REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 234 OF 2017

IN THE MATTER OF ARTICLES 27 & 28 OF THE

CONSTITUTION 2010

IN THE MATTER OF INTERPRETATION OF SECTION

23 AND 29 OF ELECTIONS ACT LAWS OF KENYA

IN THE MATTER OF ELECTIONS FOR INDEPENDENT PRESIDENTIAL CANDIDATES

BETWEEN

PETER SOLOMON GICHIRA...PETITIONER

-VERSUS-

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....1ST RESPONDENT

ATTORNEY GENERAL...2ND RESPONDENT

JUDGEMENT

Introduction

1. The Petitioner herein, **Peter Solomon Gichira**, describes himself in this petition as a Kenyan and an aspirant for an Independent Presidential seat in this Republic on 8th August, 2017.

2. The 1st Respondent, the **Independent Electoral and Boundaries Commission** (hereinafter referred to as "the Commission") is a Constitutional Commission established under Article 88(1) of the Constitution responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament.

3. The 3rd Respondent, **the Attorney General**, is established by Article 156 of the Constitution of Kenya and he is the Chief Legal Adviser of the Government with the mandate of *inter alia* promoting, protecting and upholding the rule of law and defending public interest.

The Petitioner's Case

4. According to the Petitioner he was cleared by the Office of the Registrar of Political Parties and an Independent Presidential Candidate and his symbol approved. It was his view that he fulfilled the requirement for the collection of signatures from each of the Twenty Four (24) Counties which is above 48,000 supporters as required by the law and what was remaining was the presentation thereof to the Commission.

5. However, on 17th May, 2017 the Commission through a notice on Social Media indicated that they would only receive signatures in (a) Microsoft excel and that the same should be for voters/supporters not affiliated to any political party.

6. It was contended by the petitioner that he had taken the arduous process of collecting signatures in 24 Counties around the country and that the submission of the documents in Microsoft excel ignores the fact that it was not a condition when the Commission issued the petitioner with the forms; that most counties where the petitioner collected signatures even wards in Kenya, there is no electricity leave alone photocopy machines; and that it is not prudent to demand the same names in a new format without signatures.

7. It was the Petitioner's case that being nominated by voters not members of a political party is absurd and unconstitutional since the Commission and the Registrar of Political Parties have not compiled a list of voters who are not members of any political party hence the conditions and obstacles at the instant stage are not practical and infringe on his right to contest. In the premises the Petitioner sought the following orders:

> 1. **An order of Declaration whether Independent Candidates should be "nominated" by members not affiliated to any Political Party taking account party lists in Kenya.**
>
> 2. **A declaration that Section 29 (2) of the Election Act No. 37 of 2016 requiring that the nominees be persons who are not members of any Political Party contravenes Article 137(1) (d) of the Constitution of Kenya that requires them only to be "registered voters2 and that to the extent of that contravention, the Section is unconstitutional, null and void.**
>
> 3. **An order that the requirement issued by the 1st respondent on the 17th May, 2017 that independent presidential aspirants do submit their nomination signatures by way of Microsoft Excel is an unfair administration action on the part of the 1st respondent and contrary to Article 47 of the constitution that guarantees fair administrative actions, and the same be declared untenable for failure to give written reasons for the action.**
>
> 4. **An order directing the 1st respondent to acknowledge receipt and accept the submitted signatures in hand copy as well as the scanned PDF Format of the same, of the persons who have nominated petitioner for nomination as presidential candidate in the August 8th 2017 General Election.**

8. In his submissions, **Mr Gachie**, learned counsel for the Petitioner contended that section 29(2) of the Elections Act (hereinafter referred to as "the Act") which requires that the supporters of the independent candidate ought not to belong to a political party is unconstitutional since it is inconsistent with Article 137(1)(d) of the Constitution which only requires that the said supports be registered voters. It was submitted that whereas section 23 of the said Act mirrors the Constitution, Parliament sneaked in section 29 which takes away the rights under the said constitutional provision and attempts to limit the political rights of the independent candidates by introducing the said requirement that the supporters should not be members of a political party.

9. It was submitted that to that extent Parliament went overboard in curtailing the rights of the petitioner. According to learned counsel, whereas there is a presumption of constitutionality of statutes. Article 259 of the Constitution provides a guide on the manner of interpretation of the Constitution. It was submitted that the political right to vie as an independent candidate is provided for in Article 38 of the Constitution

hence the same can only be limited as provided under Article 24 of thereof which provides in clause (1) that "*a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors*…"

10. It was submitted that since the petitioner is seeking to be the president of Kenya and not a section thereof, to require him to secure the signatures from a particular section amounts to alienating some of the people he seeks to serve and in an open and democratic society, that is unreasonable. It was further submitted that since there is no register of persons who are not members of any political parties, that requirement was untenable and a way of curtailing the Petitioner's rights without any constitutional basis. Accordingly it was submitted that the section is unconstitutional and should be declared invalid.

11. It was submitted that there ought to be a level playing ground for all those vying for political seats whether via the vehicle of political parties or as independent candidates. In this regard it was submitted that whereas the other independent aspirants for county assemblies and parliamentary seats are not required to get signatures from non-party members, which is in line with the constitutional provisions, this requirement is restricted to candidates vying for presidency hence discriminatory and unconstitutional.

12. It was further submitted that by posting in its Facebook one day to the commencement of the submissions of the supporters' lists, the requirement that the said lists be submitted in excel format, the Commission's action was unreasonable. This is more so as the forms given by the Commission itself did not require that the same be submitted in the said format and the said form was itself explicit that what was required were signatures of registered voters.

13. It was therefore submitted that this requirement amounted to unfair administrative action contrary to Article 47 of the Constitution since no reasons were advanced for the introduction of this requirement. It was submitted that to expect a person who has traversed 24 counties to restart the same process by way of excel is unreasonable and that the only reasonable thing to do was to compress the same in a compact disc or PDF form which is what the Petitioner did but was rejected. Whereas the Petitioner had no problem with Regulation 18 of the ***Election General Regulations, 2012*** (hereinafter referred to as "the Regulations") to the extent that they require that the submission be both in hard and electronic forms, it was submitted that the said Regulation does not require that the same be submitted in excel format which is a spreadsheet.

14. It was therefore reiterated that the actions of the Commission were by a large unfair, unwarranted, unconstitutional and a deliberate attempt to lock out a number of Presidential Independent aspirants. In support of his submissions the Petitioner relied on **Hassan Ali Joho & Another vs. Suleiman Said Shabhal & 2 Others [2014] eKLR**, **Union of Civil Servants & 2 Others vs. Independent Electoral and Boundaries Commission (IEBC) & Another [2015] eKLR** and **Geoffrey Andare vs. Attorney General & 2 Others [2016] eKLR**.

1st Respondent's Case

15. The Petition was opposed by the Commission which filed the following grounds of opposition:

> 1. **THAT the Amended Petition is fatally defective as it does not set out, with reasonable precision, the provisions of the Constitution alleged to have been violated and the manner in which they have been contravened.**
>
> 2. **THAT Parliament is mandated by Article 82 (1) of the Constitution to enact legislation to provide for, inter alia, the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including nomination of candidates for elections. Pursuant to Article 82 (1) of the Constitution, Parliament enacted the Elections Act No. 24 of 2011.**

3. **THAT the 1st Respondent is required by Article 88 (5) of the Constitution to exercise its mandate in accordance with the Constitution and national legislation.**

4. **THAT Article 137 (1)(d) of the Constitution provides that a person qualifies for nomination as a presidential candidate if the person is nominated by not fewer that two thousand voters from each of a majority of the counties.**

5. **THAT pursuant to Section 29 of the Elections Act presidential candidates sponsored by a political party are to be nominated by members of that candidate's political party and conversely, independent presidential candidates are required to be nominated by non-members of any political party.**

6. **THAT the Amended Petition has failed to disclose any apparent conflict between Section 29 of the Elections Act and Article 137 (1)(d) of the Constitution.**

7. **THAT further, the Amended Petition does not set out with precision, the manner in which Section 29 of the Elections Act discriminates independent political party presidential candidates as against political party presidential candidates, with respect to the persons who nominate both presidential candidates.**

8. **THAT the Petitioner has misapprehended the purpose and effect of Section 29 of the Elections Act which is to operationalize Article 137 (1)(d) of the Constitution.**

9. **THAT the orders sought in the Amended Petition seek to alter the timeline for the submission of supporters of nomination of presidential candidates contrary to Regulation 18 (1) of the Elections (General) Regulations.**

10. **THAT the requirement that the independent presidential election candidates submit their list of supporters in standard A4 sheets of paper and in electronic form is contained in Regulation 18 (1) of the Elections (General) Regulations.**

11. **THAT the issues raised in the Petition in respect of the constitutionality of Regulation 18 of the Elections (General) Regulations are res judicata having been determined by this Honourable Court in John Harun Mwau v Independent Electoral And Boundaries Commission & another [2013] eKLR and no good reason has been advanced to this Honourable Court to depart from this decision.**

12. **THAT the Amended Petition herein is incompetent, misconceived and does not lie in law and should be struck out and/or dismissed with costs to the respondent.**

16. On behalf of the Commission it was submitted by its learned counsel, **Mr Nyamodi**, that a proper reading of the rules reveals that there is nothing wrong in different aspirants collecting signatures from the same persons.

17. It was however submitted that the Constitution creates two distinct pathways for the enjoyment of political rights by those aspiring to stand for elective offices. The first one is vide support of a registered political party and secondly, as an independent candidate. It was however submitted that here the word "independent" means independent of a political party. According to learned counsel Article 38 of the Constitution provides for the first pathway while the second pathway is provided under Article 85 of the Constitution. This distinction, it was submitted is maintained throughout the Constitution and finds its way in section 29 of the Act.

18. It was submitted that a Constitution is informed by the history of the Country and in this case the history surrounding the presidential elections is clear n the provisions dealing with presidential elections. Reference was made to Article 137 of the Constitution which deals with the qualifications and disqualifications but maintains the two distinct pathways. It was therefore submitted that the Petitioner's

interpretation was skewed when considering the constitutionality of section 29 since there are several Articles to be borne in mind other than Article 137(1)(d) of the Constitution.

19. It was submitted that whereas section 29(1) provides for nomination by members of political parties, section 29(2) deals with independent candidates hence section 29 was made in deference to clear dichotomy in the Constitution as to the pathways for those eligible to contest to follow. According to learned counsel, it is not true that the right flows from Article 38 which only deals with those who seek elective offices vide political parties.

20. As regards lack of register for members who do not belong to political parties it was submitted that since there are registers for members of political parties which are public documents, by simple deduction non-members of political parties can be easily ascertained and it is the duty of the person intending to run and an independent candidate to get supporters from persons who are not members of political parties.

21. It was therefore submitted that section 29 of the Act is good law and there is no reason why the Commission should not apply section 29(2) thereof to the letter.

22. With respect to the allegation of discrimination, it was submitted that the same is untenable since from a reading of section 29 of the Act the restriction applies to both independent candidates and those fronted by political parties.

23. Regarding the issue of the format of submission of the supporters' list, it was submitted that it is not true that the said requirement was notified through social media. To the contrary the requirement is contained in Regulation 18 of the Regulations which requires that the list be delivered in electronic form as well. Learned counsel however admitted that had the requirement been only contained in the social media, it would have been irresponsible on the part of the Commission. However the said notification was only a reminder of the requirement in regulation 18 and it was the duty of the Petitioner to familiarise himself with the same

24. It was submitted that the said provision cannot be questioned since no challenge has been taken to the same. **Mr Nyamodi** however referred to **John Harun Mwau vs. Independent Electoral and Boundaries Commission & Another [2013] eKLR** and submitted that the legality of the said regulation had been dealt with in the said case where it was found that there was nothing wrong with the said regulation. This Court was therefore urged not to depart from the said decision but to adopt the same. Dealing with the decision relied upon by the Petitioner it was submitted that the ratio decidendi of the same was different from the instant case.

25. The Court was urged that in considering the petition apart from the presumption of constitutionality of a statute it should consider the purpose and effect of the impugned legislation. It was submitted that the purpose of section 29(2) of the Act is to maintain dichotomy that flows from the Constitution in respect of the paths a party seeking elective office is able to follow hence the purpose is constitutional. The Court was therefore urged to dismiss the petition with costs.

2nd Respondent's Case

26. In opposing the Petition, **Mr Odhiambo**, learned counsel for the 2nd Respondent herein, the **Attorney General** (hereinafter referred to as "the AG") while associating himself with the submissions made on behalf of the Commission referred to Article 84 of the Constitution which places an obligation on all candidates and political parties to comply with the Commission's Code of Conduct. It was argued that the Constitution, the Act and the Regulations must be read together and where the petition is not clear and precise as in this case the Court should employ Article 259 of the Constitution in construing the Constitution.

27. It was therefore argued that the petition does not meet the threshold in terms of precision of pleadings and the Court was urged to dismiss the same with costs.

Analysis and Determination

28. I have considered the issues raised in this Petition. The issues raised herein revolve around the constitutionality of section 29 of the ***Elections Act, 2011*** and the propriety of the requirement by the Commission that the supporters' list be submitted in excel format.

29. It is however important to set out the general rule that applies to such investigations. That there is a presumption of constitutionality of statutes is not in doubt. This position was affirmed by the Court of Appeal of Tanzania in the celebrated case of **Ndyanabo vs. Attorney General [2001] EA 495** which was a restatement of the law in the English case of **Pearlberg vs. Varty [1972] 1 WLR 534**. In the former, the Court held that:

> **"Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative"**

30. I agree, as found by the Court in **Ndyanabo**, that the principle of presumption of constitutionality is a sound principle. However, like any other legal presumption, it has exceptions and in our constitutional set up the example that immediately comes to mind is to be found in Article 24(3). With respect to legislation that is alleged to violate provisions of the Constitution other than the Bill of Rights, the obligation is on the petitioner to establish that the legislation violates a provision(s) of the Constitution. This was the view taken by the Court in the case of **Coalition for Reform and Democracy (CORD) vs Attorney General and Others [2015] eKLR** in which it stated:

> **"We have been called upon to declare SLAA in its entirety, or at the very least certain provisions thereof, unconstitutional for being in breach of various Articles of the Constitution. In considering this question, we are further guided by the principle enunciated in the case of Ndyanabo vs Attorney General [2001] EA 495 to the effect that there is a general presumption that every Act of Parliament is constitutional. The burden of proof lies on any person who alleges that an Act of Parliament is unconstitutional."**

31. However, the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article. See **Coalition for Reforms & Democracy & 2 Others vs. Republic of Kenya & 10 Others Petition Nos 628, 630 of 2014 & 12 of 2015 (Consolidated).**

32. The criteria in such circumstances was set in **Lyomoki and Others vs. Attorney General [2005] 2 EA 127** where the Constitutional Court of Uganda set out the following principles:

> i. **The onus is on the petitioners to show a *prima facie* case of violation of their constitutional rights.**
>
> ii. **Thereafter the burden shifts to the respondent to justify that the limitations to the rights contained in the impugned statute is justified within the meaning of Article 43 of the Constitution. Both purposes and effect of an impugned legislation are relevant in the determination of its constitutionality.**
>
> iii. **The constitution is to be looked at as a whole. It has to be read as an integrated whole with no particular provision destroying another but each supporting the other. All provisions concerning an issue should be considered together so as to give effect to the purpose of the instrument.**
>
> iv. **Where human rights provisions conflict with other provisions of the Constitution, human rights provisions take precedence and interpretation should favour enjoyment of the human rights and freedoms.**

33. See also **Institute of Social Accountability & Another vs. National Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR**.

34. Section 29 of the said Act provides as hereunder:

> ***(1) The persons who nominate a presidential candidate shall be members of the candidate's political party.***
>
> ***(2) The persons who nominate an independent presidential candidate shall not be members of any political party.***

35. According to the Petitioner, this provision is inconsistent with Articles 85, 99, 137 and 193 of the Constitution which provide as follows:

> ***85. Any person is eligible to stand as an independent candidate for election if the person—***
>
> ***(a) is not a member of a registered political party and has not been a member for at least three months immediately before the date of the election; and***
>
> ***(b) satisfies the requirements of—***
>
> ***(i) Article 99 (1) (c) (i) or (ii), in the case of a candidate for election to the National Assembly or the Senate, respectively; or***
>
> ***(ii) Article 193 (1) (c) (ii), in the case of a candidate for election to a county assembly.***
>
> ***99. (1) Unless disqualified under clause (2), a person is eligible for election as a member of Parliament if the person—***
>
> ***(a) is registered as a voter;***
>
> ***(b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament; and***
>
> ***(c) is nominated by a political party, or is an independent candidate who is supported—***
>
> ***(i) in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or***
>
> ***(ii) in the case of election to the Senate, by at least two thousand registered voters in the county.***
>
> ***(2) A person is disqualified from being elected a member of Parliament if the person—***
>
> ***(a) is a State officer or other public officer, other than a member of Parliament;***
>
> ***(b) has, at any time within the five years immediately preceding the date of election, held office as a member of the Independent Electoral and Boundaries Commission;***
>
> ***(c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;***
>
> ***(d) is a member of a county assembly;***
>
> ***(e) is of unsound mind;***

(f) is an undischarged bankrupt;

(g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or

(h) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six.

(3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.

137. (1) A person qualifies for nomination as a presidential candidate if the person—

(a) is a citizen by birth;

(b) is qualified to stand for election as a member of Parliament;

(c) is nominated by a political party, or is an independent candidate; and

(d) is nominated by not fewer than two thousand voters from each of a majority of the counties.

(2) A person is not qualified for nomination as a presidential candidate if the person—

(a) owes allegiance to a foreign state; or

(b) is a public officer, or is acting in any State or other public office.

(3) Clause (2) (b) shall not apply to—

(a) the President;

(b) the Deputy President; or

(c) a member of Parliament.

193. (1) Unless disqualified under clause (2), a person is eligible for election as a member of a county assembly if the person—

(a) is registered as a voter;

(b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament; and

(c) is either—

(i) nominated by a political party; or

(ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.

(2) A person is disqualified from being elected a member of a county assembly if the person—

(a) is a State officer or other public officer, other than a member of the county assembly;

(b) has, at any time within the five years immediately before the date of election, held

office as a member of the Independent Electoral and Boundaries Commission;

(c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;

(d) is of unsound mind;

(e) is an undischarged bankrupt;

(f) is serving a sentence of imprisonment of at least six months; or

(g) has been found, in accordance with any law, to have misused or abused a State office or public office or to have contravened Chapter Six.

(3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.

36. In my view these provisions must be read together with Article 36(1) and (2) of the Constitution which provides that:

36. (1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

(2) A person shall not be compelled to join an association of any kind.

37. It is important in determining this petition to appreciate the nature of the Constitution of Kenya, 2010. Our Constitution, it has been hailed as being a transformative Constitution since as opposed to a structural Constitution, it is a value-oriented one. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and *inter alia* Article 10 of the Constitution. The distinction between the two was made by **Ulrich Karpen** in ***The Constitution of the Federal Republic of Germany*** thus:

"…the value –oriented, concerned with intensely human and humane aspirations of personality, conscience and freedom; the structure-oriented, concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements."

38. Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality. This was the position adopted by the Supreme Court in **The Matter of the Principle of Gender Representation In the National Assembly and the Senate, SC Advisory Opinion No. 2 of 2012** where it was held that:

"A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions. Where a Constitution takes such a fused form in terms, we believe a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care

should be taken not to substitute one for the other."

39. As appreciated by **Ojwang, JSC**, in **Joseph Kimani Gathungu vs. Attorney General & 5 Others Constitutional Reference No. 12 of 2010**:

> **"A scrutiny of several Constitutions Kenya has had since independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of 2010 is dominated by a "social orientation", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point in governance functions."**

40. As was appreciated by the majority **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct. Advisory Opinion Appl. No. 2 of 2012** at para 54:

> **"Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions."**

41. The Court is therefore required in the performance of its judicial function to espouse the value system in the Constitution and to avoid the structural minimalistic approach. The German Federal Constitutional Court in **Luth Decision BVerfGE 7, 198 I. Senate (1 BvR 400/51)** noted as follows:

> **"But far from being a value free system the Constitution erects an objective system of values in its section on basic rights and thus expresses and reinforces the validity of the basic rights. This system of values, centering on the freedom of human being to develop the society must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration and judicial decisions. It naturally influences private law as well, no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit."**

42. The foregoing position was aptly summarised by the South African Constitutional Court in **Carmichele vs. Minister of Safety and Security (CCT 48/00) 2001 SA 938 (CC)** in the following terms:

> **"Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: 'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and the judiciary.' The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed."**

43. Therefore the Constitution of Kenya, 2010, just like the post Nazi German Basic Law and the post-apartheid 1996 Constitution of South Africa, as "a transformative instrument is the key instrument to bring about a better and more just society". See **Michaela Hailbronner** in ***Traditions and Transformations: The Rise of German Constitutionalism***.

44. This was the position of the Supreme Court in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] EKLR** where it expressed itself as follows:

> **"Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of**

public power, the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy.* This is clear right from the preambular clause which premises the new Constitution on – *"RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."* And the principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government. The transformative concept, in operational terms, *reconfigures the interplays between the States majoritarian and non-majoritarian institutions*, to the intent that the desirable goals of governance, consistent with dominant perceptions of *legitimacy*, be achieved. A depiction of this scenario has been made in relation to the unique processes of constitution-building in South Africa, a country that was emerging from an entrenched racialist governance system. Karl Klare, in his article, "*Legal Culture and Transformative Constitutionalism," South African Journal of Human Rights*, Vol. 14 (1998), 146 thus wrote [at p.147]: *"At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent."* The scholar states the object of this South African choice: "*By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed…to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law."* The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country's achievements in constitutional precedent. We in this Court, conceive of today's constitutional principles as incorporating the transformative ideals of the Constitution of 2010".

45. It is my view that our position is akin to the one described by the German Constitutional Court in **BVverfGE 5, 85** that:

> **"Free democratic order of the Basic Law…assumes that the existing state and social conditions can and must be improved. This presents a never-ending task that will present itself in ever new forms and with ever new aspects."'**

46. This is my understanding of Article 20(2)(3) and (4) of the 2010 Constitution which provides as follows:

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(3) In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.

47. To paraphrase **Chege Kimotho & Others vs.Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57, the Constitution** is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle. It must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. As appreciated **In the Matter of the Estate of Lerionka Ole Ntutu [2008] KLR 452:**

> **"Constitution of any country of the world should not represent a mere body or skeleton without a soul or spirit of its own. The Court would not like to discard the possibility of the court adopting broader view of using the living tree principle of the interpretation of the Constitution where they are "amongst others, ambiguity, unreasonableness, obvious imbalance or lack of proportionality or absurd situation."**

48. Similarly in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006,** it was held that:

> **"…the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits."**

49. Nyamu, J (as he then was) in **Richard Nduati Kariuki vs.Honourable Leonard Nduati Kariuki & Another [2006] 2 KLR 356** expressed himself as hereunder:

> **"The Constitution is a living document. It is a house with many rooms, windows and doors. It is conservative enough to protect the past but flexible enough to advocate new issues and the future."**

50. It follows that the norms and values identified in Article 10 of the Constitution are bare minimum or just examples. This must be so because Article 10(2) of the Constitution provides that:

> ***"The national values and principles of governance include…"***

51. By employing the use of the term "include" the framers of the Constitution were alive to the fact that there are other values and principles which may advance the spirit of the Constitution and hence all State organs, State officers, public officers and all persons may be enjoined to apply them. What this means is that the national values and principles of governance in Article 10 of the Constitution are not exclusive but merely inclusive. The Constitution set out to plant the seed of the national values and principles of national governance but left it open to all State organs, State officers, public officers and all persons when applying or interpreting the Constitution, enacting, applying or interpreting any law, or applying or implementing any public policy decision to water and nurture the seedling to ensure that the plant develops all its parts such as the stem, the leaves, the branches and the flowers etc. In other words the national values and principles of governance must grow as the society develops in order to reflect the true state of the society at any given point in time.

52. The current Constitution of Kenya, 2010, is a product of a long struggle for democracy spanning decades by the people of Kenya. It is therefore partly a response to many years of misrule by a single party dictatorship. One must therefore start from the presumption that the provisions dealing with Kenya's political system were meant *inter alia* to correct the historical deficiencies that placed the people at the mercy of the executive by usurping the people's sovereignty and giving the executive unchecked power over all other institutions of governance. This was appreciated by the Supreme Court **In the Matter of the Principle of Gender Representation in the National Assembly and The Senate Advisory Opinion Application No. 2 of 2012,** where it held that we ought to take into account the agonized history attending Kenya's constitutional reform. Accordingly, in interpreting the Constitution it important that we do so while keeping in mind what Kenyans intended to achieve by retiring the former Constitution and substituting it with the current Constitution.

53. As was held in **Commissioner of Income Tax vs. Menon [1985] KLR 104; [1976-1985] EA 67**, it is one of the canons of statutory construction that a court may look into the historical setting of an Act, to ascertain the problem with which the Act in question has been designed to deal. Similarly, in **Njoya & 6 Others vs. Attorney General & Others (No. 2) [2004] 1 KLR 261; [2004] 1 EA 194; [2008] 2 KLR**, a majority of the Court held that quite unlike an Act of Parliament, which is subordinate, the Constitution should be given a broad, liberal and purposive interpretation to give effect to its fundamental values and principles.

54. In the case of Institute of **Institute of Social Accountability & Another vs National Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR**, the Court stated as follows:

> **[57] "[T]his Court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution.**
>
> . . .
>
> **[I]n determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011] eKLR, Samuel G. Momanyi v Attorney General and Another (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect."**

55. With regard to the purpose and effect of legislation, the Canadian Supreme Court in **R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295** enunciated the principle that:

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

56. The Court in the **Institute of Social Accountability & Another vs. National Assembly & 4 Others [2015] eKLR** case concluded as follows at paragraph 59 0f its decision:

> **"Fourth, the Constitution should be given a purposive, liberal interpretation...Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3)). We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution."**

57. In **Murungaru vs. Kenya Anti-Corruption Commission & Another Nairobi HCMCA No. 54 of 2006 [2006] 2 KLR 733**, it was held that our Constitution must be interpreted within the context and social, and economic development keeping in mind the basic philosophy behind the particular provisions of the Constitution. The same view is expressed **In Matter of the Kenya National Human Rights**

<u>Commission, Advisory Opinion No. 1 of 2012; [2014] eKLR</u>, at paragraph 26 where the Supreme Court opined that:

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

58. It is therefore my view that the constitutional provisions dealing with political rights are partly steeped in historical context. This view has in fact acquired jurisprudential recognition by the Supreme Court which **<u>In the Matter of the Interim Independent Electoral Commission</u> - <u>Constitutional Application No. 2 of 2011 [2011] eKLR</u>** paragraph 86, stated:

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

59. It is with that historical context in mind that I will endeavour to unravel the issues raised before me. This must necessarily be so due to the fact that under Article 259(a) and (c) of the Constitution this Court is expected to interpret the Constitution in a manner that promotes its values, purposes and principles and permits the development of the law. I therefore associate myself with the views expressed by **Mohamed A J** in the Namibian case of **<u>S. vs Acheson, 1991 (2) S.A. 805</u>** (at p.813) to the effect that:

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

60. In this case, borrowing from our past, it may well be that Kenyans wanted to secure their political rights even if, God forbid, we were to relapse to a *de facto* single party system by guaranteeing that those who do not subscribe to the monolithic policies and systems, a right to participate in the affairs of the country without being locked out and this they did by entrenching the provisions relating to independent candidates. To therefore deliberately set out to strangle the constitutional right of independent candidates to freely exercise their rights by introducing legal provisions meant to smother the said candidates would be inimical to the spirit of the Constitution.

61. It is in this light that we must understand the genesis of the right to contest elective posts as independent candidates. One cannot fail to appreciate that this provision has a historical basis. At one point in this country the political system was a single party dictatorship and it was this that led Kenyans to agitate for multiparty democracy. Democracy connotes the right to belong to political parties and also the right not to do so without one losing his or her rights under Article 38(1) of the Constitution which provides that:

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

a. ***to form, or participate in forming, a political party;***

b. ***to participate in the activities of, or recruit members for, a political party; or***

c. ***to campaign for a political party or cause.***

62. Although it was submitted on behalf of the Commission that these provisions deals with the rights of those who desire to participate in elections through the vehicle of political parties, it is clear from the said Article that the right to make political choices through political parties is just an aspect of the said right since the right only gives such participation as an example. Otherwise it is clear that the Article deals with the right of every citizen, as opposed to every member of a political party to make political choices. To interpret the said Article to only apply to political party candidates would be contrary to the express provisions of Article 20(3) and (4) of the Constitution which provides that:

(3) In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.

63. Therefore Article 38 of the Constitution must be interpreted in a manner that extends the right to every citizen as opposed to only those who belong to political parties.

64. Since the right to contest political positions as an independent candidate is one of the rights recognised under our Constitution, that right can only be limited as provided under Article 24 of the Constitution which provides as follows:

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid

unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

65. With regard to the said provision, **Mumbi Ngugi, J** in **Geoffrey Andare vs. Attorney General & 2 Others [2016] eKLR** expressed herself as hereunder:

"89. In other jurisdictions part of, the criteria set out in Article 24 has been applied in cases where the question of the constitutionality of statutes was at issue, and is of assistance to this court even were article 24 not applicable. In the Canadian case of R v. Oakes (supra), the Court was considering the question whether section 8 of the Narcotic Control Act, which had been found to be unconstitutional for violating section 11 of the Canadian Charter of Rights and Freedoms, was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society. In reaching the conclusion that it was not, the Court enunciated the criteria to be followed in answering the question as follows:

"69.To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M Drug

Mart Ltd., supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R. v. Big M Drug Mart Ltd., supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance"."

66. From a reading of the relevant provisions of the Constitution reproduced hereinabove, it is clear that with respect to the requirement for supporters what the Constitution requires is that such persons be registered voters. The constitutional provisions do not talk about such supporters belonging to or not belonging to political parties. One of the cardinal principles for constitutional interpretation was restated the Supreme Court in Advisory Opinion No. 2 of 2013 - **The Speaker of The Senate & Another vs. Honourable Attorney General & Others [2013] eKLR,** in which the Honourable Chief Justice at

paragraph 184 quoted the Ugandan Case of **Tinyefuza vs. Attorney General Const Petition No. 1 of 1996 (1997 UGCC3)** where it was held that:

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

67. The issue of membership to political parties or lack of it is a new provision introduced vide the ***Elections Act, 2011***. Considering the various Articles of the Constitution it is clear that section 29 of the ***Elections Act*** is a limitation of the rights enshrined in the said provisions of the Constitution. Once it is found that there is such a limitation Article 24(3) of the Constitution shifts the burden to the State to justify that limitation by demonstrating to the court, tribunal or other authority that the requirements of Article 24 have been satisfied. This was restated by **Lenaola, J** (as he then was) in **Union of Civil Servants & 2 Others v Independent Electoral and Boundaries Commission (IEBC) & Another [2015] eKLR** where the learned Judge held that:

> **"once a limitation of a fundamental right and freedom has been pleaded as has happened in the present Petition, (on grounds of equality and freedom from discrimination under Article 27 of the Constitution and political rights under Article 38 of the Constitution), then the party which would benefit from such a limitation must demonstrate a justification for the limitation. In demonstrating that the limitation is justifiable, such a party must demonstrate that the societal need for the limitation of the right outweighs the individual's right to enjoy the right or freedom in question; See S vs Zuma & Others (1995)2 SA 642(CC)."**

68. One condition that must be satisfied is that a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom**,** and the nature and extent of the limitation. A look at section 29 of the Act does not reveal an expression of an intention to limit this right. Nor does it indicate the nature and extent of the limitation.

69. In this Country the party system is still in its infancy. Going by the recent largely chaotic and shambolic party primaries, it is clear that the political parties in this country are yet to mature politically. It is not surprising that on occasions political parties have relied on lists other than their party membership lists in conducting their nominations. The membership lists, assuming they exist, may well be of doubtful authenticity and at worst grossly unreliable. Their credibility may well be highly questionable. With that state of affairs to provide that independent candidates can only be supported by persons who do not belong to political parties would irrational. It was contended that since there is a register of membership to political parties, once the independent candidates secure the said register, it is easier for them to determine those who do not belong to political parties. In my view to expect the independent candidates to do this would be to send them to a wild goose chase. Under Article 21(1) of the Constitution:

It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

70. It is therefore clear that a constitutional duty is cast upon the State and its organs to promote and fulfil the rights and fundamental freedoms and to do this they must facilitate the beneficiaries of the said rights to enjoy the same to the maximum. To simply direct the candidates to go into the wilderness and secure their rights in my view amounts to an abdication of that constitutional duty on the part of the State and its organs of which the Commission is a part.

71. In any case the mere fact that a person belongs to a political party does not bind that person to vote for the particular political party's candidate. It may well be that members of a political party may not subscribe to the choice of candidates by their political party in which event they would be free not only to vote for other candidates of their choice but also to front such candidates so as to realise their political rights. In my view to lock out persons from fronting candidates other than those chosen by their political parties would amount to unreasonably limiting their rights under Article 38 of the Constitution more so

when the Constitution itself does not contemplate such limitation and when the ***Elections Act*** itself is not clear and specific about the right or freedom to be limited and the nature and extent of the limitation hence cannot constitutionally be construed as limiting the right or fundamental freedom in question.

72. It is my view that what section 29 of the ***Elections Act*** has attempted to do is to limit the fundamental freedom of association especially in political sphere so as to derogate from its core and essential content. To say section 29 of the Act was made in deference to clear dichotomy in the Constitution as to the pathways for those eligible to contest to follow in my view cannot be correct. By introducing such conditions as nomination by members of the candidate's political party or in case of an independent candidate by non-members of any political party, when the Constitution only talks about registered voters, cannot by any stretch of imagination be said to an implementation of the provisions of the Constitution.

73. I further agree with the Petitioner that to subject a presidential candidate to only seek support from those who belong to his party would be inimical to principles of national unity and inclusiveness which are some of the national values and principles of governance in Article 10 of the Constitution as it would mean that a person seeking such office who, under Article 131(1)(e) of the Constitution is a symbol of national unity, is pigeonholed and cocooned within his or her corner of supporters. In my view a presidential contest ought not to be treated in a similar manner as a boxing bout where the protagonists are restricted to their respective corners in the ring. In fact in my view the requirement under Article 137(1)(d) that a person seeking the highest office in the land be nominated by not fewer than two thousand voters from each of a majority of the counties is an attempt to give the presidency a national outlook which is an antithesis to the restriction of the presidential nominee to only those who prescribe to his or her policies and political convictions. The effect of section 29 of the Act would be to render the freedom of association in Article 38 a dead letter of the law if all Kenyans were to belong to political parties or if the only Kenyans who do not belong to political parties would be less than the prescribed number. In that event presidential independent candidates would have been locked out from selling their policies to Kenyans simply on the basis of their political leanings. It could not have been the intention of the framers of the Constitution that the rights of Kenyans to choose political leaders of their choice would only be restricted to those fronted by political parties and this, the ***Elections Act***, does not expressly state so. I associate myself with the position of the Court of Appeal of Uganda in **Oulanyah vs. Attorney-General [2008] 1 EA 336** that:

> **"The first issue is whether rule 11(1) is inconsistent with article 29(1)(e) of the Constitution. That article specifically protects the freedom of association, which includes the freedom to form and join associations or trade unions, and political and other civic organisations. This without saying includes the freedom to dissociate or not join any union or organisation or political party. Notwithstanding the foregoing, rule 11(1) Part 1 provides that Elected members of EALA representing Uganda shall be nominated by the parties or organisations represented in the House on the basis of proportional Party membership, taking into consideration the numerical strength of the parties or organisations and gender. This clearly leaves "other shades of opinion" as stipulated under article 50 which would include independent members. The argument of numerical strength is also anomalous and prejudicial against the independents who number 37 in the House like FDC, which similarly numbered 37 and was qualified to elect whereas independents could not. The direct and inevitable consequence of Appendix B, rule 11(1) is to impose a restriction on the exercise by the independents of their right to participate in and contest any elective office as guaranteed under article 72(4) and (5)…It is remarkable that this Constitutional command could have been ignored with no plausible rationale…This situation is tantamount to unequivocal discrimination against the independents as they are undoubtedly denied equal protection of the law, which contravenes article 21, which preserves the right to equality and freedom from discrimination. Independents are thus being discriminated against for their political opinion for not conforming to the established political ideologies. It is a cardinal principle of constitutional interpretation that a fundamental right or freedom once conferred by the Constitution can only be taken away by an express unambiguous provision in the Constitution and not otherwise as is evidenced by rule 11(1) which seeks to take away the**

independents' right to associate or not to associate… It is well settled that though Parliament is mandated to make rules to regulate its own procedure, such rules/regulations are subject to the Constitution."

74. Accordingly, section 29 of the Act there fails to meet the threshold set in Article 24 of the Constitution.

75. That now brings me to the issue whether section 29 of the Act violates Article 27 of the Constitution which provides for equality and freedom from discrimination. Article 27(4) provides that:

> ***The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***

76. In his decision in **Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688, Nyamu, J** (as he then was) expressed himself *inter alia* as hereunder:

> **"Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word "discriminatory" in section 82 of the Constitution. Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:- (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational relation to the object sought to be achieved by the law in question; (iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification."**

77. In this case the justification for having a different criteria for nomination of independent candidates from those candidates fronted by the political parties is said to stem from the Constitution itself since the two sets of candidates have different pathways. If this was the basis one would have expected that in similar way the candidates vying for other posts other than the presidency would be treated in the same manner. However section 29 of the Act seems to have only targeted the presidential candidates rather than dealing with all candidates in an elective contest. In my view no intelligible differentia which distinguishes persons vying for other posts from those vying for presidential posts has ben shown. It is therefore my view and I hold that there is no rational relation to the object sought to be achieved by the law in question.

78. Apart from that the effect of requiring the presidential independent candidates not to seek support from supporters of political parties would be to force them to join political parties in the event that they are unable to secure the prescribed numbers. I agree with the opinion of **Kitumba, JA** in **Oulanyah vs. Attorney-General** (supra) where he expressed himself as follows:

> **"The right to associate provided for in article 29(1)(e) of the Constitution includes the right to disassociate. In the circumstances of this case the petitioner was forced to associate by becoming a member of the NRMO so as to be able to stand for election as a member of the EALA. Rule 11(1) of the Rules of Parliament is inconsistent with and contravened article 29(1)(e) of the Constitution. Similarly, rule 11(1) is inconsistent with and contravenes article 21(1) and (2) of the Constitution which guarantees equality of treatment and protection from non-discrimination on grounds of political beliefs, among others. There was discrimination in the instant petition as the independents were discriminated against on grounds of their political beliefs."**

79. I now come to the issue of the requirement that the list of supporters be in Microsoft Excel apart from

the hard copy. The Commission purported to direct that the list of the candidate's supporters be in print and excel. The notice did not disclose under which provision the requirement for excel was being sought. Learned Counsel for the Commission conceded that if the said requirement was only contained in the social media communication vide Facebook, it would have been difficult to justify. He however contended that the said requirement is contained in Regulation 18 of the ***Election General Regulations, 2012***which is not being challenged in these proceedings. The said Regulation states as hereunder:

> ***The person delivering an application for nomination under regulation 16 or 17 shall at least five days to the day fixed for nomination, deliver to the Commission a list bearing the names, respective signatures, identity card or passport numbers and voters' numbers of at least two thousand voters registered in each of a majority of the counties, in standard A4 sheets of paper and in an electronic form.***

80. Therefore a reading of Regulation 18 clearly shows that what is required is a transmission in standard A4 sheets of paper and in an electronic form. In my view even a Word document can be transmitted in an electronic form. Therefore the specification that the document must be in Excel cannot be justified by reference to Regulation 18. In my view there is no justification whatsoever for directing the candidates to transmit the list in Excel. That requirement in my view is in the circumstances irrational, unwarranted and has no basis in law. It is clearly a limitation or restriction on the exercise by independent candidates of their political rights. Such limitation or restrictions can only be effective if under Article 24 of the Constitution, it is by law and not by a social media notice. Even then each case must be decided on its circumstances and as Article 24 of the Constitution prescribes, the nature of the right or the fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose are all relevant factors to be taken into consideration. This in my view is the import of the holding in **S vs Makwanyane and Another CCT 3/94(1995) 2A CC3** where it was held by **Chaskalson, J** held that:

> **"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provision of Section 33(1). The fact that difference rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equally"; means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests…In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."**

81. Similarly in **NTN Pty Ltd and NBN Ltd vs. State (1988) LRC 333**, the Court stated as follows in that regard;

> **"What is reasonable and justifiable in democratic society is not a concrete or precise concept. It entails different policy and executive considerations. Traditionally, Court is kept out of this field. This is a new field of intrusion by the Constitution. The Court is to be careful in saying what it is. I do not think it is a concept which can be precisely defined by the Courts. There is no legal yardstick. What has been decided by Courts can only be guide as to the nature of this illusive principle. However, the fundamental thread which runs through all this is that it must have regard for a 'proper respect for the rights and dignity of mankind'. It is this context that I adopt what I said in Supreme Court Reference of 1982. In Re Organic Law On National Election as [1982] PNGLR 214, I have one correction to make. After I discussed the proper**

principles, I stated that a proper test was a subjective one. The test really is an objective one. What I should have said was the Application of the proper test must be considered within the context of the subject matter or circumstance of each case."

82. Having considered the issues raised in this petition, it is my view and I hold that this petition is merited. I fail to understand what section 29 of the ***Elections Act*** was meant to achieve when section 23 thereof properly reproduced the constitutional provisions relating to nomination of presidential candidates. As I have stated hereinabove the Act failed to rationalise this glaring departure from the constitutional provisions. Similarly both the section and the directive based on the circumstances of this case do not meet the fairness and the reasonability test as provided for under Article 24 of the Constitution and the Respondents' submissions cannot be sustained.

83. What then is the role of this Court in circumstances where a piece of legislation does not meet constitutional muster? The US Supreme Court in **U.S vs Butler, 297 U.S. 1[1936]** expressed itself as follows:

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

84. I appreciate the sentiments in the case of **Jayne *Mati & Another vs. Attorney General and Another* - Nairobi Petition No. 108 of 2011** where the Court stated in paragraph 31 that:

> **"At this juncture I must emphasise that separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by the Constitution and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of the Constitution."**

85. I however associate myself with the view adopted by **Nyamu, J** (as he then was) decision in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** that:

> **"The other reason why this Court cannot blindly apply the so called ouster clauses is that, unlike the English position where judges must always obey, or bow to what Parliament legislate, is, because Parliament is the supreme organ in that legal system. Even there judges have refused to blindly apply badly drafted laws and have in some cases filled the gaps in order to complete or give effect to the intention of the legislature. In the case of Kenya it is our written Constitution which is supreme and any law that is inconsistent with the Constitution is void to the extent of the inconsistency (see s 3). Our first loyalty as judges in Kenya is therefore to the Constitution and in deserving cases, we are at liberty to strike down laws that violate the Constitution."**

86. I, further defer to the words of **Kasanga Mulwa, J** in **R vs Kenya Roads Board exparte John Harun Mwau HC Misc Civil Application No.1372 of 2000** that:

> **"Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created**

under the Constitution are subordinate and subject to the Constitution."

87. Therefore when any of the state organs steps outside its mandate, this Court will not hesitate to intervene. The Supreme Court has ably captured this fact in **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** where it expressed itself as follows:

> **"The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."**

88. Subsequently, the same Court in **Speaker of National Assembly -vs-Attorney General and 3 Others (2013) eKLR** stated that:

> **"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering its opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. "**

89. The Court went on to state as follows;

> **"Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a resolution in plebiscite, is only the Courts."**

90. **Ngcobo, J** in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** on his part expressed himself as follows:

> **"The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on**

the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation."

91. The learned Judge then added:

"It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation. By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does."

92. The Court went on to state as follows:

"While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution."

93. I am are duly guided and this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the invitation to do so is most welcome as that is one of the core mandates of this Court. As was held by the Supreme Court in **Hassan Ali Joho & Another vs. Suleiman Said Shabhal & 2 Others** (supra):

"As rightly submitted by the appellants, the Court of Appeal interpreted Article 87(2) of the Constitution so as to place it in conformity with the provisions of Section 76(1)(a) of the Elections Act. This is tantamount to elevating a statutory provision above that of the Constitution, and is not tenable, in the light of the provisions of Article 2 of the Constitution. The provisions of the Constitution are superior to any legislation. As such, when interpreting the provisions of an Act of Parliament, the Court must always ensure that the same conform to the Constitution and not *vice versa.* **In order to ensure that justice is not sacrificed at the altar of technicality, the Court is, however, enjoined to invoke its** *inherent power* **while interpreting the Constitution and legislation, to preserve the** *values and principles of the Constitution***."**

94. The South African Constitutional Court in ***Minister of Health and Others vs. Treatment Action Campaign and Others* (2002) 5 LRC 216, 248 at** paragraph 99 **underscored** the Court's role to protect the integrity of the Constitution thus:

"The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself."

95. Similarly in **Nation Media Group Limited vs. Attorney General [2007] 1 EA 261** it was held that

"The Judges are the mediators between the high generalities of the Constitutional text and the messy details of their application to concrete problems. And Judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary they are applying the language of these provisions of the Constitution according to their true meaning. The text is "living instrument" when the terms in which it is expressed, in their Constitutional context invite and require periodic re-examination of its application to contemporary life."

96. It is therefore clear that the mere fact that the legislative assembly enacts an Act that is not the end of the matter. I am satisfied that I can grant the orders sought in the petition, where appropriate, or appropriate orders in accordance with Article 23(3).

Summary of Findings

97. I have dealt in the preceding sections with the issues which were raised before me in this petition. What remains is to summarise my findings in this judgment and my disposition of the petition. Consequently I find that:

1. **By enacting that the persons who nominate an independent presidential candidate shall not be members of any political party, section 29 of the Elections Act contravened the letter and the spirit of Article 38 as read with Article 137(1)(d) of the Constitution. Similarly, by enacting that the persons who nominate a presidential candidate shall be members of the candidate s political party, the same section contravened the letter and the spirit of Article 38 as read with Article 137(1)(d) of the Constitution.**

2. **By restricting section 29 of the Elections Act to presidential candidates, the said section contravened Article 27 of the Constitution that enshrines freedom from discrimination.**

3. **By providing that all presidential candidates submit their list of 2000 supporters from at least 24 counties to the Commission by Excel, the Independent Electoral and Boundaries Commission went overboard and purported to unlawfully and unjustifiably restrict or limit the rights of such candidates to exercise their political rights under the Constitution. I further find that the said requirement does not meet the fairness and reasonability test as provided for under Article 24 of the Constitution.**

Disposition and Remedies

98. In the premises the orders which commend themselves to me and which I hereby grant are as follows:

1. **I declare that to the extent that Section 29(1) of the Elections Act No. 37 of 2016 requires the persons who nominate a presidential candidate to be members of the candidate' s political party, the section contravenes Articles 27(2) and (4) and Article 137(1)(d) of the Constitution of Kenya and is therefore null and void to the extent of the said inconsistency.**

2. **I declare that to the extent that Section 29(2) of the Elections Act No. 37 of 2016 requires the persons who nominate an independent presidential candidate shall not be members of any political party, the section contravenes Articles 27(2) and (4) and Article 137(1)(d) of the Constitution of Kenya and is therefore null and void to the extent of the said inconsistency.**

3. **I declare that the requirement issued by the 1st respondent on the 17th May, 2017 that presidential aspirants do submit their nomination signatures by way of Excel is unlawful unconstitutional, null and void.**

99. I am however unable to issue a blanket order directing the 1st respondent to acknowledge receipt and accept the submitted signatures of the persons who have nominated petitioner for nomination as presidential candidate in the August 8th 2017 General Election. The 1st Respondent is however barred from rejecting the said lists based on the provisions of section 29 of the ***Elections Act*** or its requirement issued on the 17th May, 2017 that presidential aspirants do submit their nomination signatures in Excel.

100. That brings me to the issue of costs. In my view if there are any proceedings in which public interests is a factor to be considered, these must be such. The petitioner has properly undertaken his constitutional duty under Article 3(1) a read with Article 258(1) by commencing these proceedings in order to uphold and defend the Constitution. He is obviously poorer in his pockets but his reward cannot be quantified in monetary terms. Kenyans and in particular those who aspire for the highest office in the land now and in the future will no doubt be grateful to him for having spiritedly sacrificed both his time and finances in instituting and prosecuting these proceedings. For that the Country, I am sure will be forever indebted to him.

101. In the premises I will make no order as to costs.

102. I take this opportunity to express my appreciation to counsel who appeared in this petition for their well-researched and in-depth arguments and submissions. If I have not referred to all the submissions made and the decisions referred to me, it is not out of lack of appreciation for their industry.

103. It is so ordered.

Dated, Signed and Delivered in open Court at Nairobi this 26th Day of May 2017

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GV ODUNGA

JUDGE

In the presence of:

Mr Mutua for Mr Gachie for the Petitioner

Miss Ndong for the 1st Respondent

Mr Bitta for Mr Odhiambo for the 2nd Respondent

CA Mwangi