; and

(c) Promote constitutionalism.

(2) “The Commissions and the holders of independent offices;

(a) are subject only to this Constitution and the law; and

(b) are independent and not subject to the direction or Control by any person or authority.

46. On the applicability of the Election Laws (Amendment) Act no. 36 of 2016, the petitioner claimed that it was averred that Section 2 (d) of the Election Laws (Amendment) Act No. 36 of 2016 defines the register of voters by deleting the expression “Principal Register” of voters and substituting therefore the expression “Register of voters.” That therefore the amendment contained in this definition part of the Act is crucial in light of the Supreme Court finding in **Raila Odinga versus the Independent Electoral and Boundaries Commission Supreme Court Petition No. 5 of 2013**, that there were multiple registers relied upon by the Respondent.

47. The petitioner claims that in the internal management brief of September 26th 2016 the Respondent IEBC admitted that the post 2013 and the pre 2013 registrations are yet to be integrated into a single voter register.

48. It was alleged by the petitioner that the Respondent IEBC has to-date not gazetted an official voter register and if it has not opened it to stake holders and public scrutiny and public participation in the circumstances cannot properly engage any firm to carry out an audit as it is not clear what this firm will be auditing.

49. That Section 2 (e) of the Election Laws Amendment Act, 2016 amends the Act by inserting a new definition that includes the term biometric which means **“unique identifier or exhibits including fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves, DNA and signatures and integrated electronic electoral systems which refers to”** a system that includes biometric voter registration, biometric voter identification and electronic results transmission system.

50. That Section 17 of the Amendment Laws mandates the Commission to consult all relevant agencies, institutions and stakeholders **including political parties to make regulations for the implementation of this section and in particular regulations providing for:**

(a) Mechanisms for the conduct of a systems audit;

(j) The operations of the technical committee under subsection

51. It was averred that the Respondents’ decisions are made for an illegal, improper motive and for extraneous reasons.

52. **On the provisions of the IEBC Act, 2011, it was averred that** Section 33 of the Election Laws (Amendment) Act No. 36 of 2016 amended section ??(sic) of the Independent Election and Boundaries Commission Act providing for the composition and vacancy in the Commission **as well as the procedure for appointment of commissioners in the event of a vacancy in the Commission.**

53. According to the petitioner, the Respondent had no Commissioners in office at the time of the impugned decision-making to procure the audit firm and therefore the audit subject of the impugned decision being a policy issue within the ambit of the Commissioners, cannot be conducted in the absence of Commissioners. To this extent, the petitioner averred that the decision of the Respondent to commence the audit exercise and to award the tender to KPMG by the Chief Executive Officer of the Commission is *ultra vires* the powers of the Chief Executive Officer of the Respondent or any other technical member of the Commission.

54. On the distinction between the powers of the commissioners and the secretariat, it was averred that Section 35 of The Election Laws (Amendment) Act, No. 36 of 2016 makes a distinction in the functions of the Commission and the Secretariat and that therefore the functions must be carried out in accordance with the law and the Constitution. Further, that the Secretariat can only perform administrative duties and implement policies formulated by the Commission not to make policy and implement it.

55. It was averred that the audit exercise was not an administrative function reserved for the Secretariat in the absence of the commissioners who by dint of the amendment Act are responsible of formulating policy.

56. The petitioner maintains that there was need for a policy formulation or direction by the Commissioners which in this case was absent and in the circumstances the decision to proceed with the audit and appoint a firm to carry out the audit contemplated under section 8 of the Amended Elections Act was *ultra vires* the powers of the Secretariat.

57. Further, it was deposed that pursuant to section 33 of the Election Laws (Amendment) Act, No. 36 of the 2016, amending section 7 of the Independent Electoral and Boundaries Commission Act, 2011, the President published a special gazette notice No. 121 of 6th October, 2016 declaring the position of chairperson and members of the Respondent Commission vacant.

58. That the President further caused to be published another gazette notice No. 31 of **24th October, 2016** appointing a selection panel comprising nine (9) members to carry out the advertisement, short listing, interviewing and recommending to Parliament, of the new nominees to the Commission.

59. That the interviews and appointment of the new Commissioners had not been concluded and there were no Commissioners in place to conduct the duty of formulating policy.

60. The Petitioner therefore avers that the decision to advertise and issue a notification of the award of Tender No. IEBC/05/2016-2017 to the 1st interested party herein KPMG is *ultra vires* the powers of the Respondent and that the said decisions is capricious, irrational and **Wednesbury** unreasonable;

61. Further, that the decision is against the legitimate and rightful expectations of the Petitioner and the millions of Kenyans who have a right to vote at the August, 8th elections in 2017. Further, that the Respondent's decision is unfair, discriminatory, arbitrary, inconsistent and capricious. That the Respondents' decision is actuated by malice and extraneous considerations other than the administration of justice. That the Respondent's decision is irrational, unjustifiable oppressive, punitive and an abuse of power taken in bad faith.

62. The Petitioner also averred that he was aware of the filing and determination of **Judicial Review Miscellaneous 648 of 2016 between Coalition for Reforms and Democracy on the one hand and the Respondent and the 1st Interested Party herein** which case was dismissed on a technicality without the court determining the merits therein.

63. On jurisdiction of this court, the petitioner averred that this court has jurisdiction to entertain and grant the orders sought.

64. The Petition was wholly and in all material particulars supported by the 2nd interested party Coalition for Reforms and Democracy [CORD] which was enjoined to these proceedings by consent of all the parties.

THE RESPONDENT'S CASE

65. In opposing the petition as amended on 5th April, 2017, the respondent Independent Electoral and Boundaries Commission [IEBC] filed a replying affidavit sworn by EZRA CHILOBA, the Chief Executive Officer/Commission Secretary of the Commission who deposed that the enactment of the Elections Laws Amendment Act No 36 of 2016 Section 8(A) (3) of the Elections Act, 2011, as amended by the Election Laws (Amendment) Act, 2016 requires the Commission to, within 30 days of the commencement of the law, engage **a professional reputable firm** to conduct an audit of the Register of Voters.

66. That pursuant to the above provisions, on 10th October 2016, the Commission invited, through Tender No. IEBC/EOI/05/2016-2017, and advertised a Request for an Expression of Interest (EOI) for consultancy services from suitably qualified firms with appropriate experience and expertise to conduct the audit of the Register of Voters, out of which a total of eleven (11) firms responded and submitted bids.

67. That upon evaluation of the submitted bids, the Commission's Tender Evaluation Committee found that only six (6) firms had met the preliminary requirements as set out in the EOI document annexed to the replying affidavit and were recommended and issued with a Request for Proposals [RFPs].

68. That out of the six firms invited to submit RFPs, only four (4) namely, Lantech Africa Ltd, Business Systems Ltd, KPMG Kenya and ERNST & Young LLP submitted their Technical and Financial proposals.

69. That upon the Technical Evaluation, and guided by the provisions of the Public Procurement and Asset Disposal Act (PPADA), the Commission's Tender Evaluation Committee found that only Ernst & Young LLP and the 1st Interested Party KPMG Kenya, were technically responsive and were therefore recommended to proceed to the Financial Evaluation stage.

70. That upon Financial Evaluation based on the formula prescribed in the tender document, the Evaluation Committee recommended KPMG Kenya for the award of the tender having attained the highest score for both the technical and financial proposals, with the redacted sum.

71. That on 2nd December 2016, the successful bidder, KPMG Kenya was notified of the Award of the tender.

72. That on 15th December 2016, the head of the Commission's Procurement unit issued a signed statement of professional opinion to the Accounting Officer, certifying that the Tender Evaluation Committee recommended the lowest evaluated bidder and that the procurement process complied with the provisions of the Public Procurement and Asset Disposals Act (PPADA).

73. That as the Commission was in the process of tendering for the Audit of the Voters Register, and cognizance of the weighty nature and the importance of the matter, and fully aware that the Section 6 of the Election Laws (Amendment) Act, 2016 does not require any stakeholder or public consultations, the Commission nevertheless held consultative meetings with political parties and Civil Society Organizations (CSOs).

74. That on 14th October 2016, at the Nairobi Safari Club, the Commission held a consultative meeting with over 40 political parties and Civil Society Organizations where two agenda items, namely the effect of the new electoral laws (the Election Laws (Amendment) Act, 2016 and the audit of the Register of voters) were discussed and that the Commission later organized a similar meeting with CSOs at the same venue.

75. That with respect to the Audit of the Register of voters, the participants were taken through best practices from 13 countries that had undertaken audits of voter registers.

76. That the 2nd Interested Party herein and the chairman of the Political Parties Liaison Committee (PPLC) were represented at the consultative meeting held on 14th October 2016 as shown by annex "EC.6" the meeting's Attendance Sheet duly signed by and/or for the 2nd Interested Party and the PPLC.

77. That at no point during the said consultative meetings did the Commission receive any objections, reservations or dissenting voices, comments or opinions with regards to the audit of the register of voters. Indeed, the Commission received very positive and constructive feedback at the consultative meetings.

78. That as is evident from the foregoing, the tendering process was conducted in accordance with the relevant provisions of the Public Procurement Asset Disposal Act [PPADA] and the law, and the Commission ensured that the necessary consultations with all the stakeholders were undertaken notwithstanding that this was not a legal requirement. That the process cannot therefore be faulted in any way, legally or otherwise.

79. That following the award of the said Tender to the 1st Interested Party, and being aggrieved by the decision of the Commission, on or about 21st December 2016, the 2nd Interested Party herein filed in this Honourable Court **Judicial Review Misc. Application No. 648 of 2016: R vs IEBC ex parte Coalition for Reform and Democracy.**

80. That on 30th March 2017, this Honourable Court (Mr. Justice Mwita, J) delivered the Judgment on the aforesaid Judicial review Application striking it out with no order as to costs as shown by annexure "EC.7" a copy of the said Judgment.

81. That following the said Judgment, on 31st March 2017, the Commission and the 1st Interested Party signed the contract on the tender for the Audit of the Register of Voters signaling the commencement of the work thereon.

82. That on 4th April 2017, the 1st Interested Party issued a Media Release to the effect that it had commenced the audit in accordance with the contract signed with the Commission and outlining the methodology to be employed, the terms of reference and the deliverables under the said contract, as shown by annexure "EC.8" a copy of the said Media Release.

83. That contrary to the contents of paragraph 10 of the Supporting Affidavit, the Commission indeed

held stakeholder consultative meetings although this is not a requirement under Section 6 of the Election Laws (Amendment) Act, 2016.

84. That Section 17 (5) of the Election Laws (Amendment) Act, No. 36 of 2016 relates to and concerns consultations in making regulations for the implementation of the Integrated Electronic Electoral System established thereunder.

85. That Section 17 (5) of the Election Laws (Amendment) Act, 2016 is irrelevant for the purposes of the audit of the Register of Voters. Significantly, the audit of the Register of Voters is not an audit on the Integrated Electronic Electoral System established under Section 17 (5) of the Election Laws (Amendment) Act, 2016 as the Petitioner seems to imply.

86. That whereas the law does not define the methodology to be used in auditing the Register of Voters, the Commission consulted stakeholders with a view to informing the methodology to be adopted for the process as stated hereinabove

87. That having received feedback from stakeholders at the meeting of 14th October 2016 and other consultative meetings held, and based on best practices in 13 countries, the Commission determined that the following criteria to be adopted by the successful firm for the audit of the Register of Voters:

(i). Review the legal framework relating to voter registration.

(ii). Review the voter registration process, voter transfer process and voter updates processes.

(iii). Review the Biometric Registration System Database that hosts data on registered voters.

(iv). Review the process of identifying and removing deceased voters from the register of voters.

(v). Assess the accuracy of the register of voters in terms of completeness of the details of voters' data, matching of voters details (Biometrics) to the voter.

(vi). Assess inclusiveness of the register of voters in relation to eligible voting population based on gender, age and geographic distribution.

(vii). Review and recommend improvement on existing mechanism for continuous update of the register of voters.

(viii). Analyze the security of the registration of voters' data and infrastructure.

(ix). Make recommendations for enhancing the accuracy and inclusiveness of the register of voters.

88. That the Commission also issued press statements on the progress that it was making in the preparations for the audit of the voter's register as shown by annexure EC.9" a copy of the Press Statement issued by the Commission in this regard.

89. That therefore, it is not correct that the audit is intended to take place without an agreed methodology, criteria and/or benchmarks as alleged in paragraph 15 of the Supporting Affidavit.

90. In addition, the respondent contented that in any event, at no time during the consultative meetings on 14th October 2016 and thereafter, did any stakeholder raise or present to the Commission any issue that is inconsistent with the methodology or criteria adopted by the Commission.

91. That there is a clear distinction between the audits anticipated under Sections 6 (3) of the Election Laws (Amendment) Act, 2016 on the one hand, and Section 17 (5) (c) on the other hand. Whereas Section 6(3) of the Election Laws (Amendment) Act, 2016 specifically provides for the audit of the

Register of Voters, Section 17(5) (c) is categorical that the audit contemplated thereunder is a Systems Audit in respect of the Integrated Electronic Electoral System comprising of the Biometric Voter Registration, Electronic Voter Identification and Transmission of elections results.

92. That the Commission did not and has never presented different versions of the same register of voters and the alleged confusion arising out of the alleged multiplicity of voters registers is therefore untrue, misplaced and unfounded.

93. That in Section 6 of the Election Laws (Amendment) Act, 2016 and Section 8A (1) of the Election Act, 2011, the requirement in respect of the audit firm is that of a professional reputable firm and not an international firm.

94. That the Commission never acted with malice or bad faith as alleged by the petitioner and that the audit of the Register of Voters is informed by a verifiable methodology or criteria and conforms to the letter and spirit of the Election Laws (Amendment) Act, 2016, which methodology includes a review on the process of identifying and removing deceased voters from the register of voters.

95. That in its Media Release of 4th April 2017 referred to hereinabove, the 1st Interested Party outlined a comprehensive methodology which includes a review of certified data from the Principal Registrar of Persons on National Identification Cards, a Review of the National Passports Register certified by the Director of Immigration, a Review of the certified Register of Death duly certified by the Registrar of Persons and Deaths, a Review of the certified Register of Births duly certified by the Principal Registrar of Persons and Deaths, and a Review of the Biometric data in the Voters Register with a view to confirm completeness and eliminate any duplication that may exist.

96. That in view of the above, it is baseless for the Petitioner to prophesy doom on the process of the audit of the Register of Voters as he purports to do in paragraph 23 of his Supporting Affidavit.

97. That the tender for the audit of the Register of Voters was awarded by the Commission to the 1st Interested Party after an evaluation based on among others general and specific experience related to the assignment. that during the tendering process, the bidders were required to provide for Technical Evaluation, a list of three projects that they had been engaged on audit of registers of voters or similar work with more than 10 million records, as well as letters of recommendation for the three projects.

98. That upon evaluation, the Commission's Tender Evaluation Committee found the 1st Interested Party to be the most responsive scoring 11 out of the possible 12 marks for the three projects, and 3 out of the possible 3 marks for the recommendation letters. The court was referred to the Evaluation Report herein as shown by annexure marked "EC.3", hence the Petitioner's allegations on the inexperience and incapacity of the 1st Interested Party are untrue, baseless and misplaced.

99. That the Commission carried out stakeholder consultations notwithstanding that such consultations were not statutorily necessary. Further, the methodology developed by the Commission was a product of the said consultations. Accordingly, the Petitioner's allegations of illegality, irrationality and procedural impropriety are baseless and unfounded.

100. That in any event, the said anomalies are the reason why Parliament found it necessary to carry out an audit of the Register of Voters which exercise should be left to take place and thereafter gauge its effectiveness against the said identified anomalies and not to cast aspersions of interference with the Register of Voters by the Respondent .

101. That in any event, it is not a requirement under the Elections Act, 2011 as amended by the Election Laws (Amendment) Act, 2016 that the audit firm awarded the tender for the audit of the Voters Register be an international firm or have international partners. but that the only requirement in this regard is that the firm be a professional reputable firm.

102. That the Petitioner has not demonstrated how the decision of the Commission is in breach of Article

10 of the Constitution as alleged .

103. That the Commission nonetheless held consultative meetings with political parties and other stakeholders notwithstanding the said consultations are not statutorily required for the process leading to the award of the tender for the audit of the Voters Register. Accordingly, the Commission is not in breach of Article 38 of the Constitution as alleged or at all.

104. Further, that contrary to the Petitioner's allegations, the Political Parties Liaison Committee (PPLC) is not an amorphous outfit and that indeed, the PPLC is established under Section 38 of the Political Parties Act to provide a platform for dialogue between the Registrar of Political Parties, the Commission and political parties.

105. that contrary to the Petitioner's averments in paragraph 45 of the Supporting Affidavit, there is no requirement in law for a technical Committee for the purposes of the audit of the Register of Voters. That the requirement for a Committee is only under Section 44 of the Elections Act, 2011 as amended by Section 17 of the Election Laws (Amendment) Act, 2016 on the use of technology for the purposes of an Integrated Electronic Electoral System.

106. That contrary to the Petitioner's averments in paragraph 46 of the Supporting Affidavit, it was not necessary to agree on "what constitutes an international firm" as this is not a legal requirement for the audit of the Register of Voters. That to the contrary, Section 8A of the Elections Act, 2011 as amended by Section 6 of the Election Law (Amendment) Act, 2016 stipulates that the Commission shall engage a professional reputable firm to conduct an audit of the Register of Voters.

107. That the Commission's advertisement for the EOI did not emphasize or require that potential bidders be international firms, and the Commission did not evaluate any of the bidders based on that criterion.

108. That the Petitioner has not demonstrated how the Commission has breached the provisions of Article 249 of the Constitution as alleged in paragraph 47 of the Supporting Affidavit or at all.

109. That contrary to the ex parte Applicant's allegations, the Commission is not required in law to Gazette the actual Register of voters but certify its compilation through a notice in the Kenya Gazette.

110. That in any event, the Commission had, prior to the 2013 General Elections, gazetted the compilation of a Voters Register, which Register was used for the 2013 General Elections and that this, together with the additions thereto as a result of subsequent voter registrations, is the Register that will be subjected to the audit.

111. Further, that Section 17 of the Election Laws (Amendment) Act, 2016 relates to the use of technology, specifically the Integrated Electronic Electoral System that enables biometric voter registration, electronic voter identification and electronic transmission of results. As such, the said Section 17 of the Election Laws (Amendment) Act, 2016 is irrelevant for purposes of these proceedings.

112. That it is not correct that the Commission has no Commissioners in office as alleged but that the Chairperson and members of the Commission were duly appointed via the Gazette Notice No. 399 and 400 dated 18th January 2017 as shown by annexure "EC.10" copies of the said Gazette Notices.

113. That according to the decision of the Supreme Court in **Supreme Court Petition No. 11 of 2014: Mable Muruli v Wycliffe Ambetsa Oparanya & 3 Others [2016] eKLR**, the Commission comprises the Commissioners as well as its employees who have been duly authorized hence, the decision taken by the Chief Executive Officer of the Commission duly authorized is deemed a decision of the Commission of the Commissioners and the Commission.

114. That upon appointment and assumption into office, the Commissioners ratified the decision to award the impugned tender to the 1st Interested Party hence the signing of the contract for the tender between the Commission and the 1st Interested Party.

115. That in any event, and as stated hereinabove, the methodology for the audit of the Register of Voters was subjected to views of stakeholders, and at no point during the consultative meetings with the 2nd Interested Party and other political parties, did the Commission receive any objections, reservations or dissenting voices, comments or opinions with regards to the alleged lack of commissioners to make the impugned decision. As such, the attempt to challenge the decision which was widely approved by the stakeholders is in bad faith and is not in public interest.

116. That in view of the foregoing, the Amended Petition is not merited and therefore this court should dismiss it with costs to the Commission.

THE 1ST INTERESTED PARTY'S CASE

117. In opposition to the petition, the 1st interested party **KPMG-Kenya** filed a replying affidavit sworn by **JOSPAT LEONARD MWAURA**, the Chief Executive Officer and Senior Partner of KPMG-Kenya.

118. According to the depositions of Mr Mwaura, KPMG is a member of KPMG International, a global network of independent member firms offering audit, tax and advisory services to business corporations, governments, public sector agencies and not-for-profit organizations. It operates in 152 countries and has more than 189,000 people working in member firms around the world. KPMG is committed to providing a consistent standard of service based on high order professional capabilities, industry insight and local knowledge, and that therefore KPMG is not just a financial audit firm as alleged by the petitioner in paragraph 3 of the supporting Affidavit.

119. Further, that KPMG has been recognized as an outstanding firm for its shared services and outsourcing advisory capabilities by the International Association of Outsourcing Professionals (IAOP) in its 2016 World's Best Outsourcing Advisors list, and that the audit firm was also recently crowned best in Risk Management Advisory (Top-tier) at the CFO Innovation Awards 2016.

120. That the 2nd Interested Party, Coalition for Reforms and Democracy [CORD] Party had previously filed a Judicial Review Application Number 648 of 2016 in which it sought orders whose outcome would have been the same as the consequence of the orders set out herein.

121. That KPMG was by letter dated 2nd December 2016 notified by the Respondent that it was the successful bidder of tender No. IEBC/EOI/05/2016-2017 and following the Judicial Review Application No 648 of 2016 in which an order of stay was granted, it was not possible to enter into contract with the Respondent and to commence audit work as anticipated.

122. That the said Judicial Review Application was eventually disposed of on 30th March 2017 whereupon, KPMG and the Respondent were able to proceed to conclude the contract and that by a contract dated 31st March 2017, the procurement process was completed and work thereon has already commenced.

123. That the Petitioner's assertions that there is a requirement for consultations to be held with various stakeholders before the audit of the register of voters can be undertaken is a misapprehension (deliberate or otherwise) of the provisions of the Elections Act which apply to the audit of the register of voters.

124. That Section 8A of the Elections Act is the only section that governs the audit of the register of voters and that the only obligation imposed upon the Respondent under that section is that the Respondent is to engage a professional reputable firm to conduct an audit of the Register of Voters upon which the firm so engaged is then required to conduct the audit and report to the Commission within a period of thirty (30) days.

125. That various safeguards are stipulated in the same section in that the report once received by the Commission is to be submitted to the National Assembly and the Senate and that there is a statutory obligation upon the Respondent to implement the recommendations of the audit report within thirty (30)

days of receipt of the report, and similarly submit its report to the National Assembly and the Senate.

126. That the provisions of section 17 of the Elections Laws (Amendment) Act No. 36 of 2016 amended section 44 of the Elections Act, deals with the use of technology. Section 17(1) deals with the establishment of an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

127. That Section 17(2) provides that the Commission shall develop a policy on the progressive use of technology in the electoral process while Section 17(3) requires the Commission to ensure that the technology in use is simple, accurate, verifiable, secure, accountable and transparent. Section 17(4) deals with the procurement and deployment of the technology while Section 17(5) deals with the consultations necessary in the implementation of such technology.

128. That from a reading of the above section it is clear that the section deals solely with the implementation of technology and has nothing to do with the audit of the Register of Voters. Further, that the integrated electronic electoral system contemplated under Section 44 is yet to be implemented, let alone being subjected to a systems audit.

129. That the obligation for the Respondent to consult relevant agencies, institutions and stakeholders including political parties and to make regulations for the implementation of that section relate specifically and only to the establishment of the integrated system hence the Petitioner cannot purport to read into a statute what the said statute does not provide.

130. That KPMG had outlined in its Technical Proposal that one of the activities it would undertake is consultations with various stakeholders, and that the primary stakeholder in the audit of the Register of Voters is the electorate, whose sovereign power and political rights need to be safeguarded by verifying the Register of Voters. In addition, it was contended that KPMG has already commenced this process of stakeholder engagement, issued a press release on 4th April 2017 which has been shared with key stakeholders identified in consultation with the Respondent.

131. It was further deposed that the Respondent has sent introductory letters to key stakeholders and meetings have been organized, with the first of these to be held on Monday 10 April 2017 as shown by a copy of the letter sent to these stakeholders, including the second interested party.

132. That the allegation that there is absence of methodology, criteria or benchmarks for the audit of the Register of Voters is both unfortunate and untrue since KPMG outlined the methodology, work plan and approach that it would use in the audit exercise.

133. It was also deposed that in accordance with the methodology inherent in the Constitution, KPMG's technical proposal outlined a methodology which indicated that it will be necessary to obtain all required data and information including the Register of Voters, relevant record counts and information from other databases such as the Register of Births and Deaths for comparative purposes and in order to perform duplicate tests.

134. That KPMG also proposed mechanisms to review the biometric data and carry out procedures intended to give assurance that there is no duplicate biometric data held in the Register of Voters.

135. That some of the key activities KPMG outlined in its proposal include:

- a. Obtaining all required data and information;
- b. Performing GAPS detection to identify matters such as blanks in mandatory fields, valid gender entries, dates of birth among others;
- c. Performing VALIDITY checks for inter alia valid ID numbers, passport numbers, validity against other data bases e.g. the Register of persons, etc; and

d. Performing DUPLICATE checks to test for any duplicates in fields such as ID numbers, biometric details etc

136. That the detailed methodology is a work product of KPMG and is a protected intellectual property as a result of which no full disclosure can be made of the methods and skill set to be applied. However, that the respondent considered all the proposals submitted and identified KPMG's as the best for the audit job stipulated under the law and that the criteria and methodology for auditing the register of voters is based on the provisions of Articles, 12, 38, 83 and 260 of the Constitution hence there was no speculation, guesswork or experimentation on the part of KPMG in defining its methodology.

137. On the allegation that the intended audit of the register of voters is clouded in opaqueness, secrecy and lack of accountability it was contended that the statement by the petitioner on oath is misleading and without basis.

138. That section 4 of the Elections Act provides that there shall be a register known as the Register of Voters, and further stipulates what that register shall comprise of and that this is the register to be audited hence the assertion that there are different versions of the register of voters is a sensational allegation, lacking any basis in fact or in law.

139. That the Elections Act was amended and has been in force since October 2016. That during the intervening period to date, any party that would have wanted to put forward any interventions on the question of how the audit should be undertaken could and ought to have done so. That it is self-serving for the Petitioner who claims to be a public spirited individual to contend that a lack of previous experience on the part of the Respondent disabled it from engaging with a reputable firm and framing terms of reference for the audit of the register without specifying what omissions have been made.

140. That the award of the tender to KPMG was neither illegal, irrational nor procedurally improper and that the process was wholly within the law and in accordance with the provisions of section 8A of the Elections Act.

141. It was further deposed that given that the Petitioner introduces himself as the Executive Director of a legal trust whose purpose is that of "promoting democratic governance and economic development and prosperity," and not a political party, it is not clear as to the reference to the "**Applicants strong hold areas**" referred to in paragraph 27 of the supporting Affidavit.

142. That the audit of the register of voters is for the purpose of eliminating the very issues that the Petitioner refers to at paragraph 28 – 30 of the supporting affidavit.

143. That KPMG has assemble a team that has specific and relevant experience, including that of helping with the historic elections in South Africa in 1994 and subsequent elections in South Africa, Ghana and India, supplemented by team members with relevant experience drawn from KPMG Australia and the Netherlands.

144. That KPMG has invested considerable time, effort and resources to serve the people of Kenya by offering to provide services relating to the verification of accuracy, completeness and validity of the Register of Voters. That KPMG has also lined up resources to provide recommendations that are expected to be implemented to inspire confidence in the integrity of the Register of Voters. That the firm has commenced its work and is racing against time on account of the delays occasioned by the interim orders that were made in **Judicial Review no. 648 of 2016.CORD V IEBC**

145. That it is an abuse of the Court's process for the Petitioner to make wild and irresponsible allegations against KPMG and which have a likely impact on KPMG's reputation and that this the Petition lacks merit in that;

a. It does not disclose the constitutional provisions violated by the award of the tender and contract to KPMG which was made in accordance with section 8A of the Elections Act;

b. It does not disclose the nature of the injury caused or likely to be caused to the Petitioner or to the public by the award of the contract to KPMG in accordance with the provisions of section 8A of the Elections Act;

c. It fails to take into account the provisions of the Constitution and the Elections Act in so far they provide for the eligibility of voters and the audit of the register of voters and the strict timelines within which various activities are to be undertaken;

d. It interferes with the sovereign power of the people of Kenya under Article 1(2) of the constitution as it is dilatory, an abuse of the court process, and if allowed, could deny those Kenyans who have sacrificed their time and effort to register as voters with a view to exercising their sovereign power at the general elections scheduled for 8 August 2017, the right to go to the elections with a verified Register of Voters that respects the principles set out in Article 81 of the Constitution. Such an eventuality would offend the very supremacy of the Constitution that the Petitioner claims to champion.

146. That the Petitioner's deliberate attempt to read into the provisions of section 8A of the Elections Act, matters that are not provided therein is intended to create unnecessary anxiety in an already emotive issue of the general elections scheduled for 8th August 2017.

147. With respect to the orders sought in the Petition, it was deposed that the same lack merit and ought to be declined on the following grounds:

a. Prayer A: The award of tender contained in the letter to KPMG dated 2nd December 2016 was lawful, valid and made in accordance with the provisions of the law. No basis has been set out to show that the said letter violates any of the provisions referred to by the Petitioner.

b. Prayer B: The provisions of section 8A of the Elections Act do not provide for consultation and public participation in the audit of the Register of Voters. The exercise of sovereign power provided under Article 1(2) is assured by the requirement to submit the report of the Audit to the National Assembly the democratically elected representatives contemplated in Article 1 (2).

c. The fact that a meeting was in fact held by the Respondent would not have the effect of amending the statutory provisions governing the engagement of KPMG to audit the register of voters. In any event, the Petitioner has not demonstrated in what way the meeting of 14th October 2016 violated any constitutional provisions.

d. Prayer C: The requirement for the Respondent to engage a firm to audit the register was a statutory obligation. As such, the decision being predicated upon the Constitution and provision of law, it cannot be held to be illegal or irregular.

e. Prayer D: The provisions of section 8A and 44 of the Elections Act are clear and precise that they deal with two different processes. There is no jurisdiction for the Court to merge the provisions as sought by the Petitioner.

f. Prayer D1: There is no basis for declaring the contract entered into between the Respondent and KPMG as illegal, irregular or null and void. The Petitioner has not shown the basis upon which the contract is asserted to be illegal.

g. Prayer D2: The contract between the Respondent and KPMG is for the audit of the register of voters. KPMG has not entered into a contract for the verification of biometric data under the provisions of section 6A of the Elections Act.

h. Prayer E: A contract has already been concluded between the Respondent and the 1st interested party.

i. Prayer F: There is no requirement under section 8A for a national stakeholders' meeting or for any of the matters assertion in this prayer. KPMG has in any event already indicated that part of the audit process will entail engagements with various stakeholders.

148. The 1st interested party therefore urged the court to dismiss the petitioner's petition.

THE 2ND INTERESTED PARTY'S CASE

149. The 2nd interested party CORD was enjoined to this petition vide an application dated 3rd April, 2017 with the consent of all the participating parties its case is materially and substantially like that of the petitioner. The 2nd interested party wholly supports the petitioner's case save that it is one of the largest political parties in Kenya which is an integral and substantial party to the upcoming elections and was the Substantive applicant in **JR No. 648 of 2014 CORD V IEBC** which was struck out on 31st March, 2017 by Hon Justice Chacha Mwita on a technicality, paving way for the petitioner to reinstitute similar proceedings in the form of a petition but which are essentially a replica of what the 2nd interested party had lodged in the judicial Review application. Therefore, this court need not reincarnate what was advocated for by the 2nd interested party as it is what the petitioner herein has stated, and this is demonstrated by the Judgment of Hon. Justice Chacha Mwita dated 31st March, 2017 annexed as exhibitNM2 attached to the affidavit of Norman Magaya sworn on 4th April, 2017 in support of the 2nd interested party's application for joinder to these proceedings.

SUBMISSIONS

150. All parties' advocates agreed and argued the petition by way of written submissions followed by oral highlights made in court on 19th April, 2017.

151. The petitioner and the 2nd interested party filed joint submissions dated 11th April 2017, whereas the respondent and the 1st interested parties filed separate submissions. The parties also highlighted their submissions while adopting their respective pleadings and affidavits.

152. The petitioner represented by Mr Appollo Mboya Advocate, and the 2nd interested party represented by Mr Antony Oluoch filed joint submissions and made separate oral submissions, outlining the following key issues for determination:

i. Whether the Court has the Jurisdiction to entertain and answer the legal questions in this matter.

ii. Whether a properly constituted commission was in place at the time of issuing the tender

iii. Whether the issuance of the tender award was in full compliance with the law and the Constitution.

iv. Whether the Key stakeholders as per section 17(5) of the Election Laws Amendment Act were consulted

153. According to the petitioner and the 2nd interested party, there was no proper Commission in place at the time of awarding the tender; that the tender was awarded in total disregard of the prescribed laws and that the requirement that key stakeholders were to be consulted during the election process was overlooked.

154. They underscored the importance of the Audit under Section 6 and section 17 of the Election Laws (Amendment) Act No. 36 of 2016 which they contended must be understood from the general principles founded in the Constitution of Kenya 2010, especially the provisions of Article 10 on National values and principles of governance.

155. It was submitted that a requirement that seeks state organs and officers to be in full compliance with the Constitution and uphold it in its application and interpretation cannot be ignored as was allegedly done by the respondent in this petition. Reliance was placed on Article 38 of the Constitution on political rights.

156. **on whether the court has the jurisdiction to entertain and answer the legal questions in this matter**, it was submitted that Jurisdiction is everything as was enunciated in the locus classicus case of **OWNERS OF THE MOTOR VESSEL “LILLIAN S” V CALTEX OIL (KENYA) LTD [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows;

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

157. It was submitted that there was no denial of jurisdiction of the court and that the issues before the Court strictly address and involve matters of election and as such, the High Court having original jurisdiction is entitled to address the issues therein, as was held in the **MISC APPLICATION 637 OF 2016 REPUBLIC V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER EX PARTE COALITION FOR REFORM AND DEMOCRACY & 2 OTHERS [2017] EKLR** where the Honourable Judge G V Odunga held:

“In this case, it is not in doubt that the ex parte applicant herein was a party to the proceedings before the Review Board. The Board however found that: in matters of election and whether the provisions of the Elections Act and the Election Laws (Amendment) Act 2016, it is only the High Court and the Supreme Court while exercising their original jurisdiction or the Court of Appeal while entertaining an appeal from the High Court that are vested with jurisdiction to consider such matters. The Board on the other hand is only vested with powers to deal with procurement disputes although in doing so the Board is bound to consider provisions of the Constitution and only other statute in so far as the same relates to procurement”(Emphasis).

158. Further reliance was placed on the recently decided matter of the exact similar nature involving issues against the IEBC on election matters **MISC APPLICATION NO. 648 OF 2016 REPUBLIC V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER EX PARTE COALITION FOR REFORM AND DEMOCRACY & 2 OTHERS** where Honorable Judge E.C Mwitwa concurred on the issue of jurisdiction and in particular that where the legality of a decision is in question an applicant is perfectly entitled to approach the High Court and or the Constitutional division and is therefore not restricted to the remedy available at the Public Procurement Administrative Review Board established under the PPDA.

159. On the alternative remedy to jurisdiction, it was submitted that section 174 of the Public Procurement and Asset Disposal Act provides for the right to request a review under the Part which is in addition to any other legal remedy a person may have. Therefore, it was submitted that this is the position the Petitioner and the 2nd Interested Party are holding as far as the Petition is concerned in that the reliefs being sought herein are not restricted to issues that can be addressed by the Review Board but those that need the High Court's attention.

160. It was further submitted that in as much as neither the Petitioner nor the 2nd Interested Party was a party to the procurement process; the courts cannot fail to address the issue as the Petition raises pertinent issues that deserve court's audience and full address. That Justice Mwitwa in JR 648/2016 confirmed that the Judicial Review Application, which is on the same questions as the instant application, raises serious questions of law but which he declined to go into the merits of. The learned Judge stated:

“...The position emerging from the above decisions is that availability of other remedies cannot

be a basis for rejecting an application for judicial review because a party has an inherent right to access courts of justice otherwise courts will cease to have meaning as the custodian of justice.”.....“...Having looked at the provisions of the Act myself, I do find this assertion to be correct. Section 174 of the Act states that a review is in addition to any other remedies. It could not have been the intention of the legislature to deny parties the right to access courts even when they were not party to the tender process, but feel aggrieved by the decision which they come to be aware of days after the date for requesting a review is long past...”

161. The petitioner and the 2nd interested party urged the court to ultimately stay guided under the principle that since legality issues that invoke the application of the Constitution and other statutes have been pleaded, the High Court is the legally correct forum to address the same.

162. It was submitted that the Applicant having alleged that the Constitution and the law were breached including the requirement for public participation in the cause of awarding the tender, and that if that be true, as stated by Justice Mwita Chacha in the JR 648 of 2016, the question then is; where should the Applicant have addressed its complaint to, given that it could not go to the Review Board and yet the questions raised touch on the legality of the decision made by the Respondent? In those circumstances, it was submitted that moving the court was the only available avenue to the Ex parte applicant to challenge that decision and the court cannot run away by narrowly interpreting the Public Procurement and Asset Disposal Act as that would deny the applicant the right to access this court hence the court has jurisdiction to hear and determine the petition.

163. On the issue of **whether a properly constituted commission was in place at the time of advertising and award of the TENDER**, it was jointly submitted by the petitioner and the 2nd interested party that on the 2nd Day December 2016, the Respondent through the letter referenced Notification of award for tender No. IEBC/5/2016 -2017 Consultancy Services for the audit of voters register notified the Audit Firm of being successful.

164. That at that particular time there was no qualified Commission in place to carry out this function. Nevertheless, that the Respondent in its wisdom or lack of it found it befitting to take on the role. Reliance was placed on the provisions of section 35 of the Election Laws (Amendment) Act on Relationships between the Commissioners and the Secretariat which stipulates that: “The Independent Electoral and Boundaries Commission Act, 2011 is amended by inserting the following new section immediately after section 11—

11A. for the effective performance of the functions of the Commission—

(a) The chairperson and members of the Commission shall perform their functions in accordance with the Constitution and in particular, shall be responsible for the formulation of policy and strategy of the Commission and oversight; and

(b) The Secretariat shall perform the day-to-day administrative functions of the Commission and implement the policies and strategies formulated by the Commission.

165. It was submitted that from the clear distinction of roles between the Commission itself and the Secretariat it is without a doubt that the Audit issue was a policy decision, a decision that the secretariat took upon itself and formulated and implemented, in the absence of a properly constituted Commission.

166. Further, it was submitted that a careful and critical reading of the IEBC Act section 11 A and 11 (b) as amended by section 35 of the Election Laws Amendment Act No. 36 of 2016 reveals that the strict function of the secretariat is to “perform the day to day administrative functions of the commission” and that in no way does this section provide that the secretariat formulates policies and strategies, and that the strict mandate of the Commission (namely nine (9) under section 11 of the IEBC Act, 2011 prior to the amendment, and seven (7) Commissioners under section 11A as amended by section 31 of the ELAA, No. 36 of 2016; is to formulate the policies and strategies; a function the Respondent failed at.

167. It was submitted that the audit exercise was not an administrative function reserved for the Secretariat in the absence of the Commissioners who by dint of the amendment Act are responsible for formulating policy.

168. That there was need for a policy formulation or direction by the Commissioners which in this case was absent and in the circumstances, the decision to proceed with the audit and appoint a firm to carry out the audit contemplated under section 8 of the Amendment exceeded the powers of the Secretariat.

169. That as at the 6th of October, 2016 when the President declared vacancies in the position of Chairperson and members of the Respondent Commission, there were no Commissioners in office and accordingly the audit subject of the impugned decision being a policy issue within the ambit of the Commissioners could not be conducted in the absence of Commissioners.

170. To this extent it was submitted that the decision of the Respondent to commence the audit exercise and to award the tender to KPMG, the 1st Interested Party herein, was beyond the legal power or authority of the Chief Executive of the Respondent or any technical members of the Commission.

171. That with no commissioners in office, the role taken up by the Secretariat is null and void as was stated in the case of **MICHAEL SISTU MWAURA KAMAU & 12 OTHERS V ETHICS AND ANTI-CORRUPTION COMMISSION & 4 OTHERS [2016] ECLR** where the bench comprising of Ngugi J; Odunga J; and Onguto J held as follows :

“We are therefore clear in our mind that the Secretary cannot be placed on the same plane as the Commissioners. To equate the Secretary with the Commission when he is an appointee of the Commission is in our view an anathema to the rules relating to employment and defeats common sense. To do so would amount to creating two centers of power, a scenario which would be a recipe for chaos and disorder. We are not persuaded by the contention on behalf of the Respondents that the framers of the Constitution intended that the powers vested in the Commission, as a composite entity, were also vested in the Secretary, who is not a member of the Commission, to be exercised singularly and/or independently of the Commission. The ultimate result of that would be for the Secretary to override, at his/her whim, the Commission as to the exercise of powers vested in the Commission.”

172. Paraphrasing the decision of the Constitutional Court of Uganda in **Constitutional Petition No. 46 of 2001 and Constitutional Reference No. 54 of 2011 between Hon Sam Kuteesa & Others vs. Attorney General, Uganda & Others**, it was submitted that under the Constitution and the legislation, the foundation of the powers of the Secretariat is the existence of the Commission and that the Secretary and the Secretariat can only carry out the powers vested in their offices when the Commission is in place exercising its powers since they implement what the Commission has deliberated and resolved.

173. It was submitted that albeit the staff may, based on their areas of specialization, perform the duties for which they are appointed, to contend that they have a free hand to make binding recommendations arising from their duties without reference to the Commission, would be absurd.

174. That the outcome of the tasks undertaken by the Commission’s staff must be ratified by the Commissioners if they are to be deemed as the decisions of the Commission otherwise unilateral actions taken by the staff may well be deemed to be insubordination.

175. Further reliance was placed on section 10 of the Independent Election and Boundaries Commission, Act No.9 of 2011 as read with section 11 of the Act which provides that the CEO shall be secretary to the Commission and is an employee of the Commission; which section also stipulates on how the secretary is to be appointed, qualifications and removal and what the secretariat is expected to do.

176. It was also submitted that issues pertaining to Composition of the Commission and as to validity of the functions carried out by persons/organs on behalf of the Commission were extensively addressed in the recently concluded case of **CORD VERSUS IEBC JUDICIAL REVIEW NO. 637 OF 2016** at page

65 paragraph 182 where Judge Odunga reasoned:

“In my view once an office is declared vacant, unless there is a transition clause that deems the holder thereof to be still in office, it would with respect amount to an aberration to contend that the person whose position is declared vacant is still in the officeOnce an office becomes vacant, it is in effect empty and it cannot be contended that an empty office can make decisions.”

177. That the learned Judge concurred with the reasoning of the case of **Eng. Michael Kamau and Others vs. Ethics and Anti-Corruption Commission and Others Nairobi (Milimani) High Court Petition No 230 of 2015**: at page 66 where the court expressed itself thus:

“...it is clear to us that under the Constitution and the legislation, the foundation of the powers of the Secretariat is the existence of the Commission. The Secretary and the Secretariat can only carry out the powers vested in their offices when the Commission is in place exercising its powers since they implement what the Commission has resolved upon. Whereas we appreciate that the staff may, based on their areas of specialization, perform the duties for which they are appointed, to contend that they have a free hand to make binding recommendations arising from their duties without reference to the Commission, in our view would be absurd. The outcome of the tasks undertaken by the Commission’s staff must be ratified by the Commissioners if they are to be deemed as the decisions of the Commission”.

178. The Petitioner and 2nd interested party jointly submitted that at the time the policy was being formulated, there were no Commissioners in place which means that the secretariat was misguided and in breach of the law and or usurped the powers of the Commissioners by taking on the role of the Commissioners and formulating the policy. That the process that eventually led to the decision in dispute is in totality marred with irregularities and as such null and void.

179. The petitioner and 2nd interested party further relied on section 31 of the Elections Laws Amendment Act No. 36 of 2016 on composition and appointment of the commissioners and submitted that before the alleged confirmation of the **“new and functioning”** commission, the applicable statute at the time was the Independent Electoral and Boundaries Commission Act (IEBC Act, 2011) which provided that the commission was a composition of nine members. It was therefore submitted that there was no commission confirmed to be in office at the time the audit was being awarded.

180. It was submitted that the new commission or commissioners were appointed vide a gazette notice No. 399 and 400 dated 18th January, 2017 which means that the notification of award of the tender on the 2nd December, 2016 fell during a period when the Commission was in a state of dormancy and its functions impaired or incapacitated. Reliance was placed on the decision by Odunga J in **CORD VERSUS IEBC JUDICIAL REVIEW NO. 637 OF 2016** at page 66 paragraph 186 where Judge Odunga reasoned as follows:

“ To make the argument of the IEBC even more absurd, the Election Laws (Amendment) Act at section 31 changed the composition of the Commission by amending section 5 of the Independent Electoral and Boundaries Commission Act, 2011 by providing that:

5(1) The Commission shall consist of a chairperson and six other members appointed in accordance with Article 250(4) of the Constitution and the provisions of this Act.

The date of assent and the date of commencement of the Amendment Act respectively are 13th September 2016 and 4th October 2016 and the Act was published in the Kenya Gazette as required under Article 116(1) of the Constitution of Kenya on 20th September 2016. Therefore the numerical strength of the members of the Commission was reduced from the previous nine members including the chairperson to seven members including the chairperson. If therefore the contract was signed on 30th November 2016, which seven of the nine Commissioners properly authorized the entry into the said contract.” I therefore have no hesitation in finding that the positions of the Chairperson and the Commissioners having been lawfully declared vacant, they

could not lawfully continue with their duties as such Chairperson and Commissioners respectively.

181. It was submitted that from the above statements, it is correct to submit that as at the award of the audit, there were no commissioners in office to legally effect this role. Further reliance was placed on **Eng. Michael Kamau and Others vs. Ethics and Anti- Corruption Commission and Others Nairobi (Milimani) High Court Petition No 230 of 2015** where Odunga J further reasoned *inter alia*:

“...it is clear to us that under the Constitution and the legislation, the foundation of the powers of the Secretariat is the existence of the Commission. The Secretary and the Secretariat can only carry out the powers vested in their offices when the Commission is in place exercising its powers since they implement what the Commission has resolved upon. Whereas we appreciate that the staff may, based on their areas of specialization, perform the duties for which they are appointed, to contend that they have a free hand to make binding recommendations arising from their duties without reference to the Commission, in our view would be absurd. The outcome of the tasks undertaken by the Commission’s staff must be ratified by the Commissioners if they are to be deemed as the decisions of the Commission”.

182. It was further submitted that Hon Odunga J in the above case proceeded in clarifying that in actual sense, the accounting officer was the person responsible for the preparation of the contracts that are in line with the award of the decision and in asserting this, the Honourable Judge Odunga stated as follows;

190. Section 134(1) of the Public Procurement and Asset Disposal Act provides as follows:

The accounting officer shall be responsible for preparation of contracts in line with the award decision.

191. Similarly, section 135(2) of the same Act provides that:

An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

192. It was averred that the successful tenderer was duly notified of Award of Tender and simultaneously the unsuccessful tenderers were also notified that they had not been successful and details of the successful tenderer disclosed on 18th October 2016. The 1st interested party on its part averred that it received a Notification of Award Letter dated 18th October, 2016 from the IEBC informing it that its bid had been accepted and requiring it to thereafter accept the award within fourteen (14) days. However, the presidential declaration of vacancy was made 5th October 2016, 13 days before the letter to the 1st interested party was drafted. In my view, section 134(1) of the Public Procurement and Asset Disposal Act only empowers the accounting officer to prepare and execute the contract. It does not empower him to award the tender. It is therefore my view that the aforesaid provision cannot be the basis of an award of a tender by the accounting officer where the Commission technically does not function. This was the position of the Court in Michael Kamau and Others vs. Ethics and Anti – Corruption Commission and Others (supra) where it expressed itself as hereunder:

“Whereas a Commission may be disabled in its ability to perform its functions, such disability does not automatically render the Commission extinct. Such an event in our view only places the Commission in a state of dormancy until such a time as it is able to carry out its functions...In our view therefore the fact that the Commission was disabled by pressure exerted upon them by third parties, whether deliberate or otherwise, did not obliterate the Commission, and though its ability to effectively carry out its functions was impaired by its incapacitation, the Commission was legally alive but inactive.”(emphasis)

193. This may be an undesirable situation and as the Court held in Michael Kamau and Others

vs. Ethics and Anti – Corruption Commission and Others (supra):

“It is our view that three arms of the Government are under a Constitutional obligation to protect the sovereignty of the people, and to achieve this, they must protect those organs through which sovereignty is expressed such as the Commissions, Independent Offices and the principle of devolution. To fail to do either by action or inaction is an abdication of their Constitutional mandate. Under Article 255 of the Constitution, an amendment relating to the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies can only be done in a referendum. That clearly shows the importance the people of Kenya attached to these Commissions. In fact this importance is emphasized by the fact that the people of Kenya were of the view that these commissions were important for the protection of their sovereignty. In our view any act or omission whose effect is geared towards crippling the actions of any Constitutional Commission or independent office cannot be justified on the ground of public interest as we have held herein below public interest is reflected in the Constitution and legislation”.

183. The petitioner and 2nd interested party therefore maintained that there was no commission in place when the tendering process was commenced hence the said process is null and void as the actions of the CEO and Secretariat was *ultravires* the law.

184. **on whether the issuance of the tender award was in full compliance with the law and the constitution, it was submitted that from the foregoing it is clear that in the absence a properly constituted Commission and based on the decisions cited above, the Respondent’s decision dated 2nd December, 2016 was illegal, irregular and therefore null and void, it was in breach of the Constitution, the Independent Electoral and Boundaries Commission Act, the Public Procurement and Assets Disposal Act, the Elections Act, 2011 as amended by the Election Laws (Amendment) Act, No. 36 of 2016.**

185. In addition to the alleged breaches of the constitution and statutes, the Petitioner and 2nd interested party jointly further submitted that the Respondent disregarded and violated the general principles on the electoral process that are put in place and provided for in the Constitution as had been highlighted above in the introduction of these submissions which was breach of Article 10 of the Constitution on National Values.

186. It was further submitted that the decision of the Respondent to procure the audit firm is in breach of Article 38 of the Constitution or at least threatens the enjoyment of this Article and that any decision or exercise that would affect the enjoyment of the stated right must be above board, be inclusive, involving the broadest possible consultation incorporating the key players and stake holders who are the competing political parties, as the audit of the voters register and its authenticity is very crucial to the enjoyment of the political rights under Article 38.

187. That the decision by the Respondent purporting to consult the amorphous- outfit called the Political Parties Liaison Committee is mischievous and intended to circumvent the requirement to form a technical committee to set the parameters and methodology and objectives of what the audit should achieve.

188. That the decision of the Respondent is also void for being in breach of the its duty under Article 249 of the Constitution on the objects of commissions and the independent Offices. Reliance was placed on **DIRECTOR OF PENSIONS v Cockar [2000]1EA** where (Gicheru, Shah and Owuor, JJA on 16th December 1999 held:

“Where the decision is arrived at contrary to the Constitution and the relevant statutory provisions certiorari would lie to quash the decision.”

189. Further reliance was placed on the case of **KENYA COUNTRY BUS OWNERS’ ASSOCIATION (THROUGH PAUL G. MUTHUMBI – CHAIRMAN, SAMUEL NJUGUNA – SECRETARY, JOSEPH KIMIRI – TREASURER) & 8 OTHERS V CABINET SECRETARY FOR TRANSPORT & INFRASTRUCTURE & 5 OTHERS [2014] EKLJ JUDICIAL REVIEW CASE NO. 2 OF 2014**

citing **MACFAY VS. UNITED AFRICA CO. LTD [1963] 3 ALL E.R. 1169** that:

“If an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

190. It was also submitted that Section 2 (d) of the Election Laws (Amendment) Act No. 36 of 2016 defines the register of voters by deleting the expression principal register of voters and substituting therefore the expression “Register of voters” which section was meant to cure the problem of multiple registers which was an issue in the 2013 general elections.

191. It was therefore contended that the amendment contained in this definition part of the Act is crucial in light of the Supreme Court finding in **RAILA ODINGA VERSUS THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION Supreme Court Petition No. 5 of 2013**, that there were multiple registers relied upon by the Respondent.

192. It was reiterated that in its internal management brief of September 26th 2016, the Respondent admitted that the post 2013 and the pre-2013 registrations are yet to be integrated into a single register of voters, yet the Respondent has to-date not formulated an official register of voters and if it has not opened it to stake holders and public scrutiny and public participation in the circumstances cannot properly engage any firm to carry out an audit as it is not clear what this firm will be auditing.

193. Further, that Section 2 (e) of ELLAA amends the Act by inserting a new definition that includes the term biometric which means “unique identifier or exhibits including fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves, DNA and signatures and integrated electronic electoral systems which refers to “a system that includes biometric voter registration, biometric voter identification and electronic results transmission system.

194. According to the petitioner and 2nd interested party, the above provisions were never taken into consideration by the Respondent while making the decision and that if anything, it is clear that the Respondents decisions are utterly not in compliance with the laws , made for an illegal, improper motive and for extraneous purposes spelling nothing short of a decision made on bad faith, irregular, irrational and with none consideration to the principles of Natural Justice.

195. Reliance was placed on the case of **GENERAL MEDICAL COUNCIL VS. SPACKMAN [1943] 2 ALL E.R. 337**, cited in the case of **KENYA COUNTRY BUS OWNERS’ ASSOCIATION (THROUGH PAUL G. MUTHUMBI – CHAIRMAN, SAMUEL NJUGUNA – SECRETARY, JOSEPH KIMIRI – TREASURER) & 8 OTHERS V CABINET SECRETARY FOR TRANSPORT & INFRASTRUCTURE & 5 OTHERS [2014] eKLR JUDICIAL REVIEW CASE NO. 2 OF 2014** where Lord Wright held:

“If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence or departure from the essential principles of justice. The decision must be declared to be no decision at all.”

196. On whether the key stakeholders as per section 17(5) of the election laws amendment act were consulted, the petitioner and the 2nd interested party submitted relying on Section 17 (5) of the Election Laws (Amendment) Act which provides:

“the Commission shall for purposes of this section and in consultation with relevant agencies, institutions and stakeholders including political parties make regulations for the implementation of this section and in particular regulations providing for:

(a) Mechanisms for the conduct of a systems audit;

(j) The operations of the technical committee under subsection (7);

197. It was submitted that these provisions simply dictate that in the event there is a need to purpose provisions in sections 17 (5) (a) to (j) of the Elections Laws (Amendment) Act to take into consideration views and opinions of stakeholders before any decision is arrived at by the Commission.

198. Further submission was that albeit the Commission claims that it held stakeholder consultations, the said stakeholders' meeting did not involve the key decision making organs and/ or offices of political parties and is not the consultation contemplated in Section 17(5) of the Election Laws Amendment Law No, 36 of 2016 which calls for consultation with relevant agencies, institutions and stakeholders, including political parties in making regulations for the implementation of the said section and the Act.

199. Therefore it was contended that the Respondent in failing to carry out proper stakeholder's consultation also failed to take into account international best practice including the Nigerian model of audit of the voters register where the Nigerian IEBC in the first instance set out to audit the register resulting in 650,000 double registration being detected. Upon carrying out further audit using different methodology and applying different parameters the second audit yielded 10,000,000 double registrations being detected and permanent chip cards for voter registration and identification issued.

200. According to the petitioner and 2nd interested party, these best practices and model or methodology are issues only a properly constituted Commission could apply its mind to, taking into account stake holder involvement.

201. It was submitted that the Respondent purported by a press statement to call for a stakeholder consultative forum with political parties and Civil society organizations; on Friday 14th October, 2016 at Nairobi Safari Park, which was not by any means the stakeholder's consultation for political parties and government agencies contemplated under section 17 (5) of the ELAA No. 36 of 2016.

202. That contrary to the explicit requirements of the law, the Respondent deliberately acted beyond its powers and jurisdiction in awarding the tender for the audit of the Register of Voters by proceeding without consultation and or engagement with the stakeholders including political parties in creating or rather, formulating the criteria and or the methodology for the audit and as such, the Respondent's jurisdictional error renders its decision null and void.

203. The Petitioner and 2nd interested party submitted that political parties and their members represent the views of citizens. They bear the primary responsibility for promoting , protecting and realizing their rights as such if these rights are being jeopardized then there is no other option but to draw the court's attention and seek to have the law enforced as illuminated in the case of **R V GREATER LONDON COUNCIL, EX PARTE BLACKBURN (1976) 3 ALL ER 184** where it was held:

“If there is a good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of her majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate.”

204. The Petitioner and 2nd interested party further submitted that Parliament has not enacted or passed any regulations to operationalize this section that is section 8 dealing with audit of the register nor has the Respondent established a technical committee, which is contemplated to include stakeholders including political parties prior to commencing any audit. Therefore, it was submitted that in awarding the tender for the audit of the Register of Voters, the Independent Electoral and Boundaries Commission proceeded without consultation and or engagement with the stakeholders including political parties in designing the criteria and or the methodology for the audit.

205. According to the proponents of the petition, the ultimate objectives of the audit as set out under section 8A of the Election Laws (Amendment) Act is to verify the accuracy of the register and update it,

and that this objective cannot be realized in the absence of an agreed methodology, criteria and or benchmarks for the audit of the register of voters.

206. Further that as a nation, this is a situation that has been experienced before during a presidential election where by at the hearing of **Petition No.5 of 2013 (Raila Odinga and 5 others Versus the Independent Electoral and Boundaries Commission)** the commission presented different versions of the register of voters variant from what was gazetted before the election and that in this abundance of confusion, there is no clarity as to which register is being subjected to the audit.

207. It was further submitted that the intended audit of the register of voters is clouded with opaqueness, secrecy and lack of accountability since no methodology or criteria for the audit has been disclosed to ensure the objectives set out in law are realized; that the Commission set out irrelevant specifications during the advertisement of the tender having failed to seek stakeholders views and the Commission itself having no previous experience of offering tenders for audit of the Register of Voters and therefore the entire process was tainted with speculation, guesswork and experimentations that offends the objectives of the law set out under section 8A.

208. The petitioner and 2nd interested party urged the court to allow the petition as presented.

THE RESPONDENT’S WRITTEN SUBMISSIONS

209. The Respondent (“the Commission”) submitted relying on the Replying affidavit sworn by **Ezra Chiloba on 11th April 2017** and filed on the same date. The respondent framed the following issues for determination:

i. Whether the award of Tender No. IEBC/EOI/05/2016-2017 to the 1st Interested Party was proper and/or in compliance with the law.

ii. Whether the Petitioner is entitled to the reliefs sought.

iii. Who bears the cost of the Petition.

210. On whether the award of Tender No. IEBC/EOI/05/2016-2017 to the 1st Interested Party was proper and/or in compliance with the law, the respondent urged the court to interrogate the following issues:

(i). Whether the absence of Commissioners of the Respondent grounded the operations of the Commission rendering it incapable of advertising and awarding the impugned Tender No. IEBC/EOI/05/2016-2017.

(ii). Whether the advertisement and the award of the impugned tender was in compliance with the Constitution and the Election Laws (Amendment) Act, 2016.

(iii). Whether the Commission in advertising and awarding the impugned tender acted illegally, irrationally, procedurally improper, capriciously, unreasonably, against the Petitioner’s legitimate expectations, unfairly, or whether the Commission was discriminatory, arbitrary, malicious, punitive and abused its powers.

the respondent's counsel submitted on each of the above issues as follows.

(i). Whether the absence of Commissioners of the Respondent grounded the operations of the Commission rendering it incapable of advertising and awarding the impugned tender, Tender No. IEBC/EOI/05/2016-2017.

211. On the Petitioner’s and 2nd Interested Party’s averments that without Commissioners, the decision by the Commission to advertise and award the impugned tender is null and void based on **High Court Petition No. 230 of 2015: Michael Sistu Mwaura Kamau & 12 others v Ethics and Anti-Corruption**

Commission & 4 others [2016] eKLR and Misc. Application No. 637 of 2016; Republic v Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others [2017] eKLR; it was submitted that however, the **Michael Mwaura Kamau case** (supra) despite its findings, underscores an important aspect, that a decision made in the absence of the Commissioners may be valid and in accordance with the law if ratified by the Commission and that the court held:

“356. Whereas we appreciate that the staff may, based on their areas of specialization, perform the duties for which they are appointed, to contend that they have a free hand to make binding recommendations arising from their duties without reference to the Commission, in our view would be absurd. The outcome of the tasks undertaken by the Commission’s staff must be ratified by the Commissioners if they are to be deemed as the decisions of the Commission...”

212. It was submitted that upon appointment and assumption into office, the Commissioners of the Respondent ratified the decision to award the impugned tender to the 1st Interested Party and that having so ratified the conduct of the tender process; the Commission signed the contract for the tender between itself and the 1st Interested Party on 31st March 2017.

213. Further, that in any event, the **Michael Kamau case and the J.R 637 of 2016** (supra) are in direct contradiction and or inconsistent with the **Supreme Court decision in Petition No. 11 of 2014: Mable Muruli v Wycliffe Ambetsa Oparanya & 3 others [2016] eKLR** in which the Supreme Court **held that constitutional purposes and objectives of the Commission would still go on even in absence of the Commissioners**. In the said case, the Supreme Court held:

“[55] The IEBC Act also provides for a Secretary to the Commission (Section 10), who is appointed pursuant to Article 250 (12) of the Constitution. The Secretary is the chief executive officer of the Commission; head of the secretariat; accounting officer of the Commission; custodian of all Commission records; bearer of responsibility for executing decisions of the Commission; officer in charge of assignment of duties and supervision of all employees of the Commission; facilitator, co-ordinator and executor of Commission’s mandate; guarantor of staff compliance with public ethics and values; executor of such other duties as may be assigned by law and by the Commission. Without a doubt, the Secretary is a vital component of the IEBC – indeed, a central part of the IEBC, regardless of not bearing the designation “Commissioner”. Section 11 of the Act makes provisions regarding employees of the Commission, who conduct their functions at headquarters, and at the numerous regional offices of IEBC.

[56] From the foregoing details regarding IEBC’s operations, it is clear to us that the appellant’s perception of its identity is inappositely limited. We take judicial notice that it would be impractical to expect the Commissioners qua “Commissioners”, to conduct all the functions entrusted to the Commission under Article 88 (4) of the Constitution. The secretary, hence, can hardly do without employees entrusted with specified duties. Had it been the case that all such tasks devolved only to “Commissioners”, the consequence would be that all actions routinely taken by the IEBC staff, such as continuous registration of voters, regular revision of voters’ roll, and registration of candidates, would be a nullity in law. There is need to avoid such construction of the Constitution as would be contrary to the public interest. The requisite approach in interpreting Article 88 (1) of the Constitution, is one that vindicates the constitutional purposes and objectives, and that fosters good governance, in accordance with the terms of article 259. Good governance in this instance entails ensuring that the constitutional functions of the Commission do not come to a standstill, as is destined to happen if the discharge of such functions were left entirely to the nine Commissioners.

[57] In short, as we perceive it, the IEBC comprises the Commissioners, as well as its employees who have been duly authorized. Consequently, and in accordance with the Joho precedent, the Returning Officer, an employee of the IEBC, properly acts on its behalf.”

214. In light of the above Supreme Court decision, it was submitted that the Commission comprises of among others, the Chief Executive Officer. Accordingly, the Secretariat’s decision to advertise and

award the impugned tender (which decision was ratified by the Commission) was in accordance with the law, valid and should not be disturbed.

215. On the issue of whether the advertisement and the award of the impugned tender was in compliance with the Constitution and the Election Laws (Amendment) Act, 2016; and or whether there were consultations prior to the advertisement of the impugned tender under Section 6 of the Election Laws (Amendment) Act, 2016 and whether the said consultations were necessary, it was submitted that Section 6 of the Election Laws (Amendment) Act, 2016 does not require any stakeholder or public consultations before advertisement and award of the impugned tender. However, that the absence of a requirement for consultations notwithstanding, the Commission, cognizance of the weighty nature and the importance of the audit of the voters register, nevertheless held consultative meetings with political parties (including the 2nd Interested Party) and Civil Society Organizations (CSOs), meetings which led to development of a methodology for the audit of the register of voters.

216. Further, that contrary to the Petitioner's allegations, the Political Parties Liaison Committee (PPLC) is not an amorphous outfit as it is established under Section 38 of the Political Parties Act to provide a platform for dialogue between the Registrar of Political Parties, the Commission and political parties. That the PPLC is functional and its chairman was represented at a meeting held on 14th October 2016 and the representative duly signed the attendance Sheet for the meeting.

217. On the question of whether the audit contemplated under Section 6 (3) of the Election Laws (Amendment) Act, 2016 includes a systems audit under Section 17 (5) of the Act, it was submitted that there is a clear distinction between the audits anticipated under Sections 6 (3) of the Election Laws (Amendment) Act, 2016 on the one hand, and Section 17 (5) (c) on the other hand. That whereas Section 6(3) of the Election Laws (Amendment) Act, 2016 specifically provides for the audit of the Register of Voters, and for which no stakeholder consultations are decreed, Section 17(5) (c) is categorical that the audit contemplated thereunder is a Systems Audit in respect of the Integrated Electronic Electoral System comprising of the Biometric Voter Registration, Electronic Voter Identification and Transmission of elections results. Further, that the systems Audit under Section 17 (5) of the Election Laws (Amendment) Act, 2016 is therefore not the Audit of the Voters Register and it is only in respect of the former that "consultations with the relevant agencies, institutions and stakeholders including political parties" are required by the statute, which consultations are in respect of making regulations for the implementation of the section.

218. It was further submitted that indeed, Section 17 (5) of the Election Laws (Amendment) Act, 2016 clearly states that it is only "for the purposes of this Section, and in consultations with the relevant agencies, institutions and stakeholders including political parties" that regulations for a systems Audit shall be developed. According to the respondent, the Section does not, and deliberately so in their view, make reference to Section 6 (3) of the Election Laws (Amendment) Act, 2016.

219. It was therefore submitted that the wordings of the said Sections 6 (3) and 17 (5) of the Election Laws (Amendment) Act, 2016 to the extent that they provide for two distinct audits, is cast in plain wording; and that as such, to read into the said sections any other meaning would amount to giving a different meaning to the statute when its wording is clear and unambiguous, which would be unnecessary as this Honourable Court (Mr. Mativo, J) appreciated in **Association of Retirement Benefits Schemes v Attorney General & 3 others [2017] eKLR** in which it was held;

"There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete. The implication is that when the language is clear, then it is not necessary to belabour examining other rules of statutory interpretation.

In my view, it is not the duty of the Court either to enlarge the scope of the legislation or the

intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.

220. In view of the foregoing, it was the respondent's submission that the view expressed by the Petitioner that the two audits are one or should be carried out together as alleged in the Petition is based on misapprehension of the law and should thus be dismissed.

221. On the question of whether there is a verifiable methodology for the conduct of the audit of the voters register, the respondent submitted that contrary to the Petitioner's assertions, the audit of the Register of Voters is informed by a verifiable methodology or criteria and conforms to the letter and spirit of the Election Laws (Amendment) Act, 2016. It was therefore contended that the audit is transparent and is not shrouded in secrecy as alleged by the Petitioner.

222. It was further submitted that the said methodology was developed pursuant to consultations with political parties, the Political parties Liaison Committee and Civil Society Organizations, and that it is the same methodology that the 1st Interested Party has declared its intention to use for the actual audit.

223. On whether there is a statutory requirement that the 1st Interested Party be an international firm, and on the allegations in paragraph 18 of the Supporting Affidavit, that the audit firm should be an International firm, it was submitted that contrary to that assertion by the petitioner, it is not correct that discussions on the Election Laws (Amendment) Act, 2016 agreed on an audit of the register of voters by an "internationally reputable firm, and that" neither is it a requirement that the audit firm contemplated under Section 6 of the Election Laws (Amendment) Act, 2016 be an international firm.

224. It was submitted that the said section only requires that the firm be a ***professional reputable firm***. Accordingly, any assessment of the 1st Interested Party by any parameters other than a professional reputable firm is not supported by or in contravention of the law and is not merited.

225. On whether there exist alleged discrepancies in the existing voters register as alleged in paragraphs 27 to 31 of the Petitioner's Supporting Affidavit, it was submitted that firstly, the said anomalies which were conceded by the respondent Commission are not material to the legality of the award of the impugned tender to the 1st Interested Party. secondly, that the anomalies, if at all, are the reason and the objective of the audit of the Register of Voters and therefore the tendering in respect thereof, which process should not be disturbed or at all by this court. That the anomalies exist currently is not reflection on the situation post the audit hence the Petitioner should allow the audit to take place and thereafter gauge its effectiveness against the said identified anomalies and not to cast aspersions of interference with the Register of Voters by the Commission as contained in paragraph 33 of the Petitioner's Supporting Affidavit.

226. On whether the award of the tender violates Articles 10, 38, 81, 86 (4), 88, 249 (1) (b) Constitution it was submitted that among the reliefs sought by the Petitioner is a declaration that the Commission has violated the above mentioned provisions of the Constitution. It was submitted that it is trite law that a Petitioner in a Constitutional Petition ought to set out with precision the specific provisions of the Constitution and the particulars of the manner and the extent to which such provisions have been allegedly violated. Reliance was placed on **Anarita Karimi Njeru v The Republic, Misc. Criminal Application No. 4 of 1979** wherein Justices Trevelyan and Hancox, stated:

"... We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his/her case) that he should set out with a reasonable degree of precision that

of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed...”

227. That the said principles have also been upheld by the Court of Appeal in CACA No. 290 of 2012: Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 Others [2013] e KLR where the 5 judge bench (Kihara Kariuki, PCA, Ouko, Kiage, Gatembu Kairu & Murgor, JJA) held that:

“However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules... was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

228. Further reliance was placed on HC Petition No. 4 of 2013: Northern Nomadic Disable Persons Organization (NONDO) Vs. Governor, County Government of Garissa and Another [2013] eKLR where the Court held:

“Constitutional threshold

The respondents are saying that the Petitioner has not reached the threshold in Anarita Karimi Njeru case supra. It was submitted that the Petitioner has referred to various articles of the constitution as having been violated without giving particulars of the alleged violations. The principle in Anarita Karimi case is captured in the words of the Justices Trevelyan and Hancox when they stated as follows:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed”.

229. It was submitted that the Petitioner has cited various articles of the constitution without any particulars of the alleged violations of those provisions. *For instance in paragraph 8 of the Petition the Petition states as follows:*

Based on these facts the petitioner is seeking redress before this Honourable court for enforcement of the constitutional rights, freedoms and entitlements of persons with disabilities under Articles 47, 48, 54, 81. The Petitioner goes on to cite Articles 2, 3, 10, 54 and 81. In paragraph 18 the Petitioner gives particulars of derogation but no particulars are given. Instead, the Petition goes on to state that the 1st Respondent failed to comply with Articles 54 and 81.

230. That In paragraph 20 of the Petition, the Petitioner has indicated particulars of discrimination but there are no particulars given. In paragraph 28 it is indicated Justification and entitlement and again Articles 20 and 21 are given without evidence. Reliance was placed on the Court of Appeal decision in the **Mumo Matemu** case wherein it was held that the petition did not meet the threshold in **Anarita Karimi Njeru** case for similar reasons like in this case where it is contended that there is no evidence to support the allegations of violations of constitutional provisions.

231. Further, that there is no evidence that any of the members of the Petitioner presented themselves for appointment and they were rejected. It was further contended by the respondent that there is no evidence of the number of their members and the distribution of membership in all the counties in Northern Kenya given that their membership covers a region they refer to as Northern Kenya. In addition, that there is no evidence to show the number of their members who belong to Garissa County. There is no evidence to show how many of those members meet the criteria for appointment under Section 35 of the County Government Act.”

232. The respondent also relied on **Samson Otieno Bala T/A Missam Enterprises v Kenya Bureau of Standards & 4 others [2015] eKLR, H.C of Kenya at Homabay, Petition No. 4 Of 2014, Formerly Migori Hc Petition No. 3 Of 2014**, where Justice Majanja opined :

“The petition, as drawn, is clearly deficient in that it does not cite any particular provision of the Constitution that is violated and demonstrate how it is violated. The title of petition refers to Articles 2, 3, 19, 20, 21, 22, 23, 24, 25, 27, 28, 33, 50 and 259 of the Constitution. Apart from Articles 27, 28, 33 and 50 which deal with specific rights and fundamental freedoms protected under the Constitution, the rest of the Articles cited deal with general provisions of the Constitution, its application and interpretation. Even though some of the Articles cited refer to specific fundamental rights and freedoms, the petitioner did not plead how each right has been violated. The body of the petition does not mention or cite any of the fundamental rights which are alleged to have been violated. In the circumstances I must find that the petition is incompetent.”

233. It was therefore submitted that the Petitioner’s amended Petition runs afoul of the principles in the **Anarita Karimi** [supra] case in that whereas the Petition lists Articles of the Constitution that the Petitioner alleges to have been violated or threatened to be violated by the Commission, the Petitioner has not demonstrated in clear and precise terms how or the manner in which the said Articles have been violated by the Respondent. More so, that a) The Petitioner has not established how any of the national values in Article 10 have been violated by the Respondent. The Petitioner merely reproduces the provisions in Paragraphs 42 of his Supporting Affidavit and in paragraph 34 of his submissions (at page 22)(b) Articles 38 and 81. The Petitioner has not demonstrated how the citizens’ right to free and fair elections or indeed any other right under that Article has been curtailed by the advertisement and the award of the impugned tender. In any event, as submitted hereinabove, the Commission consulted political parties, the PPLC and CSOs before tendering for the audit of the voters register. (c) Article 86(4). Sub Article (4) does not exist in the Constitution. (d) Article 88. The Petitioner is not specific on which of the five sub articles thereon the Commission has violated. (e) Article 249. The Petitioner merely reproduces the Article in paragraph 47 of his Supporting Affidavit and in paragraph 38 of his Submissions (at page 24)

234. It was submitted that the upshot of the above therefore is that there is no factual basis upon which this Honourable Court may make a finding on the manner in which the provisions of the Articles of the Constitution enumerated in the Petitioner’s Amended Petition have been violated or are likely to be violated.

235. On Whether the Commission in advertising and awarding the impugned tender acted illegally, irrationally, procedurally improper, capriciously, unreasonably, against the Petitioner’s legitimate expectations, unfairly, or whether the Commission was discriminatory, arbitrary, malicious, punitive and abused its powers, reliance was placed on **Peninah Nandako Kiliswa v Independent Electoral & Boundaries Commission (IEBC) & 2 others [2015] eKLR**, where the Supreme Court of Kenya held:

“[26] It is also incumbent upon the applicant to make out a case for judicial review on the facts of the relevant matter. As stated in the Ugandan High Court case of Pastoli v. Kabale District Local Government Council and Others [2008] 2 EA 300-301,.....

“Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....

“Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards....

“Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere [to] and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision”

236. It was submitted that these three parameters, though enunciated and defined in a Judicial Review framework, have the same meaning and application in a Constitutional Petition. Further, that, as held in **Misc. Application No. 637 of 2016: Republic v Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others [2017] eKLR** by CHACHA Mwita J , the distinction between constitutional and judicial review remedies have become blurred in view of the provisions of Article 23 of the Constitution of Kenya. And so has the distinction between grounds for granting either Judicial Review or Constitutional remedies as submitted .on each of the said parameters as below.

237. On illegality and/or ultra vires, it was submitted that the Petitioner has made heavy weather of the absence of Commissioners of the Respondent at the time of the decision to advertise and award of the impugned tender. However, that in this case, the decision was justified.

238. **On irrationality, it was submitted that** the test here is one of reasonableness, and whether there was such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision.? This is what has come to be known as *“Wednesbury Unreasonableness.”* Reliance was placed on the case of **Republic V Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another[2012 eKLR**, where Weldon Korir, J held :

“...as observed by Lord Diplock in the already cited CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE case, the court can quash the decision if the same is so unreasonable to the extent that a reasonable tribunal addressing its mind to the facts of the case would not have arrived at such a decision. In doing so, I submit, the court will have descended into the arena of decision-making. For a court to justify such action it must be clearly obvious that the decision is truly and obviously unreasonable.”

239. It was submitted that the Petitioner has not demonstrated how the impugned decision was so grossly unreasonable as to fall within the parameters of irrationality. That all the Petitioner states is that the “The decision is capricious, irrational and Wednesbury unreasonable.” and “The Respondents’ decision is irrational, unjustifiable and Wednesbury unreasonable”.

240. **On procedural impropriety, it was submitted that** as observed in **Republic vs Procurement Administrative Review Board & 3 Others ex parte Olive Telecommunication PVT LTD [2014] eKLR**, *“procedural impropriety may be a ground for judicial review. Procedural impropriety may arise due to the failure to comply with mandatory procedures such as breach of natural justice, bias,*

breach of fair administrative action or legitimate expectation.”

241. Further, that in so far as the rules of natural justice/procedural fairness are concerned, the Commission consulted the necessary stakeholders – political parties, PPLC and CSOs before the Commission advertised the impugned tender. The Court was urged to refer to paragraphs 16 to 20 of the Commission’s Replying Affidavit.

242. On the alleged discrimination, arbitrariness and inconsistency, it was submitted that the Petitioner has not placed any material before this Honourable court to prove this.

243. On the alleged malice and bad faith, it was submitted that the Petitioner has not provided or demonstrated that the Commission indeed sponsored the Petition stated in paragraph 19 of the Supporting Affidavit or provided particulars of the Regulations mentioned in paragraph 20 of the Supporting Affidavit or the effect thereof.

244. On the alleged oppression, punishment or abuse of power, it was submitted that the Petitioner has not placed any material before this Honourable court to prove this.

245. **On legitimate expectations**, it was submitted that to establish whether there was any breach of legitimate expectation, there is need to consider what legitimate expectation entails, and that Legitimate expectation is an unambiguous promise made to a party by a public body that it will act or not act in a certain manner. Reliance was placed on **Coastal Bottlers Limited V Commissioner Of Domestic Taxes [2008] eKLR** where the Court held:

“A legitimate expectation is said to arise “from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.”

246. Further reliance was placed on The Supreme Court of Kenya decision in **Petition No. 14 of 2014: Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** wherein the principles on legitimate expectation were restated thus:

“[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.

247. Further, that in **HC Petition No. 359 of 2013: Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & 10 others [2013] eKLR** the Court held that to ascertain whether a claim based on legitimate expectations is properly grounded, the Court must pose the following questions:

“(1) What has the public authority whether by practice or promise committed itself to; (2) Whether the authority has acted or proposes to act unlawfully in relation to its commitment; (3) What should the Court do”

248. The respondent further submitted relying on the Court of Appeal decision in **Justice Kalpana H. Rawal v Judicial Service Commission & 3 others [2016] eKLR** where the Court held as follows in respect of legitimate expectation:

“... Legitimate expectation involves a representation that must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate. Other important aspects of the doctrine is that the law does not protect every expectation save only those which are legitimate...; clear statutory words override any contrary expectation, however founded...; the representation must be one which the decision-maker can competently and lawfully make without which the reliance cannot be legitimate...; legitimate expectation does not arise when it is made ultra vires the decision-maker’s...; and a public authority which has made a representation which it has no power to make is not precluded from asserting the correct position which is within its power to make...”

249. The respondent also relied on the South African case of **South African Veterinary Council vs Szymanski (79/2001) [2003] ZASCA 11**, quoted with approval in **Justice Kalpana H. Rawal v Judicial Service Commission & 3 others [2016] eKLR** expounded as follows:

“(i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': De Smith, Woolf and Jowell (op cit [Judicial Review of Administrative Action 5th ed] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.

(ii) The expectation must be reasonable: Administrator, Transvaal v Traub (supra [1989 (4) SA 731 (A)] at 756I - 757B); De Smith, Woolf and Jowell (supra at 417 para 8-037).

(iii) The representation must have been induced by the decision-maker: De Smith, Woolf and Jowell (op cit at 422 para 8-050); Attorney-General of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346 (PC) at 350h - j.

(iv) The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: Hauptfleisch v Caledon Divisional Council 1963 (4) SA 53 (C) at 59E - G.”

250. On **whether the Commission acted within their power in making the impugned decision**, the respondent postulated that the question is whether the process that culminated in that decision was properly arrived at in accordance with the Commission’s statutory powers, and whether the decision was rational and arrived at fairly in accordance with the rules of natural justice, and that in this case, the Petitioner, the PPLC and political parties were consulted before the Commission’s decision to commence the procurement process for the audit of the register of voters was taken.

251. Further, that contrary to the Petitioner’s allegations, and as submitted hereinabove, Section 17 of the Election Laws (Amendment) Act, 2016 relates to the use of technology, specifically the Integrated Electronic Electoral System that enables biometric voter registration, electronic voter identification and electronic transmission of results. As such, the said Section 17 is irrelevant for purposes of these proceedings. Any allegations of any breach thereof are therefore not correct and are misplaced.

252. It was therefore submitted that the petitioner had not successfully invoked the protection of the doctrine of legitimate expectation and that he had not satisfied that he had relied on the Commission’s decision or representations to his detriment, as was held by the Court of Appeal in in the Justice Kalpana H. Rawal v Judicial Service Commission & 3 others (Supra) case that:

“A pre-requisite to successful invocation of the doctrine of legitimate expectation is that the person who bases his or her claim on the doctrine has to satisfy that he or she has relied on the decision-maker’s representation to his or her detriment. In the instant case, the appellant has not demonstrated how she relied on the 1st respondent’s decision to her detriment. A claim based on mere legitimate expectation, without anything more in the form of suffered detriment,

cannot ipso facto sustain an action founded on the doctrine of legitimate expectation. (See Sethi Auto Service Station & Another v. Delhi Development Authority & Others, (2009) 1 SCC 180.)

253. In view of the above, it was submitted that whereas the Petitioner may have had a legitimate expectation (which is not disclosed or based on the right to vote), given the circumstances and the process of making the impugned decision as stated hereinabove, the Commission did not breach or go against the Petitioner legitimate expectations.

254. On whether the Petitioner is entitled to the reliefs sought, it was submitted that in view of the foregoing, the Petitioner is not entitled to the reliefs sought for the following reasons:

(i). **PRAYER A.** That the Petitioner as not met the necessary threshold for constitutional petitions as established in the **Anarita Karimi** case (supra).

(ii). **PRAYER B.** That Section 17 (5) of the Election Laws (Amendment) Act, 2016 does not require consultations for purposes of the tender of the audit of the voters register. Accordingly, the Commission did not need to meet the threshold for public consultation established therein.

(iii). **PRAYER C.** That the Commission's decision is valid in view of submissions hereinabove.

(iv). **PRAYER D.** That Sections 6(3) and 17(5) of the Election Laws (Amendment) Act, 2016 espouses two different types of audit- audit of the voters register and a systems audit for the Integrated Electronic Electoral System comprising of the Biometric Voter Registration, Electronic Voter Identification and Transmission of elections results.

(v). **PRAYER D1.** That the Petitioner has not provided any evidence of alleged irregularity and/or illegality of the contract signed between the Commission and the 1st Interested Party.

(vi). **PRAYER D2.** That the Petitioner has not provided any evidence of irregularity and/or illegality of the verification of the biometric data.

(vii). **PRAYER E.** That a contract has already been signed between the Commission and the 1st Interested Party.

(viii). **PRAYER F.** That the Commission held stakeholder consultations notwithstanding the consultations were not necessary for the purposes of the audit of the voters register.

255. On the whole, the respondent urged the court to dismiss the petitioner's petition for want of merit.

256. On who should bear the costs of the Petition, it was submitted that the orders sought in the Amended Petition are not merited; the Petitioner should bear the costs of the Petition. Reliance was placed on the decision in **Supreme Court in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR**, where it was stated:

“...the award of costs would normally be guided by the principle that, “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fail...”

THE 1ST INTERESTED PARTY'S SUBMISSIONS

257. On the part of the 1st interested party KPMG, it was submitted by Mr Kimani Kiragu, counsel, relying on their replying affidavit and associating itself with the respondent's response and replying affidavit. The 1st interested party filed written submissions dated 13th April, 2017. It was submitted that All parties are in agreement that the Constitution is the supreme law from which all other laws flow. Further, that the Constitution prescribes the national values and principles of governance that bind all state organs, state officers, public officers and all persons whenever they apply of interpret the

Constitution, enact, apply or interpret any law or make or implement public policy decisions. In addition, that the Constitution also recognizes and guarantees the citizens' right to make political choices and to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors. This free expression of the will of the people is achieved by elections that are conducted by an independent body, transparent and administered in an impartial, neutral, accurate and accountable manner.

258. In the view of the 1st interested party, the need for a credible, verified Register of Voters is anchored in the sovereignty of the people of Kenya on which the entire Constitution is founded. In particular, Article 1(2) of the Constitution which stipulates that: "The people may exercise their sovereign power either directly or through their democratically elected representatives." Further, that democratic elections and referenda are established in the Constitution as the primary avenues for the free expression of the sovereign power of the people.

259. According to the 2nd interested party, Article 83 of the Constitution sets out the criteria that one has to meet to qualify to be registered as a voter, and that therefore any verification of the Register of Voters must revert to those essential requirements. In their view, KPMG succinctly articulated the methodology it would apply in order to obtain all required data including relevant record counts and information from databases such as the Register of Births and Deaths, the National Passports Registry and the Register of Persons.

260. It was submitted that Section 6A of the Elections Act provides for the verification of biometric data, whereas Section 8A provides for the Audit of the register of voters and that with regard to the first general elections after the commencement of that section, providing that:

"The Commissions shall within thirty days of the commencement of this section engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of –

a) Verifying the accuracy of the register;

b) Recommending mechanisms of enhancing the accuracy of the Register; and

c) Updating the register"

261. It was further submitted that the firm so engaged is required to conduct the audit and report to the Commission within a period of thirty days from the date of engagement; The Commission is in turn required to submit the report to the Senate and the National within fourteen days of receiving it; It is also required to implement the recommendations of the audit report within thirty days of receipt and submit its report to the National Assembly and the Senate. It was therefore submitted that it is evident that the audit process is not to be conducted in isolation and is to be subjected to scrutiny by the people through their elected leaders in both Houses of Parliament.

262. It was also submitted that there is nothing prescribed in the Act as to the methodology to be adopted in the audit of the Register of Voters. That the drafters of this piece of legislation were certainly not oblivious of the fact that an audit is undertaken through specific methodology that primarily interrogates the Register vis-a vis the various registers by which a citizen's eligibility to be in the register is established.

263. In their view, there was also a specific intention in making provisions for consultations and the making of regulations with respect to section 44 of the same Act and not section 8A thereof, which they do not consider was enacted by omission hence there is no statutory requirement for consultation under the provisions of section 8A of the Elections Act.

264. In the view of the 1st interested party, the process of engaging an audit firm was undertaken through competitive tendering as required by the provisions of the Public Procurement and Asset Disposal Act (PPADA) 2015, which Act provides that an accounting officer of a public entity shall be primarily

responsible for ensuring that the public entity complies with the Act. More importantly, that Section 44(2) of the PPADA provides that it is the function of the accounting officer of a public entity to inter alia:

- a. *Ensure the procurement process complies with the PPADA*
- b. *Constitute all procurement committees.*
- c. *Approve and sign all contracts of the procuring entity.*
- d. *Ensure proper documentation of procurement proceedings and safe custody of records.*
- e. *Ensure compliance with responsibilities assigned by the PPADA or any other Act of Parliament or as may be prescribed in Regulations.*

265. Further, that under Article 253 of the Constitution, the Respondent is a body corporate with perpetual succession capable of suing and being sued, whereas Article 25 and that both offices are created by Statute and have defined responsibilities under the Act.

266. It was further submitted that Section 10(7) of the Independent Electoral and Boundaries Commission Act provides that the secretary (of the Commission) shall be ___

- a. *The chief executive officer of the Commission;*
- b. *Head of the secretariat*
- c. *The accounting officer of the Commission*
- d. *Responsible for—*
 - (i) *executing decisions of the Commission;*
 - (ii) *assignment of duties and supervision of all employees of the Commission;*
 - (iii) *facilitating, co-coordinating and ensuring execution of Commission's mandate;*
 - (iv) *ensuring staff compliance with public ethics and values; and*
 - (v) *the performance of such other duties as may be assigned by the law and Commission.*

267. That the requirement to engage a professional and reputable firm to audit the Register of Voters under Section 8A was a responsibility assigned to the Commission and by that, the accounting officer who had to ensure compliance therewith.

268. On the issue of jurisdiction of this court to hear and determine this petition, it was submitted that this Court's jurisdiction to hear and determine the matters in issue in this Petition has not been challenged by KPMG, and that there has been no suggestion on the 1st interested party's part that the Petitioners ought to seek relieve elsewhere. Reliance was placed on **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR [27]**.

269. It was the 1st interested party's submission that the Petition does not meet the threshold of a constitutional petition and on that basis, the Court ought to dismiss the petition as being vexatious and an abuse of the Court process. That the Petitioners have sought to read into section 8A of the Elections Act, provisions or obligations that have not been provided therein by law. They also seek to amend that provision of law by litigation.

270. On whether a properly constituted commission was in place at the time of advertising and award of the tender, and therefore the Petitioners' submission that the Respondent's decision to award the tender for the audit of the Register of Voters to KPMG is unconstitutional as there were no commissioners in office at the time of award and that therefore that the Respondent became dormant when the previous Commissioners resigned and could only function again after new Commissioners are appointed; the 1st interested party contended that that was a fallacy on the part of the petitioner and 2nd interested party.

271. It was further submitted that it was a further fallacy for the **Petitioner and 2nd interested party to argue that the audit exercise was not an administrative function and that there was need for a policy formulation with respect to the audit of the register of voters.**

272. **In those respects, the 1st interested party submitted that the above interpretations are not borne out by the provisions of statute and more fundamentally by the fact that the requirement to engage a firm for the audit of the register was a function of statute and not policy.**

273. Further, it was contended that a Reading section 44(2) (j) of the PPADA together with Section 10 (7) (c) of the IEBC Act makes it clear that the CEO of the Respondent had a duty to ensure compliance with the requirement set out in section 8A (3) of the Elections Act.

274. It was therefore submitted that the Petitioner and 2nd interested party seem to be arguing that the Commission is the Commissioners and not a body corporate as established by the Constitution which is a fallacy of sorts.

275. It was also submitted that the engagement of the firm for the audit of the register was a procurement process governed by the PPAD Act, 2015 which places this responsibility upon the CEO, whose office is also established under the Constitution.

276. The 1st interested party urged the court to take cognizance of the fact that the declaratory orders sought are directed at the Respondent IEBC as a Commission and not the CEO Mr Ezra Chiloba who it is alleged exceeded his authority. Given that the Respondent is the Commission charged by law with the functions that the Petitioner now challenges it was submitted that the orders sought as against the Commission must fail.

277. On the relevance and applicability of the decision in the case of **Michael Sistu Mwaura Kamau & 12 others v Ethics and Anti-Corruption Commission & 4 others [2016] eKLR** heavily relied on by the Petitioner, it was submitted that the decision is distinguishable from the facts of this case as that decision involved the forwarding of a report to the Director of Public Prosecutions which required the signature of the Commissioners. That the present case involves whether the Secretariat can tender for professional services hence the issue in the present case are entirely the function of the Secretariat.

278. The 1st interested party also submitted that the decision in **Misc App No 637 of 2016 Republic versus Independent Electoral and Boundaries Commission ex-parte Coalition for Reforms and Democracy** is also distinguishable from the facts of the present case as in that case the court was considering the signing of a contract by Commissioners who are no longer in office whereas in the present case, the challenge is to the process of procuring services of KPMG to audit the Register of Voters which is a completely different scenario.

279. On the petitioner's allegation that "the Respondent currently has no Commissioners in office and the audit the subject of the impugned decision being a policy issue within the ambit of the Commissioners cannot be conducted in the absence of the Commissioners," it was submitted that this assertion, stated on oath is a clear confirmation that these proceedings are vexatious and an abuse of the Court's process because the Petitioner is well aware that the Commissioners have been in office for time now.

280. It was further submitted that the contract for the audit of the register of voters was signed on 31st March 2017, by which time the Commissioners had been in office since January 2017 and that therefore if indeed the award of tender required oversight by the commissioners, then the fact that it was signed

when the commissioners were in office confirms that any acts that the petitioner contends were done without authority were in effect ratified by the Commissioners.

281. It was further submitted by the 1st interested party that the registration of voters was carried out over a period when no commissioners were in office and therefore the question is whether this was a day-to-day administrative function of the Secretariat; and that if it was not, was then the registration of voters was null and void therefore rendering such persons as may have been registered over that period ineligible to vote, a contradiction that becomes apparent in the selective application of the law by the petitioner and the 2nd interested party CORD.

282. On whether the issuance of the tender award was in compliance with the law and the Constitution, it was submitted that KPMG has demonstrated that the award of the tender was in compliance of the law, and that the Petitioner's further contention that the Respondent disregarded and violated the general principles on the electoral process was, besides citing the various provisions of the Constitution, the Petitioner does not provide any particulars of the acts or omissions that violate those provisions.

283. It was further submitted that the contention that the Respondent has not formulated an official register of voters or has not opened it to stake holders and public scrutiny betrays the Petitioners' ignorance of the provisions of the Elections Act in the sense that Section 4(1) provides that there shall be a register of voters comprised of the various registers noted thereunder. Further, that Section 6A of the Elections Act requires the Commission to, not later than sixty days before the date of a general election to open the register of voters for verification of biometric data by members of the public at their respective polling stations for a period of thirty days.

284. It was therefore submitted that the Petitioner's claim that the register has not been opened to the public is evidently premature for reasons that the verification of the register of voters by members of the public cannot come before the audit.

285. On the Petitioner's and 2nd interested party's reference to the definition of biometric and assertion that those provisions were not taken into account by the Respondent in making its decision, it was submitted that the Petitioners do not direct the court to the provisions of section 8A of the Elections Act where this requirement is to be found.

286. On whether the key stakeholders as per section 17(5) of the Elections Laws Amendment act were consulted, it was submitted that the answer lies in the provisions of section 8A of the Elections Act and that the Petitioners have once again woefully mixed up the different provisions of the Elections Act. That the section 17(5) referred to in paragraph 50 of their joint written submissions relates to section 44 as amended of the Elections Act, which section deals with the use of technology and provides for the establishment of an integrated electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of votes. Further, it was contended that it is this system that the Commission is required to consult with relevant agencies, institutions and stakeholders including political parties and to make regulations for the implementation of that section.

287. It was submitted that the audit referred to at section 44 (5) (c) of the Elections Act is the systems audit and not the audit of the register of voters.

288. It was further submitted that the Respondent has addressed the issue of the consultations that it undertook, whereas KPMG has stated that in its performance of the contract to audit the register, it has in fact set up a programme to engage with various stakeholders hence the complaint that stakeholders have not been consulted is also manifestly premature.

289. On the Petitioners' assertions at paragraph 56 of their joint submissions on the explicit requirements of law, it was submitted that they failed to point out what those requirements are and where they are to be found. That the argument that political parties represent the views of citizens whilst partly true does not denigrate the propriety of the award of tender to KPM since, as earlier stated, both the National Assembly and the Senate will have an opportunity to interrogate the report on behalf of the electorate.

290. On the whole, the 1st interested party maintained that the prayers sought by the Petitioner cannot be granted for reasons that there is not merit in the petition, considering that the general election is scheduled to take place on 8th August 2017 which is less than five months away and that therefore if the orders sought by the Petitioner are allowed, it will not be possible to complete the audit of the register of Voters before the general election on 8th August 2017. Further, that the orders sought by the Petitioner if granted will lead to an injustice and an absurdity as it will completely frustrate the general election. Reliance was placed on the case of **Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others [2014] eKLR** where the Court of Appeal held:

“It is well settled that construction of statutes must be done as far as possible to avoid absurdity. The presumption against absurdity in rules of construction of statutes requires courts to lean against a construction that would give rise to absurdity. Courts are also enjoined to construe statutes in a manner that gives them validity rather than invalidity, hence the principle “ut res magis valeat quam pereat” which according to Black’s Dictionary 9thEdn simply means that they must be construed in a manner that gives validity and sustains them.”

291. In this case, it was contended that the Petitioners are requesting this court to give the provisions of the Elections Act an interpretation that is not only wrong, but would also lead to an absurdity, which this court should disregard and adopt the interpretation proposed by KPMG which gives the intention of Parliament validity and allows the Respondent to ensure that the register of Voters has been audited before the general election.

292. On Inordinate delay in bringing this action, it was submitted that the amended petition dated 5th April 2017 seeks equitable remedies in the form of injunctions and declarations yet the petitioner was not vigilant in that if he was aggrieved by the decision to award the tender for the audit for the Register of Voters to KPMG, he was obligated to file his suit as soon as possible, and that the obligation was even higher in the present case as it involves a matter concerning the election which has very short and strict timelines.

293. It was submitted that the Petitioner does not deny being aware of the decision he now challenges and that in fact, a previous case **Misc App No 648 of 2016 CORD V IEBC** which was widely publicized in print and electronic media was raising similar issues raised by the Petitioner herein and that therefore the Petitioner ought to have applied to be joined to those proceedings or even file a separate suit in order to agitate his case. reliance was placed on the case of **Julius Musili Kyunga v Kenya Commercial Bank Ltd & 2 others [2015] eKLR** where the Court of Appeal held:

“In this case, the appellant lost his right of redemption by virtue of the auction sale. As he was guilty of inordinate delay in bringing his suit, and the orders of injunction sought by him are equitable remedies, the appellant was caught up by the maxim “equity aids the vigilant and not those who slumber on their rights”... Therefore, the suit filed by the appellant against the 1st and 2nd respondent could not sustain his prayers for interlocutory injunction which in effect sought to impeach the sale of the suit property to the interested party and the exercise of judicial discretion in his favour.”

294. It was submitted that as this petition involves the audit of the Register of Voters, it is a time sensitive issue which needs to be concluded well before the general election on 8th August 2017 hence this court should not exercise its discretion in favour of the Petitioner due to his delay in bringing this action.

295. The 1st interested party concluded that the Petitioners have misinterpreted the provisions of the Act and the duties of the Respondent under section 8A of the Act to engage a professional reputable firm for the audit of the Register of Voters; The grounds raised by the Petitioners in support of the amended petition lack any legal or factual basis; They cannot justify the issuance of the orders sought by the Petitioner; and urged the court to dismiss the amended petition dated 5th April 2017 with costs.

DETERMINATION

296. I have considered the petitioner's case as supported by the 2nd interested party[CORD]. I have also considered the serious oppositions raised by the respondent and the 1st interested party thereto and in my humble view, the main issues for determination are as framed by the parties themselves in their submissions all combined with several ancillary questions that the court will endeavour to answer in the course of resolving the issues which can be summarized as follows:

i. Whether the Court has the Jurisdiction to entertain and answer the legal questions in this matter.

ii. Whether section 17(5) of the Election Laws Amendment Act requires that the Key stakeholders be consulted before procurement of the audit firm is undertaken and therefore whether the issuance of the tender award to the 1st interested party was in full compliance with the law and the Constitution.

iii. Whether in the absence of Commissioners, the Commission had no mandate to procure an audit firm for the audit of the Register of Voters

iv. What orders should this court make?

297. On the issue of whether this court has the jurisdiction to hear and determine this petition, I find that all parties are in agreement that the Petitioner had the right and this court has jurisdiction to hear and determine this petition in accordance with the provisions of section 174 of the Public Procurement and Asset Disposal Act, 2015 which permits an aggrieved party to seek a remedy either through an application for review to the Public Procurement Review Board or to any other forum and in this case, the petitioner sought to challenge that process by way of a petition, after the judicial review proceedings in **JR 648 of 2016 CORD V IEBC** [supra] were struck out by Hon Justice Chacha Mwita. In addition, the issue of jurisdiction was settled by Hon Chacha Mwita J in the said Judicial Review matter where the 2nd interested party herein was the main ex parte applicant and therefore as I have no good reason to depart from the findings and decision of my brother Judge, I shall not belabor that point at the expense of the merits of this case. In the end, I find that this court has jurisdiction to hear and determine the petition as filed.

298. The next issue for determination is whether the respondent was under section 17(5) of the Elections Laws Amendment Act required to consult stakeholders for purposes of engaging an audit firm to audit the Register of Voters and therefore Whether the respondent was under a statutory duty to consult stakeholders before engaging an audit firm to audit the Register of Voters.

299. Section 17 of the said Act stipulates that:

17. The Elections Act, 2011 is amended by deleting section 44 and substituting therefor the following new section—

Amendment of

section 43 in No. 24 of 2011.

Amendment of

Section 44 of No. 24 of 2011.

Use of technology.

44. (1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

(2) The Commission shall, for purposes of subsection(1), develop a policy on the progressive use of technology in the electoral process.

(3) The Commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.

(4) The Commission shall, in an open and transparent manner —

(a)procure and put in place the technology necessary for the conduct of a general election at least eight months before such elections; and

(b)test, verify and deploy such technology at least sixty days before a general election.

(5) The Commission shall, for purposes of this section and in consultation with relevant agencies, institutions and stakeholders, including political parties, make regulations for the implementation of this section and in particular, regulations providing for —

(a)the transparent acquisition and disposal of information and communication technology assets and systems;

(b)testing and certification of the system;

(c)mechanisms for the conduct of a system audit;

(d)data storage and information security;

(e)data retention and disposal;

(f)access to electoral system software source codes;

(g)capacity building of staff of the Commission and relevant stakeholders on the use of technology in the electoral process;

(h)telecommunication network for voter validation and result transmission;

(i)development, publication and implementation of a disaster recovery and operations continuity plan; and

(j)the operations of the technical committee established under subsection (7).

(6) Notwithstanding the provisions of section 109(3) and (4), the Commission shall prepare and submit to Parliament, the regulations required made under subsection (4) within a period of thirty days from the date of commencement of this section.

(7) The technology used for the purpose of the first general elections upon the commencement of this section shall —

(a)be restricted to the process of voter registration, identification of voters and results transmission; and

(b)be procured at least eight months before the general election.

(8) For the purposes of giving effect to this section, the Commission shall establish a technical committee of the Commission consisting of such members and officers of the Commission and such other relevant agencies, institutions or stakeholders as the Commission may consider necessary to oversee the adoption of technology in the electoral process and implement the use of

such technology.

300. According to the Petitioner and the 2nd interested party, the Commission attempted to define stakeholders by holding what it called **stakeholder consultations** which is not a stakeholder forum contemplated by section 17(5) of the ELAA. The petitioner maintained that stakeholders must be consulted in the implementation of the section 17 which section has to be read with section 6 of the Act which stipulates that the agencies referred to in the Act include Kenya National Foreign Service Management which is not in place and that the Act refers to Political Parties, Registrar of Births and Deaths.

301. Further, that the fact that the Commission was in a state of dormancy and comatose or in hibernation, hence the CEO of the Commission could not perform actions of advertising and awarding the tender, which actions of the CEO /Secretary of the Commission are ultravires.

302. On the part of the respondent and the 1st interested party, it is contended that it is a fallacy to state that section 17(5) contemplates stakeholders' involvement in the procurement process of the consultant who is to audit the Voter's Register.

303. I have reproduced the entire section 17 of the amended Act as above. In my humble view, reference to stakeholder engagement in the above section is in so far as the making of regulations to implement the section is concerned and NOT in the procurement of the consultant for purposes of auditing of the Register of Voters. For clarity purposes, the subsection complained of states:

17(5) The Commission shall, for purposes of this section and in consultation with relevant agencies, institutions and stakeholders, including political parties, make regulations for the implementation of this section and in particular, regulations providing for...

304. The above section is complemented by section 6 which introduces section 8A to the Elections Act, 2011 and which stipulates:

8A. The Elections Act, 2011 is amended by inserting the following new section immediately after section 8 —

(1) The Commission may, at least six months before a general election, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of—

a. Verification of biometric data.

b. (a) verifying the accuracy of the Register;

c. recommending mechanisms of enhancing the accuracy of the Register; and

d. updating the register.

(2) The Kenya Citizens and Foreign Nationals Management Service established under section 3 of the Kenya Citizens and Foreign Nationals Management Service Act shall make available to the Commission the information held by it in the national population register for the purpose of the conduct of an audit under subsection (1).

305. However, for purposes of the first-read forthcoming general elections of 8th August, 2017, the Section at subsection 3 states:

(3) For purposes of the first general election after the commencement of this section, the Commission shall, within thirty days of the commencement of this section, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of —

(a) verifying the accuracy of the Register;

(b) recommending mechanisms of enhancing the accuracy of the Register; and

(c) updating the register.

(4) The firm engaged under subsection (3) shall conduct the audit and report to the Commission within a period of thirty days from the date of engagement.

(5) The Commission shall, within fourteen days of receipt of the report under subsection (4), submit the report to the National Assembly and the Senate.

(6) The Commission shall implement the recommendations of the audit report within a period of thirty days of receipt of the report and submit its report to the National Assembly and the Senate.

306. With utmost respect to the petitioner and the 2nd interested party's averments, there is no provision under section 6 of the Act as amended stipulating that the Commission in engaging the consultant to audit the Voter's register, is expected to consult the wider stakeholders listed in section 17(5) and which stakeholder engagement, according to the section, are only required in the process of making regulations for the implementation of the section.

307. What section 6 introduces at section 8A is a stipulation at section 8A (1) (2) for the engagement of a professional reputable firm for purposes of auditing of the Register of Voters, generally in doing so, Parliament has placed a duty on the Kenya Citizens and Foreign Nationals Management Service established under section 3 of the Kenya Citizens and Foreign Nationals Management Service Act to make available to the Commission the information held by it in the national population register for the purpose of the conduct of an audit contemplated under subsection (1).

308. However, Parliament was crystal clear in subsection (3) of the section 8A that For purposes of the first general election after the commencement of this section, which are the August 8th 2017 general elections, the Commission shall, within thirty days of the commencement of the section, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of —

(a) verifying the accuracy of the Register;

(b) recommending mechanisms of enhancing the accuracy of the Register; and

(c) updating the register.

309. From the above provisions, there is absolutely no duty or even discretion imposed or placed on the Commission to engage stakeholders, including Political Parties and or the KCFNMS in the procurement of a reputable professional audit firm to audit the Register of Voters for purposes of the first general election after the commencement of the section.

310. I reiterate that engagement of stakeholders under section 17(5) is clearly for purposes of making regulations to implement that section, whereas the engagement with the KCFNMS under section 8A is for purposes of deriving the information held by KCFNMS in the national population register for the purpose of the conduct of an audit under subsection (1).

311. It follows that, what the petitioner and the 2nd interested party are seeking from this court is an interpretation of the amended law that goes beyond the scope of that law and this court must and has resisted that temptation at all costs since there is no ambiguity in the statute, to call for a reading-in.

312. Further, I have combed through the Constitutional provisions of Articles 10 on national values and principles of Governance, Articles 227 on public procurement and the provisions of the Public Procurement and Asset Disposal Act, 2015, the Elections Act and the IEBC Act and I find no provision

stipulating that before the Commission or a procuring entity embarks on any procurement process, it has to engage particular stakeholders on the choice of the bidder. This, however, is not to say that in matters of this nature which involves expenditure of public finances, the Commission can act arbitrarily or unfairly as such arbitrariness is open to judicial review as stipulated in the Public Procurement and Asset Disposal Act. It is to say with precision that the requirement for stakeholder engagement in public procurement for purposes of implementing the amended Act and provisions reproduced herein is not only foreign but extraneous to the legal framework and far-fetched.

313. In addition, albeit the petitioner claims that the respondent set out irrelevant specifications during the advertisement of the tender having failed to seek stakeholder's views and the Commission itself having no previous experience of offering tenders for audit of the register of voters and that therefore the entire process was tainted with speculation, guesswork and experimentations that offends the objectives of the law set out in section 8A of the Act; and that no methodology or criteria for the audit has been disclosed to ensure the objectives set out in law, it is my humble view that the specific methodology and criteria for the audit can only be provided by the professional reputable firm that is contemplated under the Act, which methodology must be reviewed and validated by the Commission before the actual audit exercise is commenced.

314. It must be understood quite clearly that the work of auditing of the Register of voters is the function of the IEBC. However, Parliament in its wisdom found it appropriate to prescribe for the Commission facilitation to engage external expertise consultancy services for purposes of the audit. In this case, the court finds and holds that Parliament in enacting that IEBC engages a professional reputable firm to audit the register of voters knew that the IEBC requires facilitation to undertake the audit under the supervision of the IEBC.

315. Parliament, in enacting section 8A above must have had in mind the shortcomings of the Commission, noting that the former Commissioners had been hassled out of office to pave way for the recruitment of a completely new team and that is why it provided for the Commission to engage a reputable professional firm to undertake the audit exercise within specific timeframes and report to the Commission.

316. The Amended Act further provides for checks and balances such that the audit report is not to end up with IEBC alone. IEBC has to submit that audit report to Parliament. The section provides:

(4) The firm engaged under subsection (3) shall conduct the audit and report to the Commission within a period of thirty days from the date of engagement.

(5) The Commission shall, within fourteen days of receipt of the report under subsection (4), submit the report to the National Assembly and the Senate.

(6) The Commission shall implement the recommendations of the audit report within a period of thirty days of receipt of the report and submit its report to the National Assembly and the Senate.

317. What the above provisions stipulate is that the audit report is subject to Parliamentary scrutiny. Parliament represents the people of Kenya. Moreso, the enactment of the ELAA was through a negotiated process involving political parties and all other stakeholders and therefore if there was anything wrong with the provisions being implemented as they are, nothing prevents the petitioner and the 2nd interested party and any other person or body from challenging the specific provisions.

318. It therefore follows that the alleged opaqueness, secrecy and lack of accountability on the part of the respondent in procuring the audit firm is far-fetched and amounts to nothing but vilification of the Commission in the exercise of their constitutional and statutory mandate.

319. I further find that the complains by the petitioner and the 2nd interested party on the criteria for audit and methodology can only be safely addressed in the forum where the audit firm is undertaking the process. Furthermore, the audit firm is not precluded from receiving representations and or information

that can assist it achieve the objectives for which the audit was intended namely;

(a) verifying the accuracy of the Register;

(b) recommending mechanisms of enhancing the accuracy of the Register; and

(c) updating the register.

320. On the complaint regarding the stolen BVR kits which were allegedly stolen from Manderu and were to be found being used for registering voters in Eastleigh, I find that those complaints are beyond the scope of this petition. Mass voter registration exercise was completed after the court enlarged the period for such registration and what the IEBC is expected to be engaged in at the moment as regards the Register of Voters is what is stipulated in section 8A-auditing of the voter's register, among other preparatory activities in readiness for the conduct of the August 8th general elections.

321. This court does acknowledge that elections are the heart of democracy and that only a free, fair, credible and inclusive electoral system and related processes can contribute to the meaningful institutionalization of democracy and gain public trust. This is only possible if citizens come under the voter registration process and participate in elections. The significance of voter registration is that it restricts ineligible persons to the poll and ensures that only those people who are entitled to vote in a given polling area can do so and only once. Voter registration therefore brings eligible citizens into the electoral process, ensures quality of the vote and prevents ineligible people from voting thus ensuring that political rights are free from fraud and manipulation. A more accurate and reliable voter register is therefore inevitable for purposes of elections, and it is the registration exercise that results in the compilation of entirely new voters register.

322. On the other hand, a serious audit or scrutiny of a voters' register is therefore critical, to clean up the register to ensure only citizens who registered as voters and who are living as at the time of the audit and voting are left in the register and that those who registered are not left out of the register. There should also be found in the end, to be no double registration of voters. Voter registration is therefore such an important exercise that it serves the purpose of ensuring that everyone entitled to vote as stipulated in Article 38 of the Constitution can vote, and to prevent ineligible persons from voting, and to guard against multiple voting by the same individuals.

323. As to how the audit is to be carried out, is a methodology that the audit firm should develop in line with the statutory mandate and terms of reference and specifications set out in the tender documents as well as the useful views and representations that may be submitted to the audit firm by different interest groups.

324. Critically examining the purposes for which the audit of the Register of Voters is intended under the Act, Parliament was aware that there was need to update the register, verify accuracy of the register and to put in place mechanisms for enhancing the accuracy of the register, now and for the future.

325. It is therefore not logical to conceive that there must have been an accurate register of voters before engaging the consultant and that the only way by which such accuracy could be guaranteed was to engage stakeholders before the consultant is hired. In my humble view, If there was an accurate register, I see no reason why Parliament would find it necessary to stipulate that a reputable professional audit firm be engaged to audit the register of voters to ensure its accuracy; is updated and to recommend mechanisms that enhance its accuracy.

326. I find that the petitioner and the 2nd interested party have not demonstrated to this court that they have, upon the IEBC engaging the audit firm, been denied the opportunity to make representations on mechanisms that should be put in place to ensure the accuracy of the register. There is also nothing to make this court reach a finding that Kenyans will be disenfranchised by the audit because they were never accorded an opportunity to participate in procuring the service provider, KPMG, or that the petitioner's legitimate expectations have been violated. Legitimate expectations must be grounded on the law and not

on misapprehension of the law. The petitioner in this case has misapprehended the law on the procurement of an audit firm. He claims that there ought to have been stakeholder or public participation in such procurement which is not the case as the law does not stipulate that procurement of a professional audit firm for purposes of auditing the Register of voters for purposes of the first general election upon the section taking effect there must be stakeholder engagement in the procurement of such firm. The Act and section is crystal clear on when the stakeholders ought to be engaged. Accordingly, no legitimate expectation existed or arose, capable of being violated.

327. The petitioner further laments that the Respondent set out irrelevant specifications during the advertisement of the tender having failed to seek stakeholders' views and the Commission itself having no previous experience of offering tenders for audit of the Register of Voters and therefore the entire process was tainted with speculation, guesswork and experimentations that offends the objectives of the law set out under section 8A.

328. It is worth noting that the Commission is an independent Constitutional Commission which is not subject to authority or direction of any person. It reports directly to Parliament and its financial matters are audited by the Auditor General which is an Independent Office under the Constitution. It is unfortunate; therefore, that the Petitioner wishes this court to open a window of opportunity for the Commission to be manipulated by interest groups for their personal benefit. It is not without doubt that this is the first time that Parliament has called for an external assistance to the IEBC in the discharge of their mandate of auditing of the Register of voters and this is meant to address the perennial problems of having a register of voters that is not accurate, as was identified by the Kriegler Committee.

329. What the petitioner and 2nd interested party have not shown to this court is an affidavit from an expert in procurement and audit of Register of Voters matters who would do a much better job than IEBC or the 1st interested party herein. The IEBC as an independent body is mandated to audit the Register of voters and what Parliament did was to provide it with support mechanisms. The Commission cannot therefore be dismissed to be an incompetent Commission engaged in speculation, guesswork and experimentations. It must be given an opportunity to undertake the task as stipulated in the law, with the assistance of an external expert.

330. Citizens of this country must be encouraged to respect the institutions created under the Constitution and accord those institutions ample opportunity to exercise the mandate as stipulated in law otherwise the kind of statements that I have read in this petition pointing at the IEBC as an independent constitutional institution are a recipe for cynicism in the competence of the IEBC to manage elections, yet there is no alternative Electoral Management Body that is constitutionally mandated to manage and conduct elections in this country.

331. The petitioner and 2nd interested party also complain that the 1st interested party, despite claiming that it has an international partner, it has not shown which international partner that it has and which it is willing to partner or work with. Further, that the respondent failed to carry out proper stakeholder's consultations to take into account international best practices including the Nigerian Model of audit of the voter's register where the Nigerian IEBC in the first instance set out to audit the register resulting in 650,000 double registration being detected; that upon carrying out further audit, using different methodology and applying different parameters the second audit yielded 10,000,000 double registration being detected and permanent chip cards for voter registration and identification issued; further, that the best practices and model or methodology are issues only a properly constituted commission could apply its mind to, taking into account stakeholder involvement.

332. In my humble view, the petitioner was being speculative of what the audit firm was expected to do and what it was capable of doing as regards the audit of the Register of voters. The Act is clear that the IEBC is to engage a reputable professional firm. There is no legal requirement that the firm must be an international firm. The section of the law that sets out the engagement of the audit firm does not give a description of all the qualifications of the contemplated firm. Nonetheless, the 1st interested party has gone to great lengths to demonstrate on oath their expansive qualifications and experience and even the details of how they would undertake this very important task of auditing the Register of voters, and

how they are undertaking the said task, including engaging stakeholders to give their views on the already set methodology for the conduct of the audit.

333. It is therefore upon the petitioner and 2nd interested party to prove by way of tangible evidence that the 1st interested party has no competence as far as the assignment of auditing of the voter's register in Kenya is concerned, noting that the methodology for the audit is not stipulated in the Act as amended and therefore I have no difficulty in finding and holding that the petitioner and the 2nd interested party are speculators.

334. Nonetheless, Parliament was not oblivious of the fact that an audit has to be conducted through a specific methodology to be developed by the auditor for purposes of the audit, and which methodology must be approved by IEBC. In this petition, the petitioner has not laid any evidence to show that the methodology adopted by the 1st interested party is one that is incapable of achieving the purposes for which the audit was or is intended.

335. I reiterate that now that the audit firm has been contracted by the Commission, and has commenced the process of collecting and collating views on how best to audit the register of voters, there is nothing that prevents the petitioner and the 2nd interested party and or any other person from making submissions and proposals based on international best practices including the much hyped Nigerian Model of audit of voter's register as proposed by the petitioner.

336. In my view, therefore, those factors that the petitioner believes will go a long way in achieving the objectives of the audit as stipulated under the Act as amended should be presented to the audit firm for consideration. Furthermore, the fact that the audit firm is by law mandated to submit its audit report to the Commission within 30 days from date of engagement; which report has to be submitted to Parliament by the Commission within 14 days from date of receipt by the Commission is an indication that Parliament has the power to adopt or reject the report which does not meet the objectives of the audit as stipulated in the Act.

337. The petitioner has also sought for a declaration under prayer D to the extent that the audit contemplated under section 6(3) of the ELAA as read together with section 17(5) includes a system audit of Biometric Voter Registration kits, Electronic voter identification Devices(EVID), Electronic transmission System in accordance with section 17(5)(c)of the ELAA. I have perused the ELAA and the Elections Act. I note that the amendment Act substituted the definition of Principal Register of Voters with "Register of Voters." Before one exercises their right to vote as guaranteed under Article 38 of the Constitution, they must be registered as voters and therefore their names must be in the Register of Voters as defined under section 2(d) of ELAA. Under section 6A of the ELAA, The Elections Act, 2011 is amended by inserting the following new section immediately after section 6—

6A. (1) The Commission shall, not later than ninety days before the date of a general election, open the Register of Voters for verification of biometric data by members of the public at their respective polling stations for a period of thirty days.

(2)The Commission shall, upon the expiry of the period for verification under subsection (1), revise the Register of Voters to take into account any changes in particulars arising out of the verification process.

(3)The Commission shall, upon expiry of the period for verification specified under subsection (1) publish —

(a) a notice in the Gazette to the effect that the revision under subsection (2) has been completed; and

(b)the Register of Voters online and in such other manner as may be prescribed by regulations.

338. The Amended Act prescribes to the Commission what it should do before the date of general

election, as regards the opening of the Register of Voters for verification of biometric data by members of the public at their respective polling stations for a period of thirty days. It is only after the public have verified the Register of Voters that revision can be done to the register, taking into account any changes in particulars arising out of the verification process.

339. As earlier stated, the audit contemplated for purposes of the imminent general elections is not a systems audit but audit of the Register of Voters. Therefore, for this court to make a declaration in the manner sought by the petitioner is tantamount to prescribing to the audit firm terms of reference which are beyond the scope prescribed by the law as enacted. And as I have stated, the Act is very clear that the audit relates to the Voters register. It therefore follows that whatever scope of works that the audit firm undertakes to achieve the purposes of the audit is not for this court to prescribe.

340. There is no evidence provided to this court by the petitioner and the 2nd interested party to suggest that the audit firm in carrying out its work is about not to follow the law. What the petitioner should have done is to present its suggestions to the audit firm for consideration. In my humble view, the above prayer of declaration seeks for interpretation of sections of the new law in a manner that seeks to rewrite those laws and not to create clarity. Courts do not rewrite the law in their interpretation of the law. If they did so, they would be guilty of amending the law. In my humble view, sound interpretation of statutes requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Context always matters and therefore courts should not forget that context is a tool for understanding the terms of the law, not an excuse for rewriting them.

341. **James Madison** warns that-

“The accumulation of all powers, legislative, executive and judicia[l] in the same hands, whether of one, a few, or many, and whether hereditary, self–appointed, or elective, may justly be pronounced the very definition of tyranny.”

342. The people of Kenya in enacting the 2010 Constitution set the stage for limiting the power of each of its three major organs of the state or branches, through a system of checks and balances. It is a system that rests on the principle of the separation of powers. As **George Washington** said in his Farewell Address:

“It is important, likewise, that the habits of thinking in a free Country should inspire caution in those entrusted with its Administration, to confine themselves within their respective Constitutional Spheres; avoiding in the exercise of the Powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create whatever the form of government, a real despotism.”

343. I have read again and again section 6(3) of ELAA and section 17(5) of the same Act and I find that the system audit contemplated in the Act is for purposes of the future elections. For the first general elections under the amendments, the law is clear that what is expected to be audited is the Register of Voters and not a systems Act. It is for that reason that section 17(1) which amends section 44 of the Elections Act, 2011 introduces the following section:

44. (1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

(2) The Commission shall, for purposes of subsection (1), develop a policy on the progressive use of technology in the electoral process.

344. Subsection 2 above mandates the Commission to develop a policy on the progressive use of technology in the electoral process. The question is whether the section 44(1) above is operational in the absence of a policy, noting that subsection 2 makes it clear that the Commission will develop policy to guide the progressive use of technology in the electoral process.

345. In my view, the petitioner is putting the horse before the cart. The section as enacted must be implemented through a policy which the petitioner has not demonstrated is already in place and therefore to make the declaration sought will be premature.

346. In addition, the system audit contemplated in section 17 is not the same as the audit of the Register of Voters for purposes of 8th August general elections. Whereas the former is long-term and would require regulations to be put in place, the latter is imminent.

347. It therefore follows that to accept the petitioner's argument would not only be a misinterpretation of legislation by imposing on statutory provisions an artificial reading that departs from Parliament's intention, but would also be as result of misunderstanding the statutory provisions and as a result, effectively rewrite it.

348. In **Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others [2014] eKLR** the Court of Appeal held :

“It is well settled that construction of statutes must be done as far as possible to avoid absurdity. The presumption against absurdity in rules of construction of statutes requires courts to lean against a construction that would give rise to absurdity. Courts are also enjoined to construe statutes in a manner that gives them validity rather than invalidity, hence the principle “ut res magis valeat quam pereat” which according to Black’s Dictionary 9thEdn simply means that they must be construed in a manner that gives validity and sustains them.”

349. It is for the above reasons that I fully associate myself with the 1st interested party's submissions that the audit contemplated in section 17 is to ensure that the Register of Voters is audited expeditiously before the 8th August 2017 general elections and that is why timelines are set out. As no party has challenged those timelines, it is not for this court to interfere with a process that is within the electoral period of the electoral cycle.

350. In addition, it is my humble view that any action that would tend to interfere or obstruct the holding of elections on 8th August 2017 must be resisted as it would be amending the Constitution through the backdoor. Since there can be no free, fair and credible elections if there is no register of voters that is reliable and accurate, it is only fair and just that the respondent and 1st interested party are given the opportunity to complete the process of auditing the Register of Voters and give feedback to Parliament which is the People's representative. The people of Kenya can only judge the performance of IEBC if it raises to the challenging occasion of cleaning up the register of voters and superintend over elections in an impartial free fair and credible manner. The commencement point is the accuracy of the register of voters.

351. Moreso, Courts must resist excessive judicial review of overriding how best administrative bodies should exercise their constitutional and or statutory powers. And in public procurement matters, the persuasive decision in **Geo Miller and co Pvt Ltd v the State of Rajasthan and another writ Petition No. 6613 /2015 under Article 226 of the Constitution of India similar to our Article 227** of the Constitution of Kenya, 2010 is instructive. The High Court of three Judge Bench made it clear at page 21-22 of the Judgment and i agree that :

“The argument that the High Court must interfere under writ jurisdiction in contractual matters in case the state has acted unfairly or arbitrarily does have merit but the court has to be first satisfied that the state has acted in such a manner. In a judgment reported as Jagdish Mandal vs State of Orissa Appeal(Civil) 5699 of 2006 decided on 11.December, 2006 and it has been held that:

“Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial

transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bonafide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. the power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenders with imaginary grievance, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

i) whether the process adopted or decision made by the authority is malafides or intended to favour someone;

ii) Whether the process adopted or decision made is so arbitrary and irrational that the court can say 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

352. The respondent also raised the issue of the petitioner herein masquerading as an individual and petitioning in the public interest when in his own affidavit he forgets and describes himself as a political party. The petitioner never responded to that allegation. I have nonetheless perused the petitioner's supporting and further affidavit and I have no doubt in my mind that Mr Okiya Omtatah Okoiti though describing himself as a public spirited individual, and whereas i have no doubt in my mind that courts in this country including the Supreme Court have taken judicial notice of the fact that Mr Okiya Omtata the petitioner herein has immensely contributed to fostering and developing liberal and broadened genuine public interest litigation, this court cannot avoid but express its opinion that while genuine litigants with legitimate grievances relating to matters which are dear to them must be addressed, no doubt, the petitioner for purposes of this case is wearing a mask of public interest litigation in his own right while he, in essence, is proxy of others.

353. I have no doubt, from the petitioner's affidavits in support of the main petition at paragraph 29 and in the amended petition at paragraph 30, in believing that it is possible that the 2nd interested party CORD having been a pious explorer in JR 648 of 2016 on a technicality, was mortified and used the name of the petitioner herein Okiya Omtatah Okoiti to initiate these proceedings.

354. Whereas nothing precludes the petitioner from approaching this court in a representative capacity, In my humble view, therefore, the petitioner has not approached this court transparently and with clean hands. Every court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have a bearing on adjudication of issues.

355. When parties approach the seat of justice for equitable remedies such as injunctions and Declarations, they ought not to be veiled. They ought to be truthful and it is no excuse to claim that they were not aware of the importance of any omitted fact. If there is no candid disclosure as was in this case where the petitioner pretended to be Okiya Omtatah Okoiti at paragraph 1 of his petition and as deposed in his affidavits, when in the body of his pleadings he is the Coalition for Reforms and Democracy CORD, yet he could as well in exercise of his constitutional and democratic right to petition on behalf of CORD and so disclose, he is guilty of misleading the court and the court has the power to reject his petition even without delving into its merits. However, the court has gone into the merits of the petition for reasons that on the face of it, it is reflective of the public interest and raises important questions of law requiring an in-depth investigation.

356. This brings this court to the question of **delay** in bringing this action before the court. The petition was initiated the same day that **JR 648 of 2016** CORD V IEBC was struck out by Hon Justice Chacha Mwita on a technicality. As correctly submitted by the 1st interested party, the amended petition dated 5th April 2017 seeks equitable remedies in the form of injunctions and declarations. It is well settled that equity only comes to the aid of the vigilant and not the indolent. If the petitioner herein was indeed aggrieved following the decision to award the tender for the audit of the Register of Voters to KPMG and not lying in the shadow of the 2nd interested party herein, he was obligated to challenge that decision as soon as was practically possible. He could not have waited from the comfort zone as if he had been promised that JR 648 of 2016 was as a matter of right and law, going to be allowed anyway, and that until the court had struck out that petition, he had to lie low and spring up with a petition claiming breach of the law and or Constitutional provisions, five months later, knowing very well that there are timelines given by the new law, in these processes leading to the 8th August, 2017 general elections.

357. The petitioner has not attempted to explain the reason for the delay in filing a challenge to the decision of the IEBC to award the tender to KPMG through a procurement process. If it was a civil appeal, it could have been lodged in accordance with the Civil Procedure Act and Rules, at least within 30 days and if a request for review, 14 days from the date of notification of the tender as stipulated in section 167 of the PPADA. Delay defeats equity and Article 159 of the Constitution abhors delay.

358. It is not denied by the Petitioner that he was aware of the decision that he now challenges. This court takes judicial notice of the fact that JR No. 648 of 2016 was widely publicized in print and electronic media and that it raised similar issues as those which the Petitioner herein has articulated as can be seen from the joint submissions by the petitioner and the 2nd interested party. Nothing prevented the Petitioner from seeking to be enjoined to the JR 648 of 2016 as a co applicant or interested party or the petitioner filing separate proceedings in order to agitate his case. In my humble view, the petition herein is an afterthought. It came too late in the day when the respondent and 1st interested party had already signed a contract for the audit of the Register of Voters, which process is time bound by statute and which is near completion.

359. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting the orders herein sought which are declarations and injunctions, the court can withhold the gravity of the order where among other reasons there has been delay and where the a public body, as is in this case, has done all that it can be expected to do to fulfill its duty or where the remedy is not necessary or where its path is strewn with blockage or where, to grant the orders sought would cause administrative chaos and public inconvenience or where the object for which the application is made has already been realized.

360. In this case, even if I was to declare the contract between the respondent and 1st interested party a nullity, weighing one thing against the other, I do not find in the circumstances prevailing that the remedies herein would be efficacious. See **Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508**. Furthermore, the discretion of the court being a judicial one must be exercised on the evidence and on application of sound legal principles. The Court of Appeal per OKWENGU, MAKHANDIA & SICHALE, JJA in **Julius Musili Kyunga v Kenya Commercial Bank Ltd & 2 others [2015] eKLR at paragraph [29]** held:

“In this case, the appellant lost his right of redemption by virtue of the auction sale. As he was guilty of inordinate delay in bringing his suit, and the orders of injunction sought by him are equitable remedies, the appellant was caught up by the maxim “equity aids the vigilant and not those who slumber on their rights”... Therefore, the suit filed by the appellant against the 1st and 2nd respondent could not sustain his prayers for interlocutory injunction which in effect sought to impeach the sale of the suit property to the interested party and the exercise of judicial discretion in his favour.”

361. In the view of this court, the contract which is impugned in this petition is not an ordinary contract. It involves the audit of the Register of Voters. The performance of the audit is statute bound and linked to the imminent general Elections which is stipulated in Article 101 of the Constitution. Elections are a

gateway to democratic governance and any impediment to the attainment of that value of Democracy which is espoused in Article 10 of the Constitution must be resisted.

362. In the same vein, prayer No. F of the petition would only be available if there was requirement for the Commission to conduct stakeholder consultations before engaging an audit firm. As I have restated the provisions of the amended Act which clearly do not stipulate for such stakeholder engagement prior to appointment of the audit firm, and now that the audit firm has been contracted and is in the process of carrying out the audit exercise, that prayer is obsolete and the best the petitioner could do would be to submit to the audit firm what it believes to be the best framework and methodology for the conduct of such audit of the Register of Voters.

363. On the prayer D1 in the amended petition for a declaration that the contract entered into for the audit of the Register of Voters on 31st March, 2017 is irregular, illegal and be declared null and void, I find and hold that the contract was entered into between the respondent Commission which was fully constituted and the 1st interested party, which contract is in the process of being performed.

364. It is noteworthy that before this court nullifies that contract, it must examine the letter and spirit of the Constitution and the significance of carrying out an audit of a Register of voters to the Kenyan people and their right to be involved in elections which must be free, fair, transparent and credible. The Constitution is the will of the people of Kenya. The people of Kenya made it clear that they want elections to be held on a specific date of the second Tuesday in August in every fifth year. That date for the 2017 general elections falls on 8th August, 2017.

365. Previous attempts by the legislature to alter that date have not been fruitful owing to the sanctity and supremacy of the Constitution over all organs of the state. It is not in doubt that it has not been a rosy affair implementing this Constitution, 5 years since it was promulgated. There have been and are still challenges to be overcome. Nonetheless, this living instrument has outlived those attempts under the watchful eye of Kenyans through the Courts and other persons of interest. That being the case, the intention of the people of Kenya was and still remains to be that they did not intend to change that election date in an easy manner and therefore no court of law of whatever hierarchy should attempt to alter the date, as that would be acting against the will of the people of Kenya.

366. But to arrive at the elections date and vote, which all Kenyans are all nerved towards, there must be registered voters who can be identified through an accurate Register of Voters, exercising that right to vote as stipulated in Article 38 of the Constitution.

367. Parliament which is representative of the people found it appropriate to enact the ELAA to provide for an audit of the Register of voters before the 2017 general elections and for a system audit for the future, after the country is done with the 8th August 2017 general elections. It also provided for timelines within which such exercise should be conducted and the objectives that the exercise was to realize.

368. Therefore, should this court nullify such process which has already commenced and nearing conclusion? My answer is a resounding NO. This is because Judicial authority is derived from the People of Kenya and is exercised by the courts and tribunals applying certain principles as espoused in Article 159 of the Constitution including the principle at Art 159 (2) (e) that the purpose and principles of the Constitution shall be protected and promoted.

369. In addition, Article 259 of the Constitution is clear that the Constitution shall be interpreted in a manner that-

- a. Promotes its purpose, values and principles;
- b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- c. permits the development of the law; and

d. contributes to good governance.

370. In this case, it is the view of this court that there is a legitimate public interest that the Register of voters be audited within the strict timelines set by the law to achieve the objectives of the law and for purposes of the imminent general elections whose date is already set by the Constitution.

371. As articulated by **Sir Ivor Jennings**, the well being of the people is the supreme law. In addition, the principle of '**Strict Necessity**' postulates that the courts ought not to pass decisions on questions of constitutionality unless such adjudication is unavoidable. Thus, strict or unavoidable necessity must exist for disposing of a constitutional issue. The Courts are required to be practical and pronounce decisions only with respect to the narrow limits of the facts of the case at hand, and therefore the question of constitutionality is dealt with by the courts only where valid and sustainable grounds exist and where any legal provision suffers from patent legal infirmity or involves excessive legislative power or violates any legal right of any person.

372. In the instant case, I see no patent or threatened violation of the Constitution and or of the law. It is also worth mentioning that it is not in every case where there is an alleged irregularity in legal processes or stipulations that the Constitution is said to be violated or threatened to be violated.

373. It must further be appreciated that the doctrine of the '**spirit**' of the Constitution is a slippery slope. In other words, the courts are not at liberty to declare an act void, because, in their opinion, it is opposed to the spirit of democracy or republicanism as espoused by the petitioner herein, in the absence of a limitation by the fundamental law, either in terms of or by necessary implication, the general powers conferred upon state organs, or the legislature. Thus, the courts should not declare an act as unconstitutional under the notion of having discovered some ideal norm of free and fair election, out of airy nothing.

374. In this case, what is hyped to be unconstitutional is the allegation that the procurement of the audit firm did not involve stakeholder engagement and further, that the methodology adopted by the audit firm in auditing the Register of voters is not appropriate. It is further hyped that the acts of the Commission in the absence of commissioners was an illegality and or unconstitutional on the part of the Secretariat team who were acting on behalf of the Commission as they had no power to make policy decisions and implement them in the absence of commissioners.

375. In my view, and having considered all the circumstances of this case, that cannot be an issue to warrant invoking the power of this court to declare the respondent's and 1st interested party's actions unconstitutional.

376. It is important for Kenyans to know that in these proceedings, allegations made regarding alleged violation or threatened violation of the Constitution have not been proved. Further, it has not been proved that the procurement process and or the ongoing audit exercise was or is in violation of the fundamental rights and freedoms guaranteed under the Bill of Rights for, where breach of fundamental rights is claimed and proved, this court would not hesitate to declare the impugned decision or action void, and the issue of prejudice would not even arise.

377. The court recognizes that within the electoral cycle, Kenya is now at the Elections period phase. That being the case, the electoral process has begun and therefore since the audit of the voters register substantially affects the whole elections as a process, for, without an accurate and reliable register, there can be no free, fair, transparent, and credible elections; it follows that the electoral process whose timelines are stipulated by the Constitution once started should not be interfered with at any intermediary stage by the Court.

378. Our Constitution not only regulates the operations of the organs of State but also symbolizes the unity of the Republic and contains the inspiring hopes and aspirations and cherished goals of all the efforts of the nation. It operates not merely through the law but also in the minds and feelings of the people. As **Dewey** says:

“the forces which determine the government are sovereign. The effective social forces are not the Union, nor the States, nor the oligarchy of States, nor the organs of Government, nor the Constitution, nor natural law, but those forces which created these organizations and agents and institutions, and to whom they are all ultimately responsible.” According to Dewey, *the “Sovereignty of the People” does not mean an anarchic license given to each individual or group to do as he or it pleases, but stands for the power of the people, “organized in Government to express and adjust their will either directly or through representatives.” [emphasis added].*

379. The general election slated for 8th August 2017 is of profound public interest, concern and significance to all the people of Kenya, and therefore, it is neither reasonable nor practical that procurement proceedings for an audit firm be recommenced at this stage. Furthermore, the challenge to the procurement process having been made through Judicial Review proceedings in JR 648/2016 which were struck out on 31st March 2017, in the absence of any stay orders on 31st March, 2017 when the contract between the respondent and 1st interested party was signed to commence the audit exercise, the respondent and 1st interested party were under a legal duty to perform the contract.

380. This leads this court to move to the next important question of Whether in the absence of Commissioners, the Commission had no mandate to procure an audit firm for the audit of the Register of Voters. the petitioner and 2nd interested party have maintained that the Commission had no mandate to enter into a contract with the 1st interested party as the procurement was done by the secretariat in the absence of the Commissioners.

381. The court notes that the contract of 31st March 2017 for the procurement of the audit firm was ratified by the Commission which was fully constituted. The Commission’s actions, in my view, were informed by the fact that there were no stay orders and *moreso*, that its actions are dictated by the timelines set out in the amended law in preparation for the 8th August 2017 general elections and therefore it had to proceed to execute the contract for the audit of the voter’s register which audit period is dictated by the law to be 30 days. The Commission, in my humble view, did not; at that stage violate any law in entering into a contract which was long overdue.

382. The enactment of the Public Procurement Asset and Disposal Act, 2105 was informed by the public interest (See Section 2 of the Act and Article 227 of the Constitution. Therefore, the court in granting orders such as the ones sought by the petitioner in these proceedings must carefully examine the nature of the challenge vis avis the wider public interest. In **KENYA POWER AND LIGHTING COMPANY LTD VS. NMG COMPANY LTD [2010] eKLR** the Court of Appeal stated that -

“The respondent has filed a judicial review application seeking public law remedies. In my view, the appropriate test is whether it is in the public interest and also in accordance with the policy of the Public Procurement and Disposal Act to grant the orders of stay sought in the application. This is so because in East African Cables Ltd and The Public Procurement Complaints Review and Appeals Board (First Respondent) Kenya Power and Lighting Co. Ltd. (Second Respondent) – Civil Application No. Nairobi 109 of 2007 (unreported) this Court said in part -

“We think that in a case like this, we must consider the likely effect of the orders sought by the applicant. We should take into account the special nature of the set-up of the Second respondent. It is common ground that it is the sole supplier of electricity in the country and that has the duty to satisfy its ever surging number of consumers of that vital commodity. While we agree that the applicant has an undoubted right of challenging the decision of the superior court and that the court has a duty to see that procurement laws are not breached nevertheless the court has a reciprocal duty to ensure that it does not hamstring such bodies like the Second respondent from performing their lawful duty or duties as bestowed upon them by the relevant law.

383. In a persuasive case of **BASELINE ARCHITECTS LIMITED & 2 OTHERS VS. NATIONAL HOSPITAL INSURANCE FUND BOARD MANAGEMENT [2008] eKLR** the High Court stated that

“It is, I think, a principle which commands general acceptance that there are circumstances in which the public interest must be dominant over the interest of a private individual. To the safety or the well-being of the general public, the claims of a private litigant motivated by profit may have to be subservient. It is therefore vital to protect the public from private interest peril – i.e. interests of a litigant must give way to that of the general public...”

As stated the court has ultimate power in the interest of justice to fulfill the mandate given to it, to safeguard the interests of the public and in doing so, where there is reasonable grounds to protect and preserve the interests of the public. Such duty must be performed in order to do justice between the parties. It is also instructive to note that the court has a duty to safeguard genuine interest of a litigant but also ensure that the scope of privilege is not extended in matters which have strategic importance to members of the public.”

384. Still on the significance of putting public interest first, Nyamu J (as he then was) had this to say in **JOHN PETER MUREITHI & 2 OTHERS VS. ATTORNEY GENERAL & 4 OTHERS [2006] eKLR :**

“In the unreported case of KENYA GUARDS ALLIED WORKERS UNION VS. SECURITY GUARDS SERVICES & 38 OTHERS & ANOTHER (IP) H.C. MISC 1159 OF 2003; I made the following observations in the ruling delivered on 19th November, 2003 in defending the autonomy of the Industrial Court on the ground of public interest:

“Where national or public interest is denied the gates of hell open wide to give way to deforestation, pollution, environmental degradation, poverty, insecurity and instability.”

385. Similarly, Nyamu, J (as he then was) held in **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443**, adding flavor to that important principle of public interest inter alia:

“..... At the end of the day, we must remember those famous words of a famous jurist – Justice is not a cloistered virtue. I must add that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and Heaven and Earth embrace. By upholding the public interest and treating it as twinned to the human rights we shall be able to do away with poverty eradication programmes and instead we shall have empowered our people to create real wealth for themselves Public Interest must be the engine of the millennium and it must where relevant occupy centre stage in the courts ... Should the Land Acquisition Act give shelter to the land grabbers of public land or are the courts going to invent equally strong public interest vehicle to counter this. Should individual land rights supersede the communal land, catchments and forests?

How for instance are the courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title" Are the courts going to stay away and refuse to rise to the greater call of unraveling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of the Constitution. I venture to suggest that such titles ought to be nullified on this ground and, thrown into the dustbins.”

386. In **Republic vs. The Kenya National Commission on Human Rights Ex Parte Hon. Uhuru Muigai Kenyatta HCMCA No. 86 of 2009**, it was held that the Court has the task of balancing between public and individual rights and therefore based on Article 24(1)(d) of the Constitution, there is a need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.

387. According to **Black’s Law Dictionary**, Public interest is the general welfare of the public that

warrants recognition and protection and is something in which the public as a whole has a stake, especially an interest that justifies governmental regulation.

388. More significantly, Article 1 of the Constitution stipulates that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. That sovereign power is delegated to the state organs to be administered in the people's behalf. It follows that judicial power must be exercised in a manner that is consistent with the expectation of the people of Kenya. As was held in **Konway vs. Limmer [1968] 1 All ER 874**, there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the nation or the public service is so grave a character that no other interest public or private can be allowed to prevail over it.

389. It is therefore my humble view that in appropriate circumstances, courts of law and independent tribunals are properly entitled under Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. This is what entails the principle of proportionality.

390. It is also for that reason that I find that albeit the advertisement and procurement process for the audit firm was conducted a few days after the then Commissioners of the IEBC had bowed to political pressure to vacate office through resignation and therefore the actions were taken by the Secretariat under the stewardship of the Chief Executive Officer/Secretary Mr Ezra Chiloba, and the fact that the decision to procure the services of the audit firm was ratified on 31st March 2017 by the duly constituted Commission, it would militate against the national interest of this country to declare the contract between the IEBC and KPMG null and void simply because the procurement process was commenced prior to the assumption of office by the new Commissioners, as that declaration would substantially and materially adversely affect the electoral process.

391. The Constitution of Kenya anticipated that there are situations where there would be a vacancy (ies) in the Commissions and or Independent Offices. It is for that reason that the Constitution establishes the Commissions and Independent Offices as body Corporates with a common seal and with the power to sue and be sued in their own name. See Article 253). The Commission herein has a perpetual succession such that unless abolished by amendment to the Constitution, it is a going concern. The secretariat headed by the Secretary who is the Chief Executive officer is also a creation of the Constitution and not just a mere employee of the Commission. Article 250 (12) establishes the Secretary/Chief Executive Officer of the Respondent. Both offices are created by Statute and have defined responsibilities under the IEBC Act. The Secretary is also the accounting officer as stipulated in the Public Finance Management Act. With regard to Public Procurement and Asset Disposal Act, 2015, the functions of the Secretary, CEO being the accounting officer include:

- a. Ensure the procurement process complies with the PPADA***
- b. Constitute all procurement committees.***
- c. Approve and sign all contracts of the procuring entity.***
- d. Ensure proper documentation of procurement proceedings and safe custody of records.***
- e. Ensure compliance with responsibilities assigned by the PPADA or any other Act of Parliament or as may be prescribed in Regulations.***

92. Section 10(7) of the Independent Electoral and Boundaries Commission Act provides that the Secretary of the Commission shall be ___

- a. The Chief Executive Officer of the Commission;***

b. Head of the secretariat

c. The Accounting Officer of the Commission responsible for—

(i) executing decisions of the Commission;

(ii) assignment of duties and supervision of all employees of the Commission;

(iii) facilitating, co-coordinating and ensuring execution of Commission’s mandate;

(iv) ensuring staff compliance with public ethics and values; and

(v) the performance of such other duties as may be assigned by the law and Commission.

392. I am in agreement with the petitioner and the 2nd interested party that the Commissioners make policies which are executed by the Secretariat, and that the Secretariat cannot make policy decisions and implement them. However, the functions of the Commission in so far as the engagement of the professional reputable firm for purposes of auditing of the Register of voters is concerned are purely statutory stipulated obligations.

393. This court does not subscribe to the notion that where there is a vacancy in the Commission as was in this case, then the Commission goes into comatose and unable to function completely because Commissioners are absent. I further do not buy the interpretation propounded by the petitioner and the 2nd interested party that the Commissioner are the Commission and vice versa. If that were the case, the Constitution would have stated so. Instead, the Constitution at Article 250(1) is clear that the Commission “consists of.”

394. In other words, there is the Commission and the Commissioners are members of the Commission. The court has examined all the cases cited by the petitioner and the 2nd interested party on this issue and it is clear to my mind that the learned judges who determined similar issues in **the Michael Sistu case were entitled to their line of thought**. In that case, High Court **Petition No. 230 of 2015: Michael Sistu Mwaura Kamau & 12 others v Ethics and Anti-Corruption Commission & 4 others [2016] eKLR and Misc. Application No. 637 of 2016; Republic v Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others [2017] eKLR**; whereas the court was emphatic that the absence of Commissioners renders the Commission comatose, nonetheless, the **Michael Mwaura Kamau case** (supra) despite its findings, underscores an authoritative characteristic, that a decision made in the absence of the Commissioners may be valid and in accordance with the law if ratified by the Commission. The Court thus went on and stated:

“356. Whereas we appreciate that the staff may, based on their areas of specialization, perform the duties for which they are appointed, to contend that they have a free hand to make binding recommendations arising from their duties without reference to the Commission, in our view would be absurd. The outcome of the tasks undertaken by the Commission’s staff must be ratified by the Commissioners if they are to be deemed as the decisions of the Commission...”

395. In **JR 456/2015 Koech kemboi v Halakhe Wakqo and 2 others [2015] eKLR** Hon Onguto J was clear that the Act does not permit the CEO to hire employees of the Commission in the absence of the Commissioners. Again, that case cannot be equated to the IEBC which in my view occupies a special place in the democratic governance of this nation.

396. In the **Republic v Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others**(supra) case, the court was dealing with a situation where Commissioners whose term had come to an end and their positions declared vacant albeit they were warming seats for the incoming Commissioners as per the MOU entered into between them and the legislature and as they negotiated their exit package with the treasury, whether they could sign any legally binding contract on behalf of the Commission. I agree with the learned Justice Odunga that in such

scenario, the Commissioners who had resigned and whose positions had already been advertised were strangers to the Commission. They were neither Commissioners nor employees of the Commission hence they had no legal authority to perform any functions on behalf of the Commission. Accordingly, the facts of that case are at variance with the facts of this case.

397. From the above pronouncement BY Odunga J, it is apparent that the court was conscious of the fact that there are situations when the Commission may not have Commissioners and certain decisions have to be taken out of necessity by the Secretariat. Therefore, it cannot be said that the court in the Michael **Kamau Sistu** case laid down the law to be followed by this court to the effect that Commissioners are synonymous with the Commission and that without the Commissioners, the Commission is dysfunctional and or that any actions taken by the secretariat in the implementation of the mandate of the Commission is null and void.

398. The position that this court so firmly holds onto is respectively fortified by the decision of the **Supreme Court** in the case of **Petition No. 11 of 2014: Mable Muruli v Wycliffe Ambetsa Oparanya & 3 Others [2016]eKLR** where the Supreme Court which is the apex court of the land held that Court held that constitutional purposes and objectives of the Commission would still go on even in the absence of the Commissioners. The Supreme Court pronounced itself as follows:

[55] The IEBC Act also provides for a Secretary to the Commission (Section 10), who is appointed pursuant to Article 250 (12) of the Constitution. The Secretary is the chief executive officer of the Commission; head of the secretariat; accounting officer of the Commission; custodian of all Commission records; bearer of responsibility for executing decisions of the Commission; officer in charge of assignment of duties and supervision of all employees of the Commission; facilitator, co-coordinator and executor of Commission’s mandate; guarantor of staff compliance with public ethics and values; executor of such other duties as may be assigned by law and by the Commission. Without a doubt, the Secretary is a vital component of the IEBC – indeed, a central part of the IEBC, regardless of not bearing the designation “Commissioner”. Section 11 of the Act makes provisions regarding employees of the Commission, who conduct their functions at headquarters, and at the numerous regional offices of IEBC.

[56] From the foregoing details regarding IEBC’s operations, it is clear to us that the appellant’s perception of its identity is inappositely limited. We take judicial notice that it would be impractical to expect the Commissioners qua “Commissioners”, to conduct all the functions entrusted to the Commission under Article 88 (4) of the Constitution. The secretary, hence, can hardly do without employees entrusted with specified duties. Had it been the case that all such tasks devolved only to “Commissioners”, the consequence would be that all actions routinely taken by the IEBC staff, such as continuous registration of voters, regular revision of voters’ roll, and registration of candidates, would be a nullity in law. There is need to avoid such construction of the Constitution as would be contrary to the public interest. The requisite approach in interpreting Article 88 (1) of the Constitution, is one that vindicates the constitutional purposes and objectives, and that fosters good governance, in accordance with the terms of article 259. Good governance in this instance entails ensuring that the constitutional functions of the Commission do not come to a standstill, as is destined to happen if the discharge of such functions were left entirely to the nine Commissioners.

[57] In short, as we perceive it, the IEBC comprises the Commissioners, as well as its employees who have been duly authorized. Consequently, and in accordance with the Joho precedent, the Returning Officer, an employee of the IEBC, properly acts on its behalf.”

399. In the above case and in the Joho case referred to in the **Mable Muruli case**, the Supreme Court held that actions of the authorized employee of the IEBC are properly acts of the Commission, which holding and reasoning I have no power to depart from and so I hold that the acts of the CEO of the IEBC which culminated in the procurement and award of the tender impugned in this petition to the 1st interested party, which acts were implementing the mandatory section 8A of the ELAA time bound provisions relating to the engagement of a professional reputable firm to audit the Register of voters were and remain

acts of the Commission as ratified through the execution of a legally binding contract on 31st March, 2017 by a fully constituted Commission.

400. The irony of it all is that despite the petitioner 's strong stance on the limited mandate of the Secretary/CEO as being only restricted to implementing policies of the Commission and that engaging the audit firm required a policy decision to be made by the Commissioners before the CEO could proceed to implement through procurement; and that the acts of the CEO were ultra vires and illegal and irrational and in violation of the Constitution, the petitioner never enjoined the said Secretary/CEO to these proceedings. He petitioned against the Commission as a body corporate, accusing it of all manner of ills, while leaving out the person who performed those alleged unconstitutional and or illegal and irregular acts or decisions that are sought to be declared a nullity.

401. What is ironical about the allegations is that whereas the petitioner and the 2nd interested party maintain that the CEO had no mandate to do what he did with regard to the engagement of the audit firm in the absence of Commissioners, they ended up accusing the Commission of acting illegally and or unconstitutionally. The question is if the Commission and Commissioners are synonymous, how would a nonexistent or comatose Commission commit acts of illegality or unconstitutionality?

402. My finding therefore is that assuming the CEO's actions are the ones being impugned herein, and assuming that he acted ultra vires, as he is not the Commission and the Commission is not the CEO, which I find not, then the absence of the CEO as a party to these proceedings where his actions are impugned and sought to be declared a nullity renders the petition a dark horse.

403. With the above assessment, I find that there was no proof that the Commission or even the CEO on behalf of the Commission violated any constitutional or statutory provisions in the decision to engage the 1st interested party pursuant to section 8A of ELAA.

404. There is no evidence that in engaging the 1st interested party to audit the register of voters, the commission failed to comply with the Elections law, the Public Procurement and Asset Disposal Act and or the Constitution. It is trite law that a Petitioner in a Constitutional Petition ought to set out with precision the specific provisions of the Constitution and the particulars of the manner and the extent to which such provisions have been allegedly violated. This is the law as enunciated in **Anarita Karimi Njeru v The Republic, Msc. Criminal Application No. 4 of 1979 in the words of Justices Trevelyan and Hancox**, who stated as follows-

“...We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his/her case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed...”

405. The said principles were also upheld by the Court of Appeal in **CA No. 290 of 2012: Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 Others [2013] e KLR** where the 5 judge bench (**Kihara Kariuki, PCA, Ouko, Kiage, Gatembu Kairu & Murgor, JJA**) where it was held :

“However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that

requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules... was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

406. Further, in **HC Petition No. 4 of 2013: Northern Nomadic Disable Persons Organization (NONDO) Vs. Governor, County Government of Garissa and Another [2013] eKLR** the Court held as follows:

“Constitutional threshold:

The respondents are saying that the Petitioner has not reached the threshold in Anarita Karimi Njeru case supra. It was submitted that the Petitioner has referred to various articles of the constitution as having been violated without giving particulars of the alleged violations. The principle in Anarita Karimi case is captured in the words of the Justices Trevelyan and Hancox when they stated as follows:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed”.

407. In this case, the Petitioner has cited various articles of the constitution without any particulars of the alleged violations of those provisions by the Commission.

408. I also find that this petition does not disclose any violation of the sovereign power of the people of Kenya under Article 1(2) of the Constitution.

409. In the end, I would decline to grant the orders sought by the petitioner as supported by the 2nd interested party CORD. I dismiss the petition herein as filed and argued quite competently by all the parties’ advocates’ on record and for whom I am grateful for their articulation of the issues raised.

410. Costs are in the discretion of the court but in this case, I do not find it appropriate to condemn the public spirited petitioner to pay costs. I order each party to bear their own costs of the petition.

Dated, signed and delivered in open court at Nairobi this 27th day of April, 2017.

R.E.ABURILI

JUDGE

In the presence of:

Mr Appollo Mboya counsel for petitioner

Mr Wambua Kilonzo assisted by Mr Nicholas Malonza Advocates for the Respondent

Mr Kiragu Kimani assisted by Miss Michi Kirimi for the 1st interested party

Mr Antony Oluoch for the 2nd interested Party

CA: Mohamed