



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. APPLICATION NO. 447 OF 2017

**IN THE MATTER OF: AN APPLICATION BY GLADWELL OTIENO, FOR ORDERS OF
MANDAMUS AND PROHIBITION**

AND

IN THE MATTER OF: THE ELECTIONS ACT

IN THE MATTER OF THE ELECTIONS (VOTER REGISTRATION) REGULATION 2012

AND

**IN THE MATTER OF AND/OR THE VIOLATION OF ARTICLES 10, 27, 38, 47, 50, 81, AND
236 OF THE CONSTITUTION, 2010**

AND

**IN THE MATTER OF AND/OR BREACH OF SECTIONS OF THE ELECTIONS ACT AND
REGULATIONS**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORMS ACT, CHAPTER 26,
LAWS OF KENYA**

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC.....APPLICANT

AND

INDEPENDENT EELCTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

JUBILEE PARTY.....INTERESTED PARTY

RULING

1. These proceedings are the subject of the Notice of Motion dated 18th July, 2017 by which the ex parte applicant herein, **Gladwell Otieno**, seeks the following orders:

1) **AN ORDER OF MANDAMUS** do issue to compel the Respondent to publish and open up for public inspection the register of voters as clustered per polling station and to take into account submissions by concerned persons and revise the register accordingly within a reasonable time before the general elections scheduled for the 8th August 2017.

2) **AN ORDER OF MANDAMUS** to compel the Respondent to publicize and gazette the final register of voters per polling station within such time as reasonable before the general elections scheduled for the 8th August 2017

3) **AN ORDER OF PROHIBITION** do issue to prohibit the Respondent and its officers from deploying a voter register for use in the general election before the same is subjected to a public inspection as required under the law.

4) **SUCH OTHER ORDERS** and reliefs as the Honourable Court may deem appropriate in the circumstances.

5) **COSTS** of these proceedings be provided for.

2. The application was based on the following grounds:

Illegality

1. The Respondent has failed and or refused to comply with the provisions of Section 6 of the Elections Act and Regulation 33 of the Elections (Voter Registration) Regulations which require that the register of voters be opened up for inspection within 90 days of the date of a general election.

2. That in failing to open up the register of voters for public inspection within a sufficient time period, the Respondent is violating the provisions of the constitution, the Act and the Regulations.

Irrationality and unreasonableness

3. The failure by the Respondent to open up the register of voters for inspection is irrational and unreasonable.

4. The failure by the Respondent to open the register of voters is in bad faith and/or for an improper motive or purpose with an intention to undermine free, fair and democratic electoral processes in the Republic of Kenya.

Unreasonableness

5. The failure to open up the register of voters for public inspection is unreasonable and ultra vires express provisions of the Constitution, the Elections Act and Regulations made thereunder.

6. The failure to open up the register of voters for public inspection and gazette of final register of voters cannot be reasonably justifiable in an open democratic society where the

Rule of Law takes precedence.

7. It is just and fair that the Judicial Review Orders sought herein be granted.

Legitimate expectation

8. The Ex Parte Applicant has a legitimate expectation that the Respondent shall at all times be guided by the laws of the Republic in executing its mandate and that the Constitution shall at all times be complied with and its principles respected when the Respondent makes decisions in fulfilment of its functions.

9. The Applicants have a legitimate expectation that the provisions of the Constitution, the Elections Act and Elections (Voter Registration) Regulations 2012 will be respected and adhered to by all persons including the Respondent.

Applicant's Case

3. According to the applicant, the *Elections Act* at section 6(2) as amended by the *Election Laws (Amendment) Act No. 1 of 2017* provides that the Respondent shall within sixty days of the notice of a general election, open the Register of Voters for inspection for a period of at least thirty days or such period as the Commission may consider necessary. Further, section 6a(3) of the *Elections Act* provides that upon the expiry of the period for verification the Respondent shall publish the register of voters online and in such other manner as may be prescribed by the Regulations.

4. The applicant further averred that the *Elections (Registration of Voters) Regulations, 2012* at Regulation 27 requires the Respondent to publish and open up the register of voters as provided for by the *Elections Act* as set out hereinabove. On the other hand, the *Elections (Registration of Voters) Regulations, 2012* sets out the manner in which the Respondent is required to publish the register by placing a notice in the Kenya Gazette and in at least two newspapers of national circulation inviting the public to carry out an inspection of the register of voters.

5. It was the ex parte applicant's case that the Respondent has without any basis refused and or failed to publish and open up the voter register for public inspection as required by the provisions of the *Elections Act* and the *Elections (Registration of Voters) Regulations*.

6. The ex parte applicant averred that there are noted inconsistencies in numbers declared by the Respondent as the actual number of registered voters in certain regions and an inspection of the register will enable the Ex Parte Applicant to scrutinize and ascertain the actual registered voters in those areas.

7. It was disclosed that whereas the Respondent opened the register of voters for the verification of voter details in line with the requirements of the law under section 6A of the *Elections Act* as amended by the *Election (Laws) Amendment Act*, verification of biometric data is different from a public inspection as the verification involves each individual voter that is registered confirming their biometric data while the public inspection is an exercise that is open to all members of the public to confirm details of all registered voters including if numbers reported by the Respondent per constituency or polling station are accurate. It was therefore the applicant's position that the above described exercise of verification of biometric data does not suffice to meet the requirements for conducting a public inspection of the register of voters and both processes are provided for under different provisions of the law.

8. It was the ex parte applicant's case that she had a legitimate expectation that the Respondent shall at all times be guided by the law and enforce all provisions of the laws as enacted to guide it in the implementation of its activities and programs. In her view, the Respondent has in the present circumstances acted unreasonably, irrationally, arbitrarily and in complete disregard of the provisions of the law and principles of the Constitution and its continued non-observance of the provisions of the law constitute a threat to the rights and freedoms to have a free and fair election that is administered in a transparent, efficient, accurate and accountable manner as guaranteed in the Constitution and that is in

tandem with democratic principles.

9. The applicant averred that in a preliminary review of the register of voters shared by the Respondent before the statutory audit observed several discrepancies in the register which she desires are cleaned or attended to before the final register of voters is published and publicised in readiness for the general elections scheduled for the 8th August 2017.

10. It was therefore her case that it is in the interest of justice that the orders sought are granted so as to protect the Constitutional and legal framework governing free and fair electoral processes.

11. In her submissions the ex parte applicant relied on the final report of the Constitution of Kenya Review Commission at page 164 where it stated that:-

“The cornerstone of participatory governance is to hold free, fair and periodic elections. Elections serve not only to choose people’s representatives, but also to elect or determine government election or appointment. They demonstrate the people’s sovereignty and accountability by politicians. They lend legitimacy to governments.”

12. According to the applicant, this aspiration was realized in the Constitution at Article 38 (2).

13. It was the ex parte applicant’s submission that essential to realizing the right enshrined in Article 38 (2), a free and fair election, an independent and impartially administered electoral process is essential and this is articulated in the Constitution at Article 81 further provides on the right of every person to a free and fair election.

14. In the applicant’s submissions the Register of Voters is a key component in achieving the aspirations of the constitutional principles herein laid out. Therefore ***Elections Act*** and ***Regulations*** have various provisions on the said register as laid in section 6(2) of the ***Elections Act*** as amended by the ***Election Laws (Amendment) Act of 2017*** and Regulation 27 of the ***Elections (Registration of Voters) Regulations, 2012***.

15. In the applicant’s view, the above provision is clear that the Respondent herein must within ninety days of the date of a notice of a general election publish the register of voters for inspection by members of the public. This is not a matter of the discretion to be exercised by the Respondent but a mandatory provision to be strictly adhered to. It was submitted that the rules of statutory interpretation have long been litigated and are well established within the judicial system and reliance was placed on **Law Society of Kenya v Kenya Revenue Authority & Another (2017) eKLR** where the learned judge stated as follows:

The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts....The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot legislate itself.”

16. It was submitted that the role of the Court is therefore to give a purposive interpretation of statutory provisions placed before it with the first rule being, as stated in the case of ***Law Society of Kenya*** (supra), as follows:

“In construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the Court has to see at the very outset is, what does the provision say? The Courts are bound by the mandate of the Legislature and once it has expressed its intention in words which have a clear significance and meaning, the Court is precluded from speculating. If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot

be warranted by the words employed by the Legislature.

Where the words of a statute are plain, precise and unambiguous, the intention of the Legislature is to be gathered from the language of the statute itself and no external aid is admissible to construe those words. It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning that the external aid may be looked into for the purpose of ascertaining the object which the Legislature had in view in using the words in question.”

17. The import, according to the ex parte applicant, therefore is that where the words in a Statute in their plain and ordinary meaning are unambiguous, the Courts work in interpretation is done and the Court has no further role in the interpretation of a statute.

18. In this case it was submitted that the statutory provisions herein above set out require the Respondent to publish the register of voters and contains words in their ordinary meaning that are clear, plain and unambiguous. These provisions set out a mandatory obligation on the Respondent herein since the word “*shall*” imposes a mandatory obligation on the Respondent herein.

19. It was the ex parte applicant’s case that the provisions of section 6(2) of the *Elections Act* also places a timeline within which the publishing for the inspection of the register must be done. This is to be done within ninety days of the notice of a general election. The notice of the general election is dated 17th March, 2017. The ninety days have since lapsed without any compliance by the Respondent. Further the regulations stipulate that a notice must be given and circulated per the provisions of the Regulations.

20. It was the applicant’s submissions that the Respondent herein has a mandatory obligation set out by the *Elections Act* and Regulations as hereinabove set out to carry out a publishing and facilitate the inspection of the register of voters.

21. As to whether the Respondent carried out its obligations per section 6(2) of the *Elections Act*, it was submitted that the provisions requiring the publishing and inspection of the register of voters are clear and distinct from one another. This denotes that these are two separate exercises to be carried out by the Respondent in fulfilling its mandate to ensure the free, fair, credible, transparent, accountable, efficient and legal elections. To the ex parte applicant, the Respondent cannot therefore rely on the basis that it conducted the exercise of verification of the register of voters as satisfying the mandatory provision for the publishing of the register for inspection of voters.

22. Voter verification as envisioned in the statutory provisions, it was submitted, is an exercise where an individual voter verifies their biometric information that will be used to identify them as a voter, their registration details for example the polling station to which they have been allocated and that they are indeed registered as a voter.

23. On the other hand inspection of the register, to the applicant, is a process that is open to all voters, all citizens, accredited observers, political parties and their agents whose purpose is to ensure that the voter register has capture accurately the details of all voters, there is no duplication of voter registration and further that there are no irregularities on the voter register. In the applicant’s view, the process of the inspection is vital to the carrying out of a free, fair, credible and transparent election as it allows an interrogation into the total tally of registered voters per polling station and therefore guarantee accuracy and credibility at the point of transmission of results.

24. The ex parte applicant therefore submitted that the two processes of verification and inspection are not synonymous and therefore must be carried out separately by the Respondent herein to ensure a credible and accountable election is carried out.

25. As to the effect of the failure of the Respondent to carry out the provisions of the law it was submitted that the Constitution guarantees every citizen the right to free, fair and regular elections which right is buttressed by the provisions of Article 81 which lays out the principles for an electoral system which

include that the free and fair elections must be conducted in a transparent, impartial, neutral, efficient, accurate and accountable manner. To the ex parte applicant, the Respondent is tasked with the duty to ensure that the above electoral principles are met in the conduct of the upcoming general elections.

26. It was the ex parte applicant's case that the issue of inspection of the register of voters is critical to ensuring the compliance with the above constitutional principles and having a free and fair election. To her, her right to a free and fair election is heavily dependent on the transparency of the register of voters which will provide information as to the total tally of voters which can be used to verify information that is transmitted and published as the tally of votes in every constituency.

27. The ex parte applicant averred that she had demonstrated that there exist anomalies in the register that was published after the statutory audit that was carried out which anomalies include the double registration of certain voters, lack of identification details attached to certain voters, among others. Such anomalies if the register is published for inspection will be arrested early enough for the Respondent to carry out the revision of the register and curb further anomalies.

28. The applicant asserted that it is recognized world over that the register of voters is a key element of the democratic process of governance and should be handled with the utmost reverence and care by the body charged with managing the elections in a country since from the register of voters stem claims that go to the root of the credibility of the entire election.

29. The ex parte applicant therefore contended that the Respondent's actions will directly prejudice her rights to a free and fair election.

30. The applicant concluded that the actions of the Respondent are contrary to the express provisions of the law and elude the principles of transparency and accountability as laid out in the Constitution. Further the actions of the Respondents have the effect of undermining the goal of free and fair elections as set out in the Constitution. To her, it is necessary that the process leading to the preparations and the conduct of the 2017 general elections be done in a transparent, open and accountable manner that does not undermine the sanctity of the vote or be in breach of existing laws and regulations.

31. The applicant therefore urged the Court to allow the present Application and grant the orders sought herein.

32. In his oral highlight, **Mr Otieno Willis** learned counsel for the ex parte applicant submitted that the response to the application have referred to the verification under section 6A of the ***Elections Act*** yet the applicant's application is premised on section 6(2) of the ***Elections Act***. To learned counsel, whereas section 6A invites individual voters to confirm their biometric particulars, which action has been complied with, section 6(2) on the other hand invites the public to inspect and conduct an inquiry on the register in order to ascertain its suitability with regard to the register itself and not just their individual particulars so as to ensure its accuracy. This, it was submitted has not been complied with. It was submitted that this section is amplified by Regulation 27 of the ***Election (Voters Registration) Regulations***.

33. According to **Mr Otieno**, the applicant did write to the Respondent requesting for the register in order to conduct inspection in compliance with section 6(2) and regulation 27 aforesaid in order to confirm the entries in the register but never received any response. It was therefore contended that the failure to open up the register is an illegality.

34. It was explained that after registration of voters, the register is pursuant to section 8 of the Act required to be cleaned and once this is done, the Respondent is required by Regulation 33 to publish the register and this requirement is mandatory. It was submitted that the Respondent is required to make public the register per polling station which the Respondent has not done since conducting mass voter registration. This failure, it was contended amounts to an illegality. It was submitted that this requirement is necessary for the purposes of Article 81 of the Constitution.

35. It was therefore submitted that the Respondent's conduct is unreasonable and defeats the applicant's legitimate expectation that the Respondent will comply with the Constitution, the statute and the regulations as required under Article 10 of the Constitution.

36. With respect to the alleged violation of privacy, it was submitted that the issue can only be raised with the drafters of the Constitution. Nevertheless the Respondent has not communicated to the applicant that its failure to comply with the law was as a result of this reason. It was however disclosed that from the records which were supplied earlier on by the Respondent to political parties, it was evident that there were irregularities such double entries and incorrect identification particulars which the applicant would have asked the Respondent to correct. It was therefore submitted that this application is aimed at upholding the integrity of the register.

37. It was submitted that whereas it is argued that it is too late to correct these anomalies, the document to be used must comply with the law. According to learned counsel, the register is a public document that belongs to the people of Kenya as the right to vote is reserved to citizens of Kenya pursuant to Article 38 of the Constitution.

Respondent's Case

38. The application was opposed by the Respondent, Commission.

39. According to the Commission, ground number a) of the Application erroneously implies that the Respondent is obliged under the ***Elections Act*** and ***Voter Registration Regulations*** to publish and open up the register of voters within 90 days to the date of a general election for public inspection of the register, when no such obligation exists. It was its view that the correct position in law is that pursuant to section 6(1) of the ***Elections Act*** the Respondent is obliged to cause the Register of Voters to be opened for inspection by members of the public at all times for purposes of rectifying the particulars therein, except for such period of time as the Respondent may consider appropriate. Further, section 6(2) of the ***Elections Act*** as amended by the ***Election Laws (Amendment) Act No. 1 of 2017*** requires the Respondent to within 90 days from the date of the notice for a general election, open the Register of Voters for inspection for a period of at least 30 days or such period as the Respondent may consider necessary.

40. According to the Respondent, the manner in which it is required to avail the Register of Voters for inspection as directed by section 6(2) of the ***Elections Act*** is provided for in Regulation 27 of the ***Elections [Registration of Voters] Regulations 2012*** as amended by Legal Notice Number 73 of 2017. The Respondent is required to make available the Register of Voters for inspection to the public at all polling stations, by way of a public web portal or any other medium approved by the Respondent.

41. The Respondent disclosed that in fulfilment of the obligation vested upon it by section 6(2) of the ***Elections Act*** as read with Regulation 27 of the ***Elections [Registration of Voters] Regulations 2012*** it established a public web portal, that is www.voterstatus.iebc.or.ke. In addition, it has availed an additional medium, vide short code messaging to 70000 availed to the public, in compliance.

42. To the Respondent, Regulation 27 of the ***Elections (Registration of Voters) Regulations 2012*** contemplates that any person desirous of inspecting the Register of Voters as provided for by Section 6(2) of the ***Elections Act*** need not physically present themselves to so inspect the register as it envisages an online inspection.

43. It was therefore the Respondent's case that the Register of Voters has thus been inspected as provided by section 6(2) of the ***Elections Act*** as read with Regulation 27 of the ***Elections [Registration of Voters] Regulations 2012***. It was deposed that section 6A (1) of the ***Elections Act*** as amended by the ***Election Laws (Amendment) Act No. 1 of 2017*** requires the Respondent to open, within 60 days to election, the Register of Voters for verification of biometric data by members of the public at their respective polling station for a period of 30 days and this obligation, the Ex-parte Applicant confirmed the Respondent has discharged. It was disclosed that the Register of Voters as revised and certified has been configured into Morpho Kits/Tablets for all polling stations across the country; and the said Kits/Tablets have since been

distributed across the Country for use during the General Election that will be held on 8th August 2017.

44. It was therefore contended that the number of voters in the Register of Voters has been duly gazetted, the number of polling stations and total number per station is available in the Respondent's online portal. The same is also available in the Kenya Gazette Notice No. 6397 dated 30th June 2017.

45. The Respondent maintained that it has not in any way whatsoever declined to provide the information sought by the Ex-parte Applicant since the Register of Voters is available from the Respondent's offices upon the payment of a nominal fee.

46. It was therefore its view that when looked at in its totality, the Application dated 18th July 2017 has no merit and is bad in law and should be struck out with costs as the same is frivolous, vexatious and a blatant abuse of this Court's Process and Precious time.

47. On behalf of the Respondent, it was submitted that on the ground of illegality, the Ex-parte Applicant is blatantly misguided in misconstruing the explicit provisions of the law. Regulation 33 of the ***Elections (Voter Registration) Regulations*** cannot be clearer that it contemplates the publication of a new register for inspection envisaged by Regulation 29 and not the regularly revised register under Regulation 28. It was submitted that section 7(2) of the ***Fair Administrative Action Act*** provides *inter alia* that this Court can only review an administrative action/decision if the Respondent has acted in excess of its authority, failed to comply with a mandatory and material procedure or condition prescribed by the ***Elections Act*** and Regulations therein in publishing the register for inspection and subsequent verification of voter details and if the same was materially influenced by an error of law. Further the same can be reviewed if there is unreasonable delay or failure by the Respondent to act in discharge of a duty imposed by the law.

48. It was submitted that section 6(2) of the ***Elections Act*** as amended by the ***Election Laws (Amendment) Act No. 1 of 2017*** as read with Regulation 27, 27A and 27B Registration of Voters Regulation as amended by Legal Notice No. 73 of 2017 are in no uncertain terms as to the manner of availing the register for inspection and verification of voter details. Regulation 27 stipulates the manner of inspection of the register while Regulation 27A on the other hand provides for the process of verification. These are ideally two different processes. The voter inspects the registrar to subsequently verify their details.

49. According to the Respondent, the register, both the printed version and the electronic one, was made available throughout the country in various verification centers, for Kenyans to review and propose corrections to be made as against their records, in case the same was not correctly captured. Pursuant to Regulation 28 of Registration of Voters Regulation, after the last day of verification, the registration officer for each constituency in respect of which the inspection and verification was carried out revised the register of voters for the respective constituency. Upon the expiry of the period for verification, the Respondent subsequently carried out quality assurance and effected the proposals and submissions by concerned voters from the verification exercise, first on the 3rd to the 11th April 2017 at the Constituency level and secondly on the 6th to the 16th June 2017, with a provision for conclusion of back-end activities on the 16th to 19th of June 2017 in compliance with the law.

50. It was therefore the Respondent's case that it did comply with the requirement of the law in regard to the above processes. A web portal is in place for the voters to inspect the register. Further, the Respondent published a notice of the availability of the register for inspection and eventual verification in the Gazette and newspaper as required by Regulation 27A (1) of the Registration of Voters Regulation.

51. To the Respondent, the process of verification under Regulation 27B is straight forward that an individual voter, verifies his/her own biometric details, that the verification is on an individual basis and not public as the Ex-parte erroneously points out. Only an individual voter can verify his or her voter details from the register. In compliance with regulation 12 of the Voter Registration Regulations, the Respondent did publish the total number of voters in the Register including in each County, Constituency, Ward and Polling Stations vide Gazette Notice dated 27th June 2017. The Respondent has further

published the number of voters per polling station online and in the Kenya Gazette Notice dated 30th June 2017.

52. It was therefore asserted that the onus is predominantly on the Ex-parte Applicant to demonstrate that the Respondent disregarded the abovementioned provisions of the law to enable the Court to review the Respondent's decision to publish the register as hereinabove mentioned but the Ex-parte Applicant has failed to do so.

53. It was the Respondent's position that there is absolutely no requirement in the provisions of the ***Elections Act*** and the ***Voter Registration Regulations*** on the Respondent to publish the register of voters as clustered per polling station as prayed for by the Ex-parte Applicant. It was submitted based on the Court of Appeal decision in **Kenya National Examination Council vs. Republic Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR** that an Order of Mandamus can only command the Respondent to do what it is legally bound to do but cannot command the Respondent's subject duty to be carried out in a specific way. The mode of publishing the register has been duly complied with by the Respondent as stipulated in the law.

54. An Order of Mandamus, it was submitted compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same, to the detriment of a party who has a legal right to expect the duty to be performed. The Ex-parte Applicant has not demonstrated that the Respondent has failed in that regard.

55. It was maintained by the Respondent that it has not failed to so publish the register. The register has always been available for inspection. To it, an Order of Mandamus is a wrong remedy to apply for in the circumstances since the same cannot quash what has already been done and this Court ought not to act in vain by making futile orders.

56. With respect to an Order of Prohibition, it was submitted that it cannot issue to quash a decision which has already been made, but can only prevent the making of a contemplated decision. Since the final register of voters as revised, certified and published has been configured by the Respondent into Morpho Kits and distributed to all polling stations in the country in readiness for the General Election, it was the Respondent's case that the process is a *fait accompli*. To it, this court may intervene to quash an act of the Respondent if it considers the same to be demonstrably unreasonable and irrational. It has long been held by the case of ***Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223*** and it is trite law that if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. To prove a case of this kind would require something overwhelming. The threshold of unreasonableness and irrationality is extremely difficult to meet. The onus is on the Ex-parte Applicant to establish irrationality and unreasonableness. She has failed to so do. According to the Respondent, it has published the final voter register as duly revised for public inspection but with truncated information regarding National Identity Card Numbers and voter's images and biometrics for privacy reasons and the same is available upon request and payment of nominal costs at the Respondent's office.

57. The Respondent averred that Article 31(c) of the Constitution stipulates that every person has the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed. According to it, part of the information on the register is private and sensitive to the respective individual voter hence the private information can only be verified by the private/individual voter, and not any other person. Article 31 of the Constitution on privacy rights limits access to information under Article 35 of the Constitution. Some of the information sought by the Ex-parte Applicant is private. It relied on section 27 (2) (b) of the ***Independent Electoral and Boundaries Commission Act No. 9 of 2012*** which provides that a request for information from the Respondent in the public interest by a citizen may be subject to confidentiality requirements of the Respondent. To it, section 27 (4) of the ***IEBC Act*** cannot be clearer that the right of access to information under Article 35 of the Constitution shall be limited to the nature and extent specified under this section while pursuant to Section 6 of the ***Access to Information Act No. 31 of 2016***, the right of access to information shall be limited in respect of information whose disclosure is likely to involve the unwarranted invasion of the

privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made.

58. It was submitted that in compliance with section 6(4) of the **Elections Act**, the Respondent has kept the Register of Voters at the headquarters of the Respondent and copies of the part of the Register of Voters relating to the constituency for which the registration officer is responsible shall be kept at all the constituency offices of the Respondent with respective Constituency Returning Officers who are permanent employees of the Respondent.

59. It was therefore averred that the Ex-parte has by reasons of the foregoing failed to prove that the Respondent has violated any provision of the law to warrant the issue of the sought orders and we humbly pray for the same to be dismissed, in public interest, with costs to the Respondent.

60. In his oral address to the Court, **Mr Nyamodi**, learned counsel for the Commission submitted that the duty to have the register inspected is directed by Regulation 27 of the **Elections (Voters Registration) Regulations** which are made pursuant to section 109 of the Elections Act. It was however submitted that these Regulations are unlike any other Regulations since section 109(3) of the said Act require that they be approved by the National Assembly.

61. It was submitted that the said Regulations direct the manner of inspection and provide that the register be published on the Webb portal. According to the learned counsel, from the affidavit sworn on behalf of the Respondent, it is clear that this requirement has been complied with.

62. It was however submitted that Regulation 33 does not apply to the forthcoming general elections. In his view, Regulation 33 which falls under Part VII are headed preparation of a new register hence is only relevant where there is a new register in place. However there is no new register. He referred to section 8(2) which provide for updating of the register and submitted that updating of the same does not amount to a new register. It was his submission that Part VII deals with fresh registration pursuant to section 8(2)(c) of the Act. However where there is no fresh registration there is no obligation to comply with Regulation 33. In this case, it was contended that at took place was under section 8(2)(a) and (b) of the Act which does not require compliance with Regulation 33 which applies to fresh registration of voters pursuant to section 8(2)(c) as read with Regulation 99 which requires the preparation of a new register for every constituency. It was contended that these two provisions set condition precedent for Regulation 33 to be applicable.

63. It was contended that in the circumstances of this case, the operative provisions are section 6(2) and Regulation 27 which in the Respondent's view have both been complied with. In the replying affidavit, it is deposed that the register is available to the applicant upon payment of the requisite fees unless the applicant is vide this application seeking waiver thereof.

64. It was submitted that an order of mandamus seeks to compel a public body to perform a duty it has refused to perform. However in this case no statutory duty has been established that the Respondent has failed to perform hence the two orders of mandamus ought not to be granted.

65. With respect to the order of prohibition it was submitted that by hat order the applicant seeks to prohibit the distribution of the register. Such a prayer it was submitted is irresponsible. In any case it was deposed that the register have already been distributed to the polling stations in readiness for use during the elections. In those circumstances, it was submitted that the order of prohibition as sought cannot lie and must fail and reliance.

66. In support of these submissions reliance was placed on **Kenya National Examination Council vs. Republic ex parte Gathenji [1997] eKLR**, **Republic vs. Sacco Societies Regulatory Authority & Another ex parte Martin Njuhigu and Others [2017] eKLR**, **Joccinta Wanjiru Raphael vs. William Nangulu [2014] eKLR** and **Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR**.

67. Without conceding any wrong doing **Mr Nyamodi** urged this Court pursuant to the holding in the NASA Case to embrace the overriding right of all Kenyans to have regular elections and consider the fact that the orders sought in this application have the real possibility of negating the constitutional right to elections.

68. It was submitted that the applicant's rights to inspect the register is not a condition precedent to the conduct of elections and in any case the Constitution provide remedies in the event that the election is not conducted in accordance with the envisaged standards.

69. The Court was however urged that in the unlikely event that the Court finds for the applicant, the orders that ought to commend themselves ought to be those that would enable the overriding right of Kenyans to the elections due next week.

70. The Court was however urged to dismiss the application with costs on the basis that this was not a public interest litigation and which was in any case unnecessary as the Respondent was willing to supply the register and secondly the application as based on either misunderstanding or misstatement of the law in particular Regulation 33.

Interested Party's Case

71. The application was opposed by the interested party herein, Jubilee Party (hereinafter referred to as "Jubilee"). In so doing Jubilee filed both grounds of opposition and a replying affidavit. According to the grounds:

(1) The Respondent is under no statutory obligation to publish the register of voters in the Kenya Gazette sixty days before the date of the general election under section 6 or 6A of the Elections Act as read with Regulation 27 of the Elections (Registration of Voters) Regulations, 2012.

(2) As there is no statutory duty for the Respondent to publish the register of voters in the Kenya Gazette, no order of mandamus can issue. See Kenya National Examination Council vs. Republic ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR.

(3) Section 6(1) of the Elections Act makes it clear that its purpose is to make information in the Register available to the public to enable the members of the public to rectify their particulars contained therein. It would cause an unnecessary disruption to the electoral process to allow members of the public to make recommendations with respect to information of other members of the public which they have no authority to rectify.

(4) Regulation 27 of the Elections (Registration of Voters) Regulations, 2012, (the Regulations) gives the Respondent discretion to determine in which form the register of voters is to be opened up for inspection. It is not for the Ex-Parte Applicant to dictate the form in which the register of voters should be made available for inspection.

(5) The prayers sought by the Ex-Parte Applicant would result in a breach of the right to privacy of all registered voters as enshrined in Article 31 of the Constitution as it would grant the Ex-Parte Applicant and by extension the general public access to voters' personal information including Identification Card Number, full name of the voter and the polling station the voter is registered among others. This could compromise the security of voters.

(6) The Respondent has complied with the requirement under Section 6A (3) of the Elections Act to publish a notice in the Gazette to the effect that the revision under subsection (2) has been completed. This was done in the Gazette notice dated 10th May 2017, Volume CXIX-No. 60.

(7) Section 6A (3) of the Elections Act only makes reference to the register of voters being

published online. It does not require that the entire register of voters be gazetted as alleged by the Ex-Parte Applicant. It is merely a requirement to ensure that there is an online repository of the information in the register of voters. This has been done.

(8) An order of prohibition can only be issued where the public body concerned is acting in excess of its powers or contrary to law. The Respondent is not acting in excess of its powers or contrary to law in deploying the register of voters to the polling stations.

(9) An order to prohibit the Respondent and its officers from deploying any register of voters for use in the general elections is contrary to the Respondent's statutory obligations. The Respondents is required to ensure the register of voters is available for the purpose of the general election to be conducted on 8th August 2017.

(10) There is no reason to prohibit the Respondent from deploying the register of voters to be used in the general election as the Ex-Parte Applicant's grievance is for the register of voters to be published in the Kenya gazette for inspection under section 6 of the Elections Act. There is no legal basis for the order of prohibition sought.

(11) The Ex-Parte Applicant has failed to disclose any illegality on the part of the Respondent. The application dated 18th July 2017 lacks any legal and factual basis and is for dismissal.

(12) The application dated 18th July 2017 is an attempt by the Ex-Parte Applicant to delay and/or obstruct the conduct of the general election on 8th August 2017 by preventing the release of the register of voters to be used in the various polling stations during the general election. It is an abuse of the court process and should be dismissed.

72. According to Jubilee, the main object of preparing a register of voters is to ensure that the essential details of each person registered as a voter are captured and also that there is a proper record of all persons registered to vote in accordance with the electoral laws. To Jubilee, the maintenance of a register of voters allows citizens to verify their details and also persons participating in elections to properly monitor the conduct of elections through *inter alia* making available such information as the total number of voters registered per polling station.

73. The said Party did not believe that it was the intention of Parliament in enacting the ***Elections Act*** that the information of all citizens registered to vote be available to all and sundry. Based on legal advice, the Jubilee Party believed that there is no general requirement in the ***Elections Act, 2011*** for the Respondent to gazette the register of voters in the Kenya Gazette 60 days before the date of the general elections.

74. Jubilee denied that there were inconsistencies in the numbers declared by the Respondent in the Register of Voters as it had never seen any evidence of inconsistency as alleged by the Ex-Parte Applicant. To Jubilee, the Ex-Parte Applicant's allegations are purely speculative.

75. The Party disclosed that it was aware that the Respondent has a web portal and a short message service where registered voters can send their identification details and confirm the correctness of their information in the register of voters. To it, this is what is required under section 6(1) of the ***Elections Act***.

76. Jubilee Party asserted that the Ex-Parte Applicant has resorted to making speculative and argumentative statements in support of the application without exhibiting any evidence of opaqueness, inefficiency, unaccountability or inaccuracy on the part of the Respondent.

77. Based on legal advice Jubilee Party believed that:

a. Section 6A of the ***Elections Act*** as read with Regulation 27 of the ***Elections (Registration of Voters) Regulations, 2012*** does not require the Respondent to gazette the register of voters in the Kenya Gazette.

- b. The order of Mandamus sought by the Ex-Parte Applicant can only be granted where there is an express statutory duty that has not been complied with.
- c. An order of prohibition can only be issued where the public body concerned is acting in excess of its powers or contrary to law.
- d. An order of Prohibition cannot issue for the purposes of preventing the Respondent from complying with the law.

78. It was therefore the position of Jubilee Party that the ex-Parte Applicant's application lacks merit and ought to be dismissed.

79. Jubilee relied on *Judicial Review Handbook*, 6th edition, Hart Publishing, 2012, page 7 where **Michael Fordham** has expressed the view that:

“Judicial review is the court’s way of enforcing the rule of law: ensuring that public authorities’ functions are undertaken according to law and that they are accountable to law. Ensuring, in other words that public bodies are not above the law.”

80. It also relied on *Halsbury’s Laws of England* 4th Edn. Vol. 1(1) para 12 that:

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so.”

81. It was submitted that decision making by the courts is always a question of balancing competing interests. In this case, the court will have to consider whether there are any grounds of making an order which would in effect “eat into”/erode the citizen’s right to privacy enshrined in Article 31 of the Constitution.

82. It was contended that since the Applicant seeks an order of mandamus to require the Respondent to publish the register of voters to facilitate its inspection by the public it is important to consider the provisions of section 6(1) and (2) of the *Elections Act*. Reference was made to section 6(1) of the *Elections Act 2011* (the Act) which provides that:

“The Commission shall cause the Register of Voters to be opened for inspection by members of the public at all times for the purpose of rectifying the particulars therein, except for such period of time as the Commission may consider appropriate.” (Emphasis added).

83. In Jubilee’s view, section 6(1) does not stipulate the modalities of which the Respondent should avail the register of voters for inspection by the public. It therefore grants the Respondent a wide berth of discretion as to how the inspection exercise should be carried out. In its view, since there is no statutory duty on the Respondent to “publish” the register of voters as alleged by the Applicant, no order of mandamus can issue where there is no statutory duty and it relied on the Court of Appeal’s decision in **Kenya National Examination Council vs. Republic ex-parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** in which the Court pronounced itself as follows:

“If the Council were to refuse to conduct any of these examinations and there were candidates ready and desiring to take the examinations, we have no doubt the High Court would be perfectly entitled to compel it by mandamus to conduct the examinations as its failure to do so

would constitute a failure to perform its statutory duty under section 10(a) of the Act. But the section does not specify when or how often the examinations are to be held in any one year and a candidate who is ready to take his examinations at a time when the Council is not conducting any would not be entitled to an order compelling the Council to conduct an examination for him alone. The times and frequency of the examinations are left to the discretion of the Council and it cannot be forced by mandamus.” Emphasis added.

84. It was therefore submitted that there is no recognisable public law wrong in this case, if there is no statutory duty. Judicial review jurisdiction, it was contended is a special supervisory jurisdiction and as stated in *Judicial Review Handbook* (7th Edition) at pages 15-16:

“The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong.” (Emphasis added).

85. It was Jubilee’s position that an order of mandamus cannot issue to direct an independent commission to perform its functions in a particular manner when the law has given it the discretion to decide how the function is to be performed. Indeed, the mandate of the Respondent as an independent commission has been reiterated time and time again by the High Court, the Court of Appeal and the Supreme Court and it relied on the Supreme Court decision in **In the Matter of the National Land Commission [2015] eKLR, Supreme Court Advisory Opinion Reference No. 2 OF 2014** for the holding that:

“Secondly, the Constitution ordains that the commissions, and the holders of independent offices, are subject only to the Constitution and the law, and are independent, and not subject to the direction or control by any person or authority. This is the pivotal provision guaranteeing independent status to the commissions and independent offices.” (Emphasis added).

86. To Jubilee, section 6(1) and (2) of the Act should not be read in isolation but together with regulation 27 of the ***Elections (Registration of Voters) Regulations, 2012***. In this case, it was submitted that the Respondent has demonstrated how it opened the register of voters for public inspection at paragraph 8 of ***Praxedes Tororey’s*** affidavit sworn on 25th July 2017 which has not been denied by the Applicant. Accordingly, it is not for the Applicant to dictate the manner in which the Respondent ought to comply with sections 6(1) and (2) of the Act as read with Regulation 27 of the Regulations since Regulation 27 gives the Respondent discretion to determine in which form the register of voters is to be opened up for inspection.

87. It was the Party’s position that the measures taken by the Respondent to establish a public web portal and a short messaging code fulfil the requirements of section 6(1) and (2) of the Act as they give voters an opportunity to ascertain their particulars and if necessary to rectify them. In its view, the Applicant has misinterpreted and misconstrued the provisions of section 6(1) and (2) of the Act since the purpose section 6(1) and (2) is not to verify the accuracy of the register of voters or check for duplication of voter registration as alleged by the Applicant. To the contrary, section 6(1) of the Act makes it clear that its purpose is to make information in the Register available to the public for the purpose of rectifying the particulars therein.

88. The Party contended that the concerns raised by the Applicant of verifying the accuracy of the register and duplication of voters are sufficiently dealt with under section 8A of the Act which provides for the audit of the register of voters. Of importance is section 8A(3) which deals with the first general election after the commencement of that section. That is the general election of 8th August 2017. It provides for the engagement of a professional reputable firm to conduct an audit of the register of voters for the purpose of verifying the accuracy of the register of voters, recommending mechanisms of enhancing the accuracy of the register and updating the register. It was submitted that it is not disputed by any of the parties that the audit contemplated under section 8A(3) of the Act has been undertaken by KPMG Kenya and the Court was urged to take judicial notice of this. Accordingly, as the fears of the Applicant with respect to the accuracy of the register of voters and duplication of voters have been sufficiently addressed under section 8A (3) of the Act, the court should not allow the Applicant to convert the inspection under

section 6(1) and (2) of the Act into a second audit of the register of voters.

89. For the said reasons, Jubilee Party urged the court to dismiss the Applicant's request for an order of mandamus to compel the Respondent to publicise and gazette the register of voters or to publish the register of voters for inspection as clustered per polling station.

90. In its view, the Respondent is not acting in excess of its powers or contrary to law in deploying the register of voters to the polling stations. As a matter of fact, an order to prohibit the Respondent and its officers from deploying any register of voters for use in the general elections is contrary to the Respondent's statutory obligations. In this case it was argued that the Applicant has not provided any reasons to prohibit the Respondent from deploying the register of voters to be used in the general election. Since the Applicant's grievance is for the register of voters to be published in the Kenya gazette for inspection under section 6 of the ***Elections Act***, this has nothing to do with the deployment of the register of voters for the purpose of the general election.

91. It was therefore Jubilee's case that there is no legal basis for the order of prohibition sought since the Respondent is required to ensure the register of voters is available for the purpose of the general election to be conducted on 8th August 2017.

92. The Party submitted that an order of prohibition can only be issued where the public body concerned is acting in excess of its powers or contrary to law and relied on **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170**, where the Court of Appeal explained:

“It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice.”

93. In this case it was submitted that as the Ex-Parte Applicant has failed to disclose any illegality on the part of the Respondent an order of prohibition cannot issue in the circumstances of the present case.

94. The Party reiterated that the Respondent has complied with section 6(1) and (2) of the Act through the use of the web portal and the short message service code hence there is no basis to prohibit the Respondent for deploying the register of voters to polling stations for purposes of administering the general election. It relied on **Khelef Khalifa & 2 Others vs. Independent Electoral and Boundaries Commission & another [2017] eKLR** where the court held:

“Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the conduct in question is based on a permissible construction of the statute.”

95. To the Party, when determining whether the order of Prohibition should issue, the court should consider whether establishing a web portal and short message service code is a permissible construction of the requirement under section 6(1) and (2) of the Act to open the register of voters for inspection. It submitted that it is a permissible construction since the purpose of opening the register of voters for inspection under section 6(1) and (2) of the Act is for voters to rectify their particulars as set out in the register of voters and this can be done by accessing the register through the web portal or the short message service. It was therefore asserted that it is clear that the Respondent has complied with the requirement under section 6(1) and (2) to open the register of voters for inspection for the purpose of rectifying the particulars therein hence the request for an order of prohibition should also fail.

96. In Jubilee Party's view, the application dated 18th July 2017 is an attempt by the Ex-Parte Applicant to delay and/or obstruct the conduct of the general election on 8th August 2017 by preventing the release of the register of voters to be used in the various polling stations during the general election. It is an abuse

of the court process and should be dismissed.

97. In his oral submissions, **Mr Kiragu Kimani**, learned counsel for the Party while very clear in his mind that he was not seeking this Court's recusal from these proceedings drew the Court's attention to the decision of **Githinji, JA** in Civil Appeal No. 258 of 2017 – **National Super Alliance (NASA) Kenya vs. Independent Electoral & Boundaries Commission & 2 Others** in which the learned judge recused himself on the ground that 10 days before he had presided over Civil Appeal No. 224 of 2017 relating to electoral process and involving some of the parties in the said appeal.

98. It was however submitted that for these proceedings to succeed the applicant must disclose a public wrong and further deal with the process as opposed to the merits or correctness of the decision otherwise the Court would be sitting on appeal against the decision of the Respondent. As to the manner in which the register is to be cleaned up or to be made available to any citizen. It was submitted that the obligation imposed on the Respondent by section 6(2) is to open up the register. However nowhere is it spelt out how the register is to be made available as this is left in the absolute discretion of the Respondent. It was contended that the applicant has the onus of demonstrating that there is a duty imposed upon the Respondent to do what they seek that the Respondent does.

99. It was submitted that there is no foundation for prayers 1 and 2 in the Act. According to **Mr Kiragu**, the words inspection and publication appear only in section 6(1) and regulation 27. However section 6(2) is not independent of section 6(1) under which Parliament donated the power for rectification of particulars pursuant to section 12. It was further submitted that rectification can only take place within certain timelines and it is clear that the focus of Parliament was to allow citizens to avail themselves of the opportunity to have their data corrected and that the section was not intended for the purpose for which the applicant intends to use it in order to allow all and sundry to critic the register of voters for any or all polling stations in the country.

100. It was submitted that the entire tenor of Part II of the **Elections Act** provides a framework for the cleaning up of the register of voters and reference was made specifically to sections 6A, 8 and 8A by whom the cleaning up is to be undertaken. It was contended that under section 8A the people have an opportunity of doing so through their elected representatives by way of the submission of the audit report to the National Assembly and the Senate and pursuant to section 8A(c) the Respondent is required to implement the report within 30 days. It was therefore submitted that it was not the intention of Parliament to delegate the process of auditing the register to all citizens. However learned counsel was quick to point out that where it comes to the attention of a citizen that there is an irregularity in the register nothing stops the said citizen from taking up the issue and challenging the same. That is however a different thing from saying that the register must be available to all.

101. It was submitted that pursuant to section 5(1) the revision of the voters register has to take place within 60 days before the elections so that even if the Court was to find that the applicant is entitled to the orders sought the same cannot be granted. It was however contended that there is no statutory duty with respect to the first two prayers since all that regulation 27 requires is for the respondent to make available the register to the public at all polling stations but not as cluster per polling station as sought in this application. In this case, the Respondent has the discretion to do so through the Webb portal or other media and the affidavit in reply by the Respondent is clear that this has been done.

102. With respect to the prayer for prohibition, it was submitted that what the Court can find is the obligation to make the register for each polling station available. To issue the order of prohibition would however amount to stopping the Respondent from discharging its statutory obligation.

103. It was however argued that the Court cannot substitute its decision for that of the Respondent in light of section 6(2) and regulation 27 with respect to the format and the forum for the availability of the register. In this case there is evidence on oath that the register is available on the portal.

104. With respect to legitimate expectation it was submitted that for the same to apply there must be a promise by a public authority which must be reasonable and one which is lawful.

105. Learned counsel therefore urged the Court to dismiss the application.

Applicant's Rejoinder

106. In his rejoinder, **Mr Otieno** reiterated that inspection is available to individual which right is independent of the right of audit. Tied to this is regulation 33 which must be read together with regulation 6 which deal with preparation of the register. It was his submission that every time an entry is made in the register, the same is being prepared a new and the same must be opened for inspection.

107. It was submitted that regulation 12(4) requires that the register be published in Kenya Gazette and that a person is entitled to registration of another person. It was submitted that the legitimate expectation is based on Article 10 in particular the requirement for adherence to the rule of law. It was submitted that the applicant is asserting both her rights and the rights of others who seek the information in the register.

108. It was reiterated that it is not a discretion to avail the register as this is a right for all Kenyans.

109. It was the applicant's case that the Respondent ought to bear the costs for failing to comply with the law and the Constitution.

Determinations

110. I have considered the issues raised in this application.

111. As indicated hereinabove, my attention was drawn to the decision of **Githinji, JA** in Civil Appeal No. 258 of 2017 – **National Super Alliance (NASA) Kenya vs. Independent Electoral & Boundaries Commission & 2 Others** in which the learned judge recused himself on the ground that 10 days before he had presided over Civil Appeal No. 224 of 2017 relating to electoral process and involving some of the parties in the said appeal. I must however clarify that **Mr Kiragu** was very clear in his mind that he was not seeking this Court's recusal and quite appropriately so in my view, only drew the attention of this Court to that matter as an officer of the Court. It must be emphasised that the decision to recuse oneself is solely a decision for a particular judge and whereas one judge may feel uncomfortable dealing with a matter another judge may not feel the same, unless in cases where bias is alleged. For example there is no indication that **Nambuye, JA** who sat in the earlier appeal shared the same view as **Githinji, JA**. While the decision of **Githinji, JA** cannot be faulted, I must however make it clear that it is not the law and hopefully shall never be that the mere fact that a Judge has presided over a matter whose substance is similar to an earlier does not automatically disqualify him or her from sitting in any subsequent matter of similar nature. We for example have the Employment and Labour Relations Court as well as the Environment and Land Court which are specialised Courts dealing with employment and labour matters on one hand and land and environmental matters on the other. Quite often matters which are substantially similar duplicate themselves before those Courts and if the judges were to recuse themselves every time a similar matter came up, sooner or later those courts would run out of judges to hear matters. I associate myself with the position in **South African Commercial Catering & Allied Workers Union & Anor. vs. Irvin & Johnson Limited Sea Foods Division Fish Processing Case CCT 2 of 2000**, where the Court expressed itself as follows:

“Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity...The double unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased even a strongly and honestly felt anxiety is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value, and thereby decides whether it is such that it should be countenanced in law...The administration of justice, emerging as it has from the evils and immorality of the old order remains vulnerable to attacks on its legitimacy and integrity.

Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. On the one hand, it is vital to the integrity of our courts and the independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged. On the other, the courts very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is as wrong to yield to a tenuous or frivolous objection as it is to ignore an objection of substance... We are aware of the need to prevent litigants from being able freely to use recusal applications to secure a bench that they regard as more likely to favour them. Perceptions of bias or predisposition, no matter how strongly entertained, should not pass the threshold for requiring recusal merely because such perceptions, even if accurate, relate to a consistent judicial "track record" in similar matters or a broad propensity to view issues in a certain way. Recusal applications should never be countenanced as a pretext for judge-shopping." [Emphasis add.]

112. In President of the Republic of South Africa vs. The South African Rugby Football Union & Others Case CCT 16/98, the Court relied on Mason J's judgment in the High Court of Australia [In Re J.R.L.:Ex parte C.J.L. (1986) 161 CLR 342 at 352.] that:

"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour... It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party... The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself. "

113. As properly put in *The Bangalore Principles of Judicial Conduct*:

"If, for example, a judge is inclined towards upholding fundamental human rights, unless the law clearly and validly requires a different course, that will not give rise to a reasonable perception of partiality forbidden by law."

114. In other words a Judge who is consistent in upholding the rule of law should not shy from doing so simply because there is a perception that he is likely to rule in a certain manner. In Miller vs. Miller [1988] KLR 555, the Court of Appeal expressed itself as follows:

"No party should be placed in a position where he can choose his court. But this is not to say that no circumstances is it possible for a judge to disqualify himself from hearing a case.... There is nothing prejudicial in one Judge making several or more orders in a court record. In practical terms it is advantageous to the parties and therefore in the interest of justice for a judge to familiarise himself with the substance of a court file. In the absence of the evidence that the appellant's case was prejudiced by some order of the nine orders the trial judge made, it must be held that the submission on this aspect was without substance. No objection was taken to the trial judge making any of the nine orders.... It would be disastrous if the practice was that once there are allegations made against a judge and the judge's honour is in question, that the judge must disqualify himself. The administration of justice through court would be adversely affected since mischievous parties to cases would obtain disqualification by judges with ease and the consequence would be a choice of trial judge by a party."

115. Where a party is aggrieved by his or her way of deciding matters, the only option available to id to

appeal.

116. I must however stress in all fairness to **Mr Kiragu** that he did not seek this Court's refusal but quite properly in my view brought to the attention of the Court the said decision by **Githinji, JA**. I have however dealt with the same as I had indicated that I would mention the same in this decision. Therefore the question of recusal does not arise and for umpteenth time I emphasise it was never raised.

117. Before dealing with the issues raised in these proceedings, it is important in my view to emphasise and appreciate the nature of the Constitution of Kenya, 2010. Our Constitution, I am proud to say, is a transformative Constitution. This must be so because it is provided in Article 10 that all State organs, State officers, public officers and all persons whenever they make or apply policy decisions are bound by the national values and principles of governance which include participation of the people, inclusiveness, integrity, transparency and accountability. Our Constitution, therefore is a value-oriented Constitution as opposed to a structural 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. Value oriented constitutions are concerned with intensely human and humane aspirations of personality, conscience and freedom while the structure-oriented ones are concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements. See **Ulrich Karpen** in *The Constitution of the Federal Republic of Germany*.

118. 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. 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 for governance functions.”

119. 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. A consideration of different constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya 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 to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its 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. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.”

120. 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.”

121. 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.”

122. 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*.

123. 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.”

124. 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.

125. In this case Article 10 of the Constitution obliges this Court when applying the Constitution,

applying or interpreting any law or implementing policy decisions to be bound by the national values and principles of governance in Article 10 which values and principles are pursuant to Article 4(2) of the Constitution the foundation of our Republic since the said Article 4(2) provides that:-

The Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10.

126. For the purpose of this judgement some of the said values and principles are the rule of law, democracy and participation of the people, good governance, integrity, transparency and accountability. In Nairobi Civil Appeal No. 224 of 2017 – **Independent Electoral and Boundaries Commission & Others vs. The National Super Alliance & Others**, the Court of Appeal was emphatic in paragraphs 80 and 81 that:

“80. In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1)(a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.

81. Consequently, in this appeal, we make a firm determination that Article 10(2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.”

127. The transformative nature of our Constitution is informed by our historical past. About a decade ago, this country was almost torn apart due to political differences. One of the positive though painful achievement was that we were able to have a new Constitution after several decades clamouring for it. Article 38(2) of the Constitution entrenches the right of every citizen to participate in universal suffrage and states that:

Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of will of the electors.

128. However as a result of past skewed manner of conducting elections, Kenyans did not want to take a chance with what amounts to free and fair elections taking into account the various electoral systems that this County has experimented with disastrous consequences. In order to avoid perceptions of opaqueness, inefficiency, unaccountability or inaccuracy on the part of the Respondent, Kenyans enacted Article 81 of the Constitution in which they expressly provided the nature of the electoral process they henceforth wanted. Consequently, the said provision states that:

The electoral system shall comply with the following principles

(a) freedom of citizens to exercise their political rights under Article 38;

(b)...

(c)...

(d)...

(e) *free and fair elections, which are-*

(i) *by secret ballot;*

(ii) *free from violence, intimidation, improper influence or corruption;*

(iii) *conducted by an independent body;*

(iv) *transparent; and*

(v) *administered in an impartial, neutral, efficient, accurate and accountable manner.*

129. Therefore for an election to meet the threshold of fairness, it must be by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner. All these words in my view are pregnant with meanings and refer to the quality and standard that any free and fair election must meet. Anything less than this cannot be said to meet the prescribed threshold.

130. I reiterate that election is a process. Therefore every stage of the electoral process must meet the threshold of a free and fair elections right from the registration of voters, the verification of voter details, the inspection of the register the cleaning of the register, the actual voting process and the counting and tallying of results.

131. In the instant section 6 of the *Elections Act* as amended by the *Election Laws (Amendment) Act of 2017* which states that:

(1) The Commission shall cause the Register of Voters to be opened for inspection by members of the public at all times for the purpose of rectifying the particulars therein, except for such period of time as the Commission may consider appropriate.

(2) The Commission shall, within ninety days from the date of the notice for a general election, open the Register of Voters for inspection for a period of at least thirty days or such period as the Commission may consider necessary.

(3) Deleted by Act No. 36 of 2016, s. 4.

(4) The Register of Voters shall be kept at the headquarters of the Commission and copies of the part of the Register of Voters relating to the constituency for which the registration officer is responsible shall be kept at all the constituency offices of the Commission.

132. Section 6A of the *Elections Act* provides that:

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

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

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

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

and

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

133. Section 8 of the *Elections Act* provides as follows:

(1) The Commission shall maintain an updated Register of Voters.

(2) For purposes of maintaining an updated register of voters, the Commission shall—

(a) regularly revise the Register of Voters;

(b) update the Register of Voters by deleting the names of deceased voters and rectifying the particulars therein;

(c) conduct a fresh voter registration, if necessary, at intervals of not less than eight years, and not more than twelve years, immediately after the Commission reviews the names and boundaries of the constituencies in accordance with Article 89(2) of the Constitution;

(d) review the number, names and boundaries of wards whenever a review of the names and boundaries of counties necessitates a review; and

(e) revise the Register of Voters whenever county boundaries are altered in accordance with Article 94(3) of the Constitution.

134. Section 8A of the *Elections Act* provides that:

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

(a) verifying the accuracy of the Register;

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

(c) updating the register.

(2) The Kenya Citizens and Foreign Nationals Management Service established under section 3 of the Kenya Citizens and Foreign Nationals Management Service Act, No. 3 of 2011 shall make available to the Commission the information held by it in the national population register for the purpose of the conduct of an audit under subsection (1).

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

(a) verifying the accuracy of the Register;

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

(c) updating the register.

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

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

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

135. Similarly Regulation 27 of the ***Elections (Registration of Voters) Regulations, 2012*** provides as follows:

The Commission shall make available the Register of Voters for inspection to the public at all polling stations, by way of public web portal or any other medium the Commission may approve.

136. It is therefore clear that under section 6(1) and 6(2) of the ***Elections Act***, what is required is for the Respondent to cause the register to be opened for inspection by members of the public at all times for the purpose of rectifying the particulars therein. Accordingly I agree that there is no obligation under that provision for the publication of the register. What the Respondent is bound to do is simply to ensure that the register is open for inspection. However it is clear that the purpose of the inspection is to enable members of the public to rectify the particulars *therein*. In my view the word therein must refer to the register and not the particulars of the voter. Accordingly the public are entitled to inspect the register and take the steps to rectify any particulars which may not be correct in the register.

137. This provision is clearly distinct and separate from section 6A of the same Act which requires the Respondent to open Register of Voters for verification of biometric data by members of the public at their respective polling stations. By employment of the phrase “*their respective*” the provision refers to the voters. Accordingly section 6A refers to the verification of a particular voter’s biometric data as opposed to the register. In my view Parliament must have intended that the two sections apply to different circumstances and cannot therefore be interpreted to apply to the same set of circumstances as the interested party contended.

138. However the manner in which the register is to be opened for inspection is, pursuant to Regulation 27 of the ***Elections (Registration of Voters) Regulations, 2012*** by way of public web portal or any other medium the Commission may approve. In other words the manner of availing the register is at the discretion of the Respondent. The Court cannot therefore interfere with that discretion unless it is proved that the mode of opening the register render it impossible or impracticable for the public to inspect the same.

139. In this case the Respondent has deposed that in compliance it established a public web portal and has in addition availed an additional medium, vide short code messaging to 70000 availed to the public. Since the regulation permits the establishment of a web portal, I agree that regulation 27 envisages inter alia online inspection or any other mode approved by the Respondent. To support its view that it has complied, the Respondent has relied on Gazette Notice No. 4413 dated 10th May, 2017. The said Notice was given as follows:

AVAILABILITY OF THE REGISTER OF VOTERS FOR VERIFICATION

IN EXERCISE of powers conferred by Article 88 (4) (b) of the Constitution of Kenya, sections 2, 4, 6A, 11 and 12, of the Elections Act, 2011 and Regulations 27A and 27B the Election (Registration of Voters) (Amendment) Regulations, 2017 the Independent Electoral and Boundaries Commission gives notice that the Register of Voters has been completed and is available for verification for a period of thirty (30) days from 11th May, 2017 to 9th June, 2017.

The Register of Voters may be verified at the Registration Centers carried *vide* Gazette Notice No. 397 of 2017 dated 16th January, 2017.

Registration Officers for purposes of this exercise will be the officers published *vide* Gazette Notice No. 396 of 2017 dated 16th January, 2017.

How to make a claim:

A person who duly applied to be registered and his or her name or biometric data has not been captured correctly in the register of voters may make a claim to the Registration Officer within the period prescribed for verification.

The claim must be made in the prescribed Form.

Dated the 8th May, 2017.

W. W. CHEBUKATI,

Chairperson

Independent Electoral and Boundaries Commission.

140. It is therefore clear that the said Notice was issued pursuant to section 6A as opposed to section 6(1) of the ***Elections Act***. To confirm that the Notice was inviting the voters to verify their individual particulars, the instructions on how to make a claim were very specific that the Notice was meant for verification of particulars as opposed to inspection of the register.

141. I therefore find that whereas the Respondent complied with section 6A(1) of the ***Elections Act***, the said Notice was not the one contemplated under section 6(1) of the Act.

142. The Respondent however denied that it had declined to provide information sought by the applicant herein. It asserted that the Register of Voters is available from the Respondent's offices upon payment of a nominal fee.

143. The Respondent however relied on Part VII of the Regulations and contended that the need for inspection of the register only applies where a new register has been opened. In my view the Respondent was subjecting section 6(1) of the ***Elections Act*** to Regulation 33 of the Regulations. However section 6(1) of the ***Elections Act*** obliges the Respondent to cause the Register of Voters to be opened for inspection by members of the public *at all times* for the purpose of rectifying the particulars therein. The section does not subject the phrase *at all times* to only where new registers are opened under Part VII of the Regulations. In **Alfred Muhadia Ngome & Another vs. George W. Sitati & 2 Others Civil Application No. Nai. 268 of 1999**, the Court of Appeal held that:

“The duty of the Court in construing a statute is to ascertain and to implement the intention of the Parliament as expressed therein. Where Parliament has used non-technical legislation (sic) words which, in their ordinary meaning cover the situation before the Court, the Court will generally apply them literally provided that no injustice or absurdity results. In such case it is a reasonable presumption that Parliament or its draftsman has envisaged the actual forensic situation.”

144. It therefore follows that the phrase *at all times* must be given its literal meaning and that being the position, Regulation 33 cannot be applied to limit the scope of section 6(1) of the parent Act.

145. It was further contended that pursuant to section 8A the audit and subsequent verification of the register is through the representatives of the people in the Senate and the National Assembly. It is however noteworthy that section 8A gives the discretion to the Respondent as to whether it should engage a professional reputable firm to conduct an audit of the Register of Voters. In my view this provision cannot be used as a substitute for the right of the voters to inspect the Register themselves since the Respondent may or may not decide to engage the services of such a firm.

146. With respect to the issue of privacy of persons who are not parties to these proceedings, I only wish to refer to **Trusted Society of Human Rights Alliance & 3 others vs. Judicial Service Commission & another [2016] eKLR** where it was held that:

“Article 31 of the Constitution protects the privacy of every person in the following terms:

Every person has the right to privacy, which includes the right not to have-

a) Their person, home or property searched;

b) Their possessions seized;

c) Information relating to their family or private affairs unnecessarily required or revealed; or

d) The privacy of their communication infringed.

In my view where a person is seeking purely public information, he or she does not have to demonstrate a specific interest in the information. However, Article 31 of the Constitution requires that information relating to a person’s family or private affairs ought not to be unnecessarily required or revealed. To me it does not matter whether that information was acquired by the person in possession thereof in his official capacity or not. If that information is not necessary it ought not to be revealed and a reading of Article 31 in my view seem to suggest that the burden of showing the necessity to reveal such information falls on the person seeking the same. In other words where a person seeks information relating to a person’s family or private affairs, he ought to lay a basis for the same. This is necessarily so since Article 45 of the Constitution recognises the family as the natural and fundamental unit of society and the necessary basis of social order, which is entitled to enjoy the recognition and protection of the State.”

147. Accordingly, it is not every information supplied by or taken from a voter that should be revealed. Only the information necessary to enable the voter make an informed decision as to the correctness of the particulars in the register is necessary.

148. It was contended that pursuant to section 5(1) the revision of the voters register has to take place within 60 days before the elections so that even if the Court was to find that the applicant is entitled to the orders sought the same cannot be granted. That section clearly deals with revision of the voters register as opposed to rectification of particulars which is what is contemplated under section 6(1).

149. Having considered the application it is my view that there is no evidence that prior to the institution of these proceedings the Respondent complied with section 6(1) of the ***Elections Act*** as read with Regulation 27 of the ***Elections (Voters Registration) Regulations, 2012***. Whereas the law gives the Respondent the discretion to determine the time when the register may be closed, which in my reading is the exception to the general rule, that exception does not apply where the register has not been opened at all and in this case there is no evidence that prior to these proceedings it was ever opened.

150. I must emphasise that it is not for the judiciary to micro-manage the electoral body. This was the position adopted in **Samson Owimba Ojiayo vs. Independent Electoral and Boundaries Commission (IEBC) & another [2013] eKLR** where it was held as follows:

“The IEBC is an independent body established under Article 248(2) (c) of the Constitution and as an independent Commission and as such, in the performance of its functions the Commission is not subject to control or direction from any person or authority, including the Court. Article 249(2) of the Constitution lays emphasis on this independence devoid of any direction or control from any other person. The IEBC must be given discretion to assess the situation and intervene when in a particular situation demands such intervention. It is not for this court to compel the independent Commission to flex its muscles and exercise discretionary powers and least of all dictate to it when and how it is to flex those muscles.”

151. The only concern is that the electoral body must comply with the letter and spirit of the Constitution, the relevant legislation and the regulations. Article 81 requires the electoral body to ensure that the

elections are free and fair in the sense that they are by secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner. To ensure this is attained Parliament in its wisdom has enacted laws and approved regulations in that regard. Those legislation and the regulations must be followed in order to attain the constitutional dictates.

152. It is however contended in these proceedings that the Respondent has not in any way whatsoever declined to provide the information sought by the Ex-parte Applicant since the Register of Voters is available from the Respondent's offices upon the payment of a nominal fee. In other words the Respondent is saying that anyone is free to access the same as long as the prescribed fee is paid.

153. I however agree with the Respondent and the interested party that there is no duty cast on the Respondent to publish the register as opposed to opening it up for public inspection. Further there is no requirement that the same be clustered as per polling station. The provisions relied upon similarly do not expressly place a duty on the Respondent to take into account submissions by concerned persons and revise the register accordingly. As to whether the Respondent can upon discovery of incorrect particulars rectify the same is beyond the scope of this judgement because the Court cannot give a blanket decision that the incorrect particulars be corrected before the same are identified. In any case, the request for correction must in the first place be considered by the Respondent hence this Court cannot compel the Respondent to take a specific action but only for it to consider whatever requests may be made to it. That is the holding in **Kenya National Examination Council vs. Republic Ex-parte Geoffrey Gathenji Njoroge & 9 others** (supra).

154. With respect to the prayer that this Court compels the Respondent to publicize and gazette the final register of voters per polling station, section 6(1) aforesaid does not place such a duty on the Respondent and this Court cannot compel it to undertake what the law does not expressly confer upon it.

155. The applicant also seeks that this Court issues an order of prohibition prohibiting the Respondent and its officers from deploying a voter register for use in the general election before the same is subjected to a public inspection as required under the law. In **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** (supra) the said Court of Appeal held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...”

156. In this case there is a duty placed on the Respondent to deploy the registers to the various polling stations. To prohibit it from doing so would amount to restraining it from carrying out its statutory duties. I am not satisfied that the mere fact that the registers are so deployed prevents the Respondent from rectifying any incorrect particulars therein. Apart from that it is deposed that the said registers have in fact been deployed so that there is nothing to be restrained.

157. There is a prayer for such other orders and reliefs as the honourable court may deem appropriate in the circumstances. Article 23 of the Constitution provides that a court "may grant appropriate relief, including a declaration of rights" when confronted with rights violations. Under the said Article, the Applicant is entitled to 'appropriate relief' which must mean an effective remedy, for without effective

remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Section 11 of the *Fair Administrative Action Act, 2015* provides as follows:

- (1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order***
- (a) declaring the rights of the parties in respect of any matter to which the administrative action relates;***
- (b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;***
- (c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;***
- (d) prohibiting the administrator from acting in a particular manner;***
- (e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;***
- (f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;***
- (g) prohibiting the administrator from acting in a particular manner;***
- (h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;***
- (i) granting a temporary interdict or other temporary relief; or***
- (j) for the award of costs or other pecuniary compensation in appropriate cases.***

158. This Court is therefore empowered to fashion appropriate remedies. It must however be noted that in so doing the Court ought not to interfere with the merits of the Respondent's decision or its discretion.

159. This Court in fashioning the remedies must do so in a manner that does not interfere with the elections which are due for 8th August, 2017. In other words this Court should not infringe upon the rights of Kenyans to regular elections. Whatever orders this Court fashions, they must be geared towards the realization of the aspiration of Kenyans for a free, fair and regular elections as envisaged in Article 38(2) of the *Elections Act*. I therefore agree with **Mr. Nyamodi** that whatever orders commend themselves ought to be those that would enable the overriding right of Kenyans to have the elections due next week conducted. Therefore this Court must balance the rights of the petitioner herein vis-à-vis the rights of the other Kenyans and protect both.

160. Having considered the issues raised herein, I decline to issue the order prohibiting the Respondent and its officers from deploying a voter register for use in the general election as sought by the applicant herein. In my view to do so would interfere with the preparations for the forthcoming general election which are due in a few days' time. I also decline to issue the orders of *mandamus* in the manner in which they are sought. However, this Court has a duty to make the legal position clear with respect to section 6 of the *Elections Act* as read with Regulation 27 aforesaid not only for the purposes of the forthcoming general elections but for the future as well. Accordingly the orders which commend themselves to me and which I hereby issue pursuant to section 11 of the *Fair Administrative Action Act* are as follows:

- (1) A declaration that the Respondent is pursuant to section 6(1) and (2) of the *Elections Act* as read with Regulation 27 of the *Elections (Voters Registration) Regulations* statutorily bound**

to cause the Register of Voters to be opened for inspection by members of the public at all times for the purpose of rectifying the particulars therein, except for such period of time as the Commission may consider appropriate. Further the Respondent is bound to, within ninety days from the date of the notice for a general election, open the Register of Voters for inspection for a period of at least thirty days or such period as the Commission may consider necessary. The said register is to be availed for inspection to the public at all polling stations, by way of public web portal or any other medium the Commission may approve.

(2) The Respondent to within the next 48 hours publish in the media a confirmation that the register of voters is open for inspection and the manner of and the period for such inspection by the public.

(3) As there is no evidence that the register was open before these proceedings were instituted, and as in my view this is clearly public interest litigation there will be no order as to costs.

161. It is so ordered

Dated at Nairobi this 3rd day of August, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Orero for the applicant

Mr Olaka for the Respondent

Mr Kiragu Kimani with Mrs Githae for the interested party

CA Mwangi